Upper Tribunal for Scotland

[2019] UT 5
TT/AFP/LBTT/2017/0005

DECISION BY MR DAVID SMALL

ON AN APPEAL

in the case of

REVENUE SCOTLAND

Appellants

and

CLASSIC LAND AND PROPERTY LIMITED

Respondents

FTT Case Reference TT/AFP/LBTT/2017/0005

7 September 2017

Introduction

[1] This is an appeal by Revenue Scotland ("RS") against a decision of the First-tier Tax Tribunal for Scotland ("FTTS") dated 14 December 2016. By that decision the FTTS allowed an appeal by Classic Land and Property Limited ("Classic") against two penalty notices which charged penalties of £1,000 in total. The notices had been issued by RS as a result of a failure by Classic timeously to make a return of a land transaction for the purposes of Land and Buildings Transaction Tax ("LBTT"). Before the FTTS the appeal was classified as a "default paper case" and was decided without a hearing.

[2] RS were initially refused permission to appeal by the FTTS, but were subsequently granted permission by the Upper Tax Tribunal for Scotland ("UTTS") in a decision dated 7 March 2017.

[3] The FTTS and the UTTS were abolished with effect from 24 April 2017, their functions and open cases being transferred, respectively, to the Tax Chamber of the First-tier Tribunal for Scotland and to the Upper Tribunal for Scotland. (The Scottish Statutory Instruments giving effect to the transfers were SSI 2017 No. 106, *The First-tier Tribunal for Scotland (Transfer of Functions of the First-tier Tax Tribunal for Scotland) Regulations 2017* and SSI 2017 No. 105, *The Upper Tribunal for Scotland (Transfer of Functions of the Upper Tax Tribunal for Scotland) Regulations 2017).* Revenue Scotland's appeal thus came before me sitting as a legal member of the Upper Tribunal for Scotland.

[4] I made pre-hearing Directions asking the parties to exchange and submit lists of documents and notes of argument according to a prescribed timetable. The Appellants provided both documents and a note of argument, but nothing was received from the Respondents. On the day of the hearing Mr Alasdair Burnet, Advocate, appeared for the Appellants with his instructing solicitor. The Respondents did not appear and were not represented. On the previous day I had been informed by the administrative staff of the Upper Tribunal that the Respondents had been notified by post of the date, time and place of the hearing, that the notification letter had enclosed a copy of the Directions, that a copy of the letter had been emailed to the Respondents' agents (Messrs Miller, Beckett and Jackson, solicitors) and that there was no record of any post being returned undelivered. The Appellants were ready to proceed with a hearing of their appeal at the appointed time and wished to do so. I decided that it would be consistent with the interests of justice to hear the appeal notwithstanding the absence of the Respondents.

[5] Soon after the hearing the administrative staff of the Upper Tribunal drew my attention to an email from the Respondents' agent, sent on the day before the hearing, informing the Tribunal as a matter of courtesy that the Respondents would not be appearing. Clearly it would have been preferable for me to have known about this email before I sat, but my lack of knowledge of it had no practical effect. I bore in mind during the hearing that there was no contradictor present, as I have done in writing this decision .

The decision of the FTTS

[6] The decision of the FTIS set out the basic circumstances underlying Classic's appeal as follows;

> " **The Facts of the Case**
>
> 2. Classic purchased a property in Renfrewshire. The settlement date for that transaction was 3 April 2015. Classic's solicitors admit that they did not submit a LBTT return in respect of the transaction until 17 February 2016. It is common ground that the return was submitted late because of the solicitors' error. Classic's solicitors candidly admit that because the value of the transaction was only £41,000 and because a significant amount of work was required after the date the transaction settled (to rectify the title deed and so enable registration of Classic's new title) the requirement to lodge a LBTT return with RS was overlooked.
>
> 3. The return should have been made not later than 3 May 2015. It was in fact received on 17 February 2016. The return was 290 days late. Because of the value of the transaction, no tax was payable. RS issued penalty notices on 6 April 2016 with penalty dates of 4 May 2015. RS 's first late return penalty notice requires Classic to pay £100. The second penalty notice is for the failure to make a LBTT tax return for a period in excess of three months and requires Classic to pay £900.
>
> 4. Classic's solicitors sought a review of the two penalty notices. RS carried out a review and adhered to the decision to issue the two penalty notices. Classic appealed against RS's decision arguing that there are exceptional circumstances surrounding the settlement of the transaction which amount to a reasonable excuse for failure to make a LBTT return on time, relying on section 178 of RSTPA, and that the imposition of a penalty when no tax is payable is unduly harsh."

