Neutral Citation: [2024] UKFTT 00305 (TC)

Case Number: TC09134

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2023/08588

*ATED – late filing penalty – special reduction*

**Heard on:** 14 February 2024
**Judgment date:** 3 April 2024

**Before**

**TRIBUNAL JUDGE HOWARD WATKINSON**
**REBECCA NEWNS**

**Between**

**HAWTHORN PROPERTIES UNLIMITED**

**Appellant**

**and**

**THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS**

**Respondents**

**Representation:**

For the Appellant: Ms. Penelope Whittington

For the Respondents: Mr. Timothy Hackett, of HMRC Solicitor's Office

## DECISION

### INTRODUCTION

1. With the consent of the parties, the form of the hearing was by video. The documents to which we were referred were: a bundle of documents running to 143 pps., HMRC's updated Statement of Reasons, and a bundle of legislation and authorities. We also received additional written submissions from the Respondents dated 14.2.24, and from the Appellant dated 15.3.15, for which we are grateful.

2. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

3. This is an appeal by the Appellant against late filing penalties for the various tax years shown in the table below charged under Schedule 55 Finance Act 2009 ("**Sch.55**").

| Tax Year ending | Date of Penalty | Legislation | Description | Amount (£) |
|---|---|---|---|---|
| 31 March 2016 | 9 June 2023 | Para 3, Sch. 55 FA 2009 | Initial late filing penalty | £100 |
| 31 March 2016 | 21 July 2023 | Para 4, Sch. 55 FA 2009 | Daily late filing penalty | £900 |
| 31 March 2016 | 21 July 2023 | Para 5, Sch. 55 FA 2009 | 6-month late filing | £300 |
| 31 March 2016 | 21 July 2023 | Para 6, Sch. 55 FA 2009 | 12-month late filing penalty | £300 |
| 31 March 2017 | 23 December 2022 | Para 3, Sch. 55 FA 2009 | Initial late filing penalty | £100 |
| 31 March 2017 | 2 February 2023 | Para 4, Sch. 55 FA 2009 | Daily late filing penalty | £900 |
| 31 March 2017 | 2 February 2023 | Para 5, Sch. 55 FA 2009 | 6-month late filing | £300 |
| 31 March 2017 | 2 February 2023 | Para 6, Sch. 55 FA 2009 | 12-month late filing penalty | £300 |
| 31 March 2019 | 21 December 2022 | Para 3, Sch. 55 FA 2009 | Initial late filing penalty | £100 |
| 31 March 2019 | 23 January 2023 | Para 4, Sch. 55 FA 2009 | Daily late filing penalty | £900 |
| 31 March 2019 | 23 January 2023 | Para 5, Sch. 55 FA 2009 | 6-month late filing | £300 |
| 31 March 2019 | 23 January 2023 | Para 6, Sch. 55 FA 2009 | 12-month late filing penalty | £300 |
| 31 March 2021 | 30 December 2022 | Para 3, Sch. 55 FA 2009 | Initial late filing penalty | £100 |
| 31 March 2021 | 2 February 2023 | Para 4, Sch. 55 FA 2009 | Daily late filing penalty | £900 |
| 31 March 2021 | 2 February 2023 | Para 5, Sch. 55 FA 2009 | 6-month late filing | £300 |
| 31 March 2021 | 2 February 2023 | Para 6, Sch. 55 FA 2009 | 12-month late filing penalty | £300 |
| | | **Total** | | **£6400** |

4. The Appellant also sought to appeal the same set of penalties for the year ended 31.3.22 but had not appealed them to HMRC. The Tribunal therefore does not have jurisdiction to hear those appeals as they must first be appealed to HMRC (see para.20 Sch.55 and paras.35 – 36 Sch.33 Finance Act 2013). Those appeals are therefore struck out for want of jurisdiction. That should not be taken as being in itself any bar to the Appellant making an appeal to the Tribunal

should (i) it make an appeal to HMRC first, and (ii) should issues as to the lateness of that appeal be resolved in the Appellant's favour.

5. The penalties are predicated on the Appellant's failure to make an Annual Tax on Enveloped Dwelling ("ATED") return for the years in question.

6. The ATED legislation was introduced by the Finance Act 2013. In summary, a dwelling is "enveloped" when it is owned by a non-natural person (in this case a company). A tax is charged annually and is payable unless an exemption can be claimed.