[7] The decision of the FTTS then sets out the provisions of the Revenue Scotland and Tax Powers Act 2014 ("RSTPA") which authorise RS to issue penalty notices in respect of late LBTT returns. The decision also set out the statutory provisions in RSPTA which concern the reduction of penalties for disclosure, or where special circumstances exist, or where the taxpayer has had a reasonable excuse for the failure. Of particular relevance are the provisions of section 178 which concern reasonable excuse;

> "(1) If P (sc. the taxpayer) satisfies RS or (on appeal) the tribunal that there is a reasonable excuse for a failure to make a return, liability to a penalty under sections 159 to 167 does not arise in relation to that failure.
>
> (3) For the purposes of subsections (1) and (2) –
>
> (b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the failure" .

[8] The FTTS's decision also narrates the provisions of sections 239 and 250 of RSTPA. I will set these out, or summarise their effect, later in this decision, (see paragraphs 13 *et seq* below, where I also refer to sections 237 and 241).

[9] The FTTS then considered and rejected the arguments put forward on behalf of Classic to the effect that it had a reasonable excuse for its failure, and/or that the amount of the penalty should be reduced. In paragraphs 14 *et seq* of its decision the FTTS said;

> " 14. Classic's solicitors candidly admit that it is their fault that a completed LBTT tax return languished on their file. They apportion the blame in part to difficulties discovered after settlement preventing registration of title and to their focus on continued negotiations with the selling solicitors.
>
> 15. The argument for Classic does not amount to a reasonable excuse because Classic relied on their solicitors to submit the return timeously. Section 178(3)(b) of the 2014 Act operates against Classic.
>
> 17. The harsh reality is that although this transaction presented difficulties for Classic's solicitors, there were no difficulties in completing the return. Classic's solicitors candidly concede that the completed return was ready for submission. All that has happened in this case is that Classic's solicitors' attention was distracted and they overlooked the requirement to take a completed form from [their] file and post

it to RS. In the particular circumstances of this case there are no arguable grounds for reduction of the penalty."

[10] Next, the FTIS considered a different point. Its view on this point enabled it to decide the appeal in favour of Classic. The relevant paragraphs are as follows;

" 19. There is one additional matter for us to consider. It is common ground that Classic requested a review of the decisions to issue penalty notices. It is also common ground that that review was completed by RS.

20. When any appellant requests a review of a decision, RS are required to notify that appellant of the review because of the operation of section 237(1) of RSTPA. When RS complete a review, section 239 of RSTPA obliges RS to notify the 'appellant' of the conclusion of that review.

21. Classic's solicitors requested a review by letter dated 4 May 2016. RS issued a notice under section 237(1) on 2 June 2016. At the conclusion of the review RS issued a section 239 notice on 15 July 2016. Both of those notices were sent to Classic's solicitors. Neither of those notices were sent to Classic.

22. The net result is that the review process has not been conducted properly in accordance with the statutory requirements. RS argue that failure to intimate to Classic is immaterial because intimation has been made to an agent who has exercised a right of appeal. That argument ignores the fact that statute expressly requires intimation on the appellant and provides for a permissive intimation to the appellant's agent. Taxpayers' rights where penalties for non-compliance are being levied need to be observed. A failure to send notices in terms of sections 237 and 239 of RSTPA is a failure to comply with a statutory requirement. In effect, the appellant has not been provided with the outcome of the review or a final decision regarding the penalty charge.

23. RS's own published guidance includes the following: Notifying you about our conclusions. We must notify you** about the conclusions of our review (and the reasoning behind those conclusions) no later than 45 days from the day we notified you about our view of the matter in question. This time limit may be varied if both you and we agree to do so. If we do not notify you** about the conclusions of our review within this time period, the review is treated as having concluded that our view of the matter in question has been upheld, and we must notify you of that fact.