7. The onus is upon the taxpayer to file an ATED return in respect of properties meeting the threshold for doing so. A return is due even where an exemption or relief applies. In this case a relief applied for the property being let on a commercial basis. The return is made annually.

8. For the tax years 2013/2014 and 2014/2015, the threshold property value for the charge to tax was £2,000,000 as at the date of 1.4.12 or later acquisition. For the tax year 2015/16, the value was reduced to £1,000,000 as at 1.4.12 or later acquisition. For the tax year 2016/2017, the value was reduced to £500,000 as at 1.4.12. The legislation also provides for fixed revaluation dates every five years regardless of when the property was acquired.

9. By paras.1(5) and 2 of Sch. 55 the penalties at paras. 3 to 6 of Sch. 55 apply to the failure to file an ATED return.

10. Other matters canvassed at the hearing have also narrowed the scope of this appeal. The Respondents accepted at the hearing that since the value of the relevant property was below the ATED threshold for the year ended 31.3.16, despite an ATED return belatedly being made for that period no such return was actually required, and therefore no penalty is actually due. The appeal is therefore allowed in respect of the 4 penalties imposed for the year ended 31.3.16 and those penalties are discharged.

11. The Appellant also confirmed that it does not appeal the initial £100 late filing penalties for the years ended 31.3.17, 31.3.19 and 31.3.21. The appeal is therefore dismissed in respect of those penalties. The Appellant does not dispute liability to the remainder of the penalties. The Appellant accepts that it does not have a reasonable excuse for the remainder of the penalties. This appeal, as the parties agreed at the hearing, is solely concerned with whether the remaining penalties should be reduced for special circumstances.

**THE RELEVANT LAW**

12. The late filing penalty regime is set out in Sch.55. The combined effect of Para.1(1) (item 11A) and (4) Sch.55 is that a person is liable to a penalty when he does not file an ATED return by the date that HMRC has required him to. Paras. 3-6 of Sch.55 set out the initial and subsequent penalty amounts and the periods of time to which they are linked.

13. Para.16 Sch.55 states

> *"16*
> *(1) If HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of this Schedule.*
> *(2) In sub-paragraph (1) "special circumstances" does not include—*
> *(a) ability to pay, or*
> *(b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.*
> *(3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to—*
> *(a) staying a penalty, and*
> *(b) agreeing a compromise in relation to proceedings for a penalty."*

14. Para.20 Sch.55 states:

> *"20*
> *(1) P may appeal against a decision of HMRC that a penalty is payable by P.*
> *(2) P may appeal against a decision of HMRC as to the amount of a penalty payable by P."*

15. Para.22 Sch.55 states:

> *"22*
> *(1) On an appeal under paragraph 20(1) that is notified to the tribunal, the tribunal may affirm or cancel HMRC's decision.*
> *(2) On an appeal under paragraph 20(2) that is notified to the tribunal, the tribunal may—*
> *(a) affirm HMRC's decision, or*
> *(b) substitute for HMRC's decision another decision that HMRC had power to make.*
> *(3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 16—*
> *(a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or*
> *(b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 16 was flawed.*
> *(4) In sub-paragraph (3)(b) "flawed" means flawed when considered in the light of the principles applicable in proceedings for judicial review.*
> *(5) In this paragraph "tribunal" means the First-tier Tribunal or Upper Tribunal (as appropriate by virtue of paragraph 21(1)).*"

16. The Tribunal can therefore only consider whether there are special circumstances justifying a reduction in the amount of the penalties if HMRC's decision on this aspect is "flawed" in a judicial review sense.

**FINDINGS OF FACT**

17. We find that the Appellant was not aware of the requirement to make ATED returns at the time that the returns that are the subject of this appeal were due. That was the Appellant's mistake, it was a genuine mistake, and it was one genuine mistake that led to multiple defaults.

**DISCUSSION**

18. HMRC have considered special reduction. The appeal letters are largely generically worded, the review letter does not consider the totality of the penalties issued. In accordance with the decision in *Bluu Solutions Limited* [2015] UKFTT 95 [at 110] HMRC additionally have until the conclusion of the hearing to exercise their discretion in relation to special circumstances. HMRC have also considered special reduction in the Statement of Reasons, arguing specifically that the penalties are the result of six different mistakes, not one as the Appellant suggests. That is on the basis that the failure to submit an ATED return for each relevant period was a separate mistake, albeit one with a common root.