** 'You' in this circumstance does not include an agent. We must notify the appellant about the conclusions of our review, but a copy of the notification may be given to the agent (see section 250(3) of the RSTPA).
24. On the facts as we find them to be, RS have failed to follow both the statutory procedure and their own guidance. The failure to follow statutory provision vitiates all subsequent procedure.

> Decision
>
> 25. The appeal is allowed. Classic should have met its statutory obligations by filing its tax return on time but RS has not followed its statutory obligations either and so the penalty cannot be enforced."

[11] For the sake of clarity, I would add here that the FTTS was first alerted to the failures in the notification procedures under section 237 and 239 by RS itself. RS drew the attention of the FTIS and of Classic to those features of the situation in a letter sent after RS had produced its Statement of Case but before the Tribunal had considered the appeal. In that letter RS submitted that the failures were not material. Classic also wrote to the FTTS in reply, making the opposite submission.

The appeal by RS

[12] The Appellants' grounds of appeal were set out at some length in their written application for permission to appeal. For present purposes, the essential gist of the grounds of appeal can adequately be distilled into three propositions. Firstly, the FTTS were wrong to take the view that procedural defects in RS's handling of the review of the penalty decisions meant that the taxpayer's appeal against those decisions inevitably had to succeed. (I was informed that this was a point which RS regarded as of considerable practical importance, with potential implications for a range of other cases). Secondly, and in any event, in the particular circumstances of this case no procedural defects had occurred in the review process, or at least any such defects as had occurred should be disregarded or treated as cured, because there had been no prejudice to the taxpayer and the requirements of sections 237 and 239 had substantially been complied with. Thirdly, (as an alternative to the second leg of the argument), if the true position was that a review had been requested by the taxpayer but not formally completed by RS, and if in those circumstances there could be no

valid appeal until the review was completed, the FTTS should have recognised that it simply did not have jurisdiction to decide the matter.

Reviews and appeals; the relevant provisions of RSTPA

[13] Before I turn to the Appellants' argument at the hearing, it will, I think, be helpful if I describe, or further describe, the provisions of Part 11 of RSTPA about reviews and appeals, in so far as those provisions are relevant to this case.

[14] Under Part 11, rights of review and appeal exist in respect of "appealable decisions". "Appealable decisions" are defined in section 233 and include decisions to impose penalties for late returns (section 233(1)(g)).

[15] A taxpayer who is aggrieved by a decision is referred to in Part 11 as "the appellant" (section 234(1)). Such a person may take his appeal against RS's decision straight to the tribunal in accordance with sections 241 *et seq.* Alternatively, an aggrieved taxpayer may give a notice of review to RS in accordance with sections 234 *et seq.* (A taxpayer who gives notice of review has not yet actually appealed, and may never do so if he is satisfied with the outcome of a review, but the legislation nevertheless refers to him as "the appellant".)

[16] On giving notice of review to RS, the "appellant" loses his right of appeal to the tribunal in respect of the same matter until the review is *"concluded or treated* as *concluded'' ;* see section 241(4)(b). Section 241(4)(b) is of particular significance in the context of this appeal and I will have more to say about it later.

[17] Section 250(2) provides that in Part 11 generally references to "the appellant" include references to the taxpayer's agent. The practical implication of this is that appeals may be made, and notices of review may be given, by the taxpayer personally, or by his agent, and in general RS may correspond about appeals or reviews with the taxpayer personally or

with the taxpayer's agent. However, section 250(2) also makes two exceptions to that general rule, with the consequence that two particular notifications given by RS in the course of a review must be given to the taxpayer personally and not to his agent. I will identify these in the paragraphs which follow.

[18] Once a taxpayer has given notice of review, section 237 (1) is in point. It provides;

> "(1) If the appellant gives Revenue Scotland notice of review, Revenue Scotland must –
>
> (a) notify the appellant of Revenue Scotland's view of the matter in question within the relevant period, and
>
> (b) review the matter in question in accordance with section 238."

"Relevant period" is defined in section 237(3) as -

> "(a) the period of 30 days beginning with the day on which RS receives the notice of review, or
>
> (b) such longer period as is reasonable."

The notification of RS's view of the matter which is referred to in section 237(1)(a) is the first of the notifications which, in accordance with section 250(3), must be sent to the taxpayer personally.

[19] Section 238 deals with the nature and extent of the review which RS is obliged to undertake. I need not describe its provisions here. However, section 239 is very much in point and I will quote it in full. Its terms are;

> "Section 239 Notification of conclusions of review
>
> (1 J Revenue Scotland must notify the appellant of the conclusions of the review and its reasoning within –
>
> (a) the period of 45 days beginning with the relevant day, or
>
> (b) such other period as may be agreed.

> (2) In subsection (1) "relevant day" means the day when Revenue Scotland notified the appellant of Revenue Scotland's view of the matter in question.
>
> (3)Where Revenue Scotland is required to undertake a review but does not give notice of the conclusions within the period specified in subsection (1), the review is treated as having concluded that Revenue Scotland's view of the matter in question (see section 237(1)) is upheld.
>
> (4) If subsection (3) applies, Revenue Scotland must notify the appellant of the conclusions which the review is treated as having reached.

[20] The second type of notification which section 250(2) requires to be given to the appellant personally is notification of the conclusions of a review under section 239. From the terms of section 239 which I have quoted, it appears that such conclusions could be what one might call "actual" conclusions, reached after the carrying out of a review within 45 days or within a longer period agreed for the purpose between RS and the taxpayer, or they could be what one might call "deemed" conclusions, where RS has failed to conclude its review within 45 days or such longer period of time as may be agreed and the conclusions are merely a re-iteration of RS's initial view. In either case, section 250(2)(b) requires that RS must notify the actual or deemed conclusions to the appellant personally.

[21] Section 240 deals with the effect of RS giving notice of the conclusions of a review pursuant to section 239. In short, such notice being given concludes the case for once and for all, unless the appellant gives notice of an appeal to the tribunal.

[22] The time limits within which appellants may give notice of appeal are set out in section 242. In the case of an appellant who has previously requested a review by RS, the time limit specified by section 242(2)(c) is within 30 days of "the date on which the conclusions of review are notified to the appellant under section 239" .

Submissions on behalf of the Appellants

[23] The Appellants had provided in advance a full note of argument, which I had been able to read before the hearing. Mr Burnet adopted it as a whole, although the submissions and discussion at the hearing, which I summarise below, concentrated on particular parts of it.

[24] Mr Burnet accepted that RS had neither notified its view of the matter in question to the appellant, as required by section 237(1)(a) read with section 250(2), nor had it notified any conclusions of the review to the appellant, as required by section 239, again read with section 250(2). However, those errors did not justify the Tribunal's view that *"the failure to follow statutory procedure vitiates all subsequent procedure ... Classic should have met its statutory obligations by filing its tax return on time but RS has not followed its statutory obligations either and so the penalty cannot be enforced."* (Paragraphs 24 and 25 of the decision of the FTTS.) In Mr Burnet's submission, in reaching that view, the FTTS had made an error of law. The FTTS had not, as it should have done, considered the specific consequences of the procedural failings in terms of the relevant provisions of Part 11 of RSTPA. In so doing it had ignored relevant factors, taken account of irrelevant factors and failed adequately to express reasons for its conclusion.

[25] Mr Burnet argued that had the FTTS reasoned correctly by applying the provisions of Part 11 to the facts of the case, it would have seen that the departure in this case from the notification procedures required by sections 237 and 239, read with section 250(2), did not imply that the penalty which was the subject of the review - and subsequently the subject of an appeal - was inappropriately applied. Nothing in the legislation said so. That did not necessarily mean that the departure from the prescribed notification procedure had no consequences at all; but one had to apply the provisions of Part 11 to the facts to see what

the consequences might be. It was wrong to reach a view that the penalty was invalid on the basis (apparently) of general considerations completely detached from the provisions of the RSTPA.