19. In *Barry Edwards v HMRC* [2019] UKUT 131 the Upper Tribunal warned against putting any "judicial gloss" on the words "special circumstances" - in other words, trying to define the term. The Upper Tribunal also approved the following statement made by Judge Vos in *Advanced Scaffolding v HMRC* [2018] UKFTT 0744 (TC) at [102]:

*"It is clear that, in enacting paragraph 16 of schedule 55, Parliament intended to give HMRC and, if HMRC's decision is flawed, the Tribunal a wide discretion to reduce a penalty where there are circumstances which, in their view, make it right to do so. The only restriction is that the circumstances must be 'special'. Whether this is interpreted as being out of the ordinary, uncommon, exceptional, abnormal, unusual, peculiar or distinctive does not really take the debate any further. What matters is whether HMRC (or, where appropriate, the Tribunal) consider that the circumstances are sufficiently special that it is right to reduce the amount of the penalty."*

20. Judge Vos also said in the same case at [106] that the right approach for the Tribunal is to look at all the relevant circumstances and consider whether, in the particular case in question, those circumstances are "special". We agree.

21. *Advanced Scaffolding* was a case on penalties for CIS returns. Judge Vos addressed para.13 of Sch.55 at [126] – [128], saying:

> *"126. In coming to the conclusion that there are in this case special circumstances justifying a reduction in the amount of the penalties, I have also taken into account paragraph 13 of schedule 55 which limits the amount of penalties for failure to file CIS returns where a taxpayer has not previously filed a return. The limit applies not only in respect of the first return which is filed but also in respect of any other returns which should have been filed before the date on which the first return is filed. Other than any tax related penalties (which are not relevant in this case), the total aggregate amount of penalties which can be charged in respect of such returns may not exceed £3,000.*
>
> *127. It is clear that Parliament's intention in enacting this provision was to ensure that a taxpayer who did not realise that they should be filing CIS returns and where there were no significant payments to be made to HMRC would still face a penalty but would not be subject to multiple monthly penalties which, as can be seen from this case, can very quickly run up to very significant amounts of money.*
>
> *128. Although the appellant has regularly filed CIS returns, in substance, the appellant is in a similar situation to a business which would normally be able to benefit from the restriction in paragraph 13. The reason for this is that, as a result of the appellant's mistake, it did not realise that it had to file CIS returns in the particular circumstances in question. Whilst this does not, for the reasons set out above, constitute a reasonable excuse for the failure, the fact that it has given rise to multiple defaults and therefore multiple penalties, in my view, supports the conclusion that there are special circumstances which do justify a reduction in the amount of the penalties."*

22. Mr. Hackett submitted that if Parliament had intended to limit the number of penalties chargeable to a taxpayer for submitting multiple ATED returns at once for the first time, it would have expanded para.13 of Sch.55 or introduced a similar paragraph covering ATED returns in later legislation such as the Finance Act 2013. Mr. Hackett submitted that in the absence of such legislation Parliament must have intended that taxpayers would receive the full number of penalties chargeable under the law even when submitting multiple late ATED returns.

23. We do not accept those submissions. Firstly, as Judge Vos said in [127] of *Advanced Scaffolding*, CIS returns are made monthly so the legislation was intended to avoid the defaulter

being subject to multiple monthly penalties which could very quickly run up to very significant amounts of money. ATED returns however, are made on a different basis, being made annually.

24. Secondly, and more fundamentally, Parliament did intend to limit what could be included within special circumstances under para.16 of Sch.55, and provided two specific matters therein that were not included. What Parliament did not do was also exclude from special circumstances multiple penalties arising from a single mistake. Had Parliament have wished to, it could and would have done so. We therefore do not accept the legislative intention ascribed to the provisions by Mr. Hackett.

25. Thirdly, Mr. Hackett himself said in his written submissions: "Whilst the Respondents accept that incurring multiple penalties is a relevant circumstance, they do not accept that makes them a special circumstance." If incurring multiple penalties is accepted to be a relevant circumstance, that rather undermines the argument on legislative intention.