[26] As to what those consequences might be, Mr Burnet's primary position (as to his secondary position, see paragraph 29 below) was that although RS had not notified its view of the matter to the appellants personally, nor had it notified the conclusions of the review to the appellants personally, as the RSTPA required - in both cases notifying its view to the agents for the appellants rather than to the appellants themselves - nevertheless one could and should regard the review as having been *"concluded or treated as concluded''* within the meaning of section 241(4)(b). On this reasoning it followed that the appeal which had been made by Classic's agents after the conclusion of the review was a valid appeal - in particular, it was not invalidated under section 241(4)(b) by the existence of an unconcluded review - and, further, was an appeal which the FTIS had decided wrongly, as a matter of law. If I were with him on this argument , Mr Burnet invited me, in terms of section 47, Tribunals (Scotland) Act 2014[1] to quash the decision of the FTIS and re-make the decision in favour of the Appellants, ie by upholding the penalty decisions (as the FTIS would have done, had it not fallen into error).

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[1] Section 47, so far as material, is in the following terms;

(1) In an appeal under section 46, the Upper Tribunal may uphold or quash the decision on the point of law in question.

(2) If the Upper Tribunal quashes the decision, it may-

(a) re-make the decision,

(b) remit the case to the First-tier Tribunal, or

(c) make such other order as the Upper Tribunal considers appropriate.

(3) In re-making the decision, the Upper Tribunal may-

(a)do anything that the First-tier Tribunal could do if re-making the decision,

(b) reach such findings in fact as the Upper Tribunal considers appropriate.

[27] In further development of his primary position, Mr Burnet submitted that one had to take a purposive approach to sections 241(4)(b) and 239(3) . Taken together, the purpose of these provisions was to treat a review to be at an end, even if RS had not dealt with a review within that timescale, either properly or at all, in order that the taxpayer could then appeal and bring his grievance before the tribunal. If RS failed to notify its conclusions to the taxpayer personally the taxpayer should not be left in limbo, unable to advance matters until RS saw fit to comply with its statutory obligations. The review in the present case was "treated as concluded" by RS and the taxpayer's agents. The agents for the taxpayer had appealed against the outcome of the review without complaining about any procedural shortcomings; that was a clear indication that they regarded the review as having been both started and concluded. The agents' appeal was a valid appeal (there being no provision that a taxpayer must appeal personally). If one were concerned to ascertain whether and to what extent the taxpayer personally knew about or authorised his agents' actings, it was sufficient to note that (1) the original penalty decisions had been served on the taxpayer personally and (2) whatever the position might have been in respect of the proceedings before the FTIS, the date and time of the Upper Tribunal appeal hearing was known to have been notified to the taxpayer personally and there had been no appearance to protest ignorance of anything that had gone before.

[28] Before Mr Burnet moved on to his secondary position, and bearing in mind that if I agreed with his primary position it would be open to me to reach my own decision on the question whether Classic had a reasonable excuse for the failure to submit its LBTT return on time, I drew his attention to the fact that, as appeared from the correspondence between the parties, or between the parties and the FTIS before the appeal was first dealt with, the position seemed to be that Classic's solicitors had advised their client that, although no LBTI

was payable, an LBTI return was required, that they had drafted such a return and had had it signed and returned to them by their client in time for it to be submitted punctually, but thereafter the solicitors had got involved in resolving post-transaction difficulties which caused them to forget that the return was lying, unsubmitted, on their file. What more could a taxpayer reasonably be expected to do? Mr Burnet's position, under reference to *Chartridge Developments Limited* v *HMRC* [2016] UKFTI 0766 (TC) was that knowing a return had been prepared and signed and was ready for punctual submission was not enough to allow Classic to say it had a reasonable excuse under section 178 for a failure to submit the return. It had to show that it had taken reasonable care under section 178(3)(b) and in order to satisfy that test - particularly in a situation in which there were post-settlement difficulties - it should have made appropriate follow up enquiries to ascertain whether the LBTT return had in fact been submitted.