26. Mr. Hackett also submitted that ATED is a self-assessed tax, the Appellant had a responsibility to keep its tax knowledge up to date, and the Appellant had "six opportunities" to become aware of their error. We accept the first two parts of that submission, and the Appellant does not argue that it had a reasonable excuse. We do not accept the last submission. As we return to below, characterising an annual return requirement as an "opportunity" to become aware of an error that one does not know that one has made is, in our view irrational. The annual return requirement itself, and the knowledge of that requirement are two separate things. If one does not come to know of the requirement, the separate fact of the annual requirement to make the return is no "opportunity" at all to become aware of a subsisting error.

27. Mr. Hackett also submitted that overall there were no special circumstances.

28. The Tribunal finds HMRC's treatment of special reduction to have been irrational and therefore flawed in public law terms. Where a taxpayer has no knowledge of the requirement to file an ATED return that means that where the requirement is not met in year 1, it will inevitably not be yet in year 2, and so, on until the taxpayer becomes aware of it. The effect is that one mistake, the failure to understand the requirement to submit an ATED return leads to numerous penalties being issued. Characterising that one mistake as six solely by reference to the legislative requirement to submit a return for each tax year is, as we have found above, irrational.

29. That finding does not mean that the circumstances are special at this stage of the analysis, they simply mean that the Tribunal is entitled to consider for itself the issue of special reduction.

30. The Appellant puts forward that its compliance history is, but for this issue, exemplary. In the Tribunal's view, that should be the norm, and of itself is not a special circumstance.

31. The Appellant puts forward that this was a genuine mistake. We have accepted that it was. We do not accept that of itself this is a special circumstance where the regime encourages taxpayers not to make such mistakes.

32. The Appellant puts forward that there was no loss of tax, and we accept that there was no loss of tax. We do not accept that this is itself a special circumstance, since the regime requires a return to be made even where there is no tax due.

33. We note than unlike other penalty regimes there is no requirement for HMRC to provide any form of warning to the taxpayer that such penalties are accruing, but that is a legislative choice we must respect, and in and of itself cannot be a special circumstance.

34. Proportionality by reference to the size of the penalty cannot be a special circumstance in cases where there is no liability and a minimum penalty is levied (*Marano v HMRC* [2023] UKUT 113 (TCC) at [138].

35. We do, however, think that it is right to consider all the above issues, save for proportionality by reference to the size of the penalty, in the round. In doing so we have come to the conclusion that cumulatively the following amount to "special circumstances":

(1) One mistake has led to numerous defaults, for numerous years;

(2) That mistake was a genuine one;

(3) Those penalties have accrued without warning;

(4) The Appellant has had no other known compliance issues; and

(5) No tax was not accounted for.

36. Those circumstances justify, in our view, reducing some of the penalties, as is set out below.

37. We maintain in full the remaining penalties for the year ending 31.3.17 which was the first year that the Appellant was required to make an ATED return. We do not find it a special circumstance that one failure to make a return should lead to multiple penalties, capped by the legislation, for the failure to make the initial return.

38. We do however view the circumstances we have set out above as sufficiently special where that one failure causes the whole penalty process to start again in relation to subsequent years. That is because there is then (i) a greater temporal dislocation between the initial mistake and its consequence, and (ii) a greater remoteness of culpability, in that it is the original error that causes the iteration of the failure to make the subsequent return, and the penalties to accrue in relation to those subsequent returns.

39. The Appellant accepts the remainder of the initial late filing penalties for the years 31.3.19 and 31.3.21. We reduce the remaining penalties for those two years to nil.

**DECISION**

40. The appeal against the penalties for tax year ended 31.3.16 are allowed as the Appellant was under no requirement to make an ATED return and so no penalty was due.

41. The appeal against the 4 penalties for the tax year ended 31.3.17 is dismissed.

42. The appeal against the penalties for the tax years ended 31.3.19 and 31.3.21 is, save for the £100 initial daily penalty for each year, allowed.

43. The appeal in respect of the penalties for the tax year ended 31.3.22 is struck out.

**RIGHT TO APPLY FOR PERMISSION TO APPEAL**

44. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

**HOWARD WATKINSON**
**TRIBUNAL JUDGE**

**Release date: 03rd April 2024**