[29] In case I did not agree with his primary argument that the review in this case could be treated as concluded, with the consequence that the appeal before the FTTS was a valid appeal, Mr Burnet had a secondary position. This was that Classic had requested a review which had not validly progressed, even to the stage of RS stating its view of the matter in question in accordance with section 237(1). That review was still unconcluded. An unconcluded review was incompatible with an appeal under section 241(2) and (4). On this line of reasoning what looked like, and had been regarded by all concerned as, an appeal by the agents was in fact a nullity and the FTTS should have declared as much, finding that in the absence of a valid appeal it had no jurisdiction. Mr Burnet invited me, if I favoured his secondary position, to allow RS's appeal to the Upper Tribunal on that ground. In that event, it would not be necessary or appropriate for me to come to a view on the substantive issue of whether or not the penalty decisions were right. I should simply find that the ball was

back in RS's court to complete its review and notify the taxpayer of the conclusions, with Classic at liberty to appeal thereafter, if so advised.

[30] In connection with his secondary position, I asked Mr Burnet if he had any observations on the implications of section 237(3)(b), which requires RS to notify an appellant of its view of the matter in question within 30 days of receiving a notice of review or *"such longer period as is reasonable"*. The former was clearly impossible, but what about the latter? While he did not think that this was strictly a matter for my decision, Mr Burnet submitted that where, as in the present case, RS had unwittingly failed in its notification obligations, communicating with the taxpayer's agents rather than the taxpayer, to no particular detriment to anybody, the matter only coming to light in the course of appeal proceedings initiated by the agents, one could fairly take the view that if RS acted promptly in the wake of my decision it would have notified its view of the matter to the taxpayer within the "reasonable" further period allowed by section 237(3)(b). He invited me to indicate support for that position in my decision.

Analysis and Decision

Error of law by the FTTS.

[31] I agree with the first submission made by counsel for the Appellants. The FTTS unfortunately did make an error of law when it concluded that failures by RS in the notification procedure during the review necessarily implied that Classic's appeal against the imposition of penalties for a late LBTT return had to be allowed.

[32] Flaws in the reasoning of FTTS become apparent if one considers paragraph 24 of its decision. The FTTS said there that *" The failure to follow statutory provision vitiates all subsequent procedure."* In the first place, this begs the question why the appeal itself (being

part of the *"subsequent procedure"* , ie the procedure subsequent to the review) was not vitiated along with everything else. If, truly, there were no valid appeal, the FTTS should simply have declined jurisdiction, as counsel for the Appellants pointed out.

[33] A second point about paragraph 24 is that the penalty notices themselves were issued during procedure prior to (not subsequent upon) the review. So, accepting for the moment that *" The failure to follow statutory provision* [sc. during the review] *vitiates all subsequent procedure "*, it would seem, as a matter of logic, that the penalty notices were **not** thereby vitiated. In other words, if it were the case that the FTTS had a valid appeal before it, the FTTS's decision does not actually contain any reasons for allowing that appeal, given that the penalty notices were issued before any procedural errors had been made and the validity of those notices was therefore apparently unimpeached.

[34] I infer that the FTTS's decision was based on a perception of a broad principle of law which might be expressed thus; an appellant against a decision of an official body must have his appeal allowed by the tribunal charged with hearing it if the official body has failed to observe statutory procedural requirements in dealing with his case at a stage subsequent to the disputed decisions being made, but prior to the appeal being lodged. Under this principle, it would seem, one has to treat the appellant's appeal as valid and allow it, even though preliminary steps taken by the administration leading up to the appeal may be invalid and even though some crucial events occurred before anything went wrong. For my part, although of course no-one would deny that tribunals should do what they can to encourage adherence to statutory procedures on the part of the administrative authorities, I do not think that any such general principle exists in our law and - even if it did - I would not think that it was within the powers of the FTTS to apply it in the abstract.

[35] Rather, as it seems to me, once the FTTS had identified the procedural failures concerned, it should have considered what the consequences of those errors were on the process of review and appeal as defined by Part 11, RSTPA, by reference to the particular terms of the statutory scheme contained therein and by reference to the particular facts of the case before it. No doubt the interpretation of Part 11 may be informed, in appropriate cases, by general legal principles, but the application of such general principles should only inform, and should not replace, a close examination of the relevant statutory provisions. The FTTS was, as its successor is, a statutory tribunal whose functions and powers were contained in the provisions of the Act and SSl's which created and regulated it; it did not have power to make decisions by reference only to general principles of public law.

[36] The failures in the reasoning of the FTTS which I have just described represent errors of law and oblige me to quash its decision. In deciding how to dispose of the case in terms of section 47 Tribunals (Scotland) Act 2014 (which I have set out at footnote 1 above) I must revert to the terms of Part 11, RSTPA and consider their exact implications for this case.

Applying Part 11 RSTPA

[37] We have seen that after a taxpayer or his agent has asked RS to review its decision, section 237 read with section 250(3) requires RS to notify the appellant personally of its view of the matter in question and to do so within 30 days of receiving the taxpayer's notice of review, or within such longer period as is reasonable. In paragraph 21 of its decision, the FTTS summarised what happened as follows;

> "Classic's solicitors requested a review by letter dated 4 May 2016. RS issued a notice under section 237(1) on 2 June 2016. At the conclusion of the review RS issued a section 239 notice on 15 July 2016. Both of those notices were sent to Classic's solicitors. Neither of those notices were sent to Classic."

[38] The appeal hearing before me proceeded on the basis that this summary by the FTTS was accurate, but my subsequent perusal of the documents has caused me to take a different view on one point. Contrary to the FTTS's summary, it seems clear to me that RS's letter of 2 June 2016 was *not* a notice of RS's position on the matter in question under section 237(1). That letter, from Mr Chalmers of RS to Classic's agents Messrs Miller, Beckett and Jackson, was simply an introductory and holding letter. It said nothing at all about what RS's position was. In a telling phrase, its author Mr Chalmers stated *"I will write to you again by 18 July 2016 to notify you of RS's view of the matter in question ...*". (I reproduce the full terms of the letter of 2 June in an Appendix to this decision.) Indeed, in a letter dated 14 October 2016 to the FTTS, RS stated *" The Respondent's notice under section 237(1) was sent on 2 June 2016 ... That notice was sent to the Appellant's agent only and not to the Appellant.* ***Further. the notice does not state the Respondent's view of the matter in question.***" (Emphasis added.)

[39] On 15 July 2016 Mr Chalmers wrote again to Classic's agents. This letter has rightly been regarded by all parties as stating the conclusions of RS's review under section 239 (albeit that it was, wrongly, sent to the taxpayer's agents rather than to the taxpayer itself). This letter could also, perhaps, be regarded as containing a belated statement of RS's position under section 237 (albeit one sent to the wrong person) because it is clear that Mr Chalmers is not departing in any material respect from what had been said by RS in previous correspondence. (If the letter of 15 July were to be seen in that way I would regard the statement of position contained therein as having been notified - albeit to the wrong person - within a reasonable period longer than 30 days, i.e. as meeting the timetable allowed by section 237.) The alternative view would be that there has simply has never been any notification of RS's position under section 237 in this case at all, not even one sent to the wrong person. I need not choose between these competing views, because - as I will try to

make clear in what follows - it ultimately seems to me to make no difference to the outcome of this case which way one regards the letter of 15 July, i.e. whether as containing both a statement of RS's position and the conclusions of the review, or as containing only a statement of conclusions (with no statement of position ever having been sent by RS to anyone).

[40] Having made those points about the letters of 2 June and 15 July 2016, I will now resume my analysis of how Part 11 applies to what happened in this case. The main issue to be decided is the effect, if any, of section 241(4) which provides that a taxpayer who has given notice of review cannot appeal to the tribunal until the review has been concluded or is treated as concluded. I need to decide whether Classic's appeal was actually made prematurely, *before* either of those two events had occurred, albeit that the parties proceeded - at least until the point was raised by RS shortly before the appeal came before the FTTS for decision - on the basis that the review was over and done with before an appeal to the tribunal was made. If I find that the appeal was indeed premature in the light of section 241(4),and was not validly before the FTTS, I will then need to consider where that leaves proceedings between the parties according to the statutory scheme of Part 11. Alternatively, if I find that Classic's appeal was validly before the FTTS, and having quashed the FTTS's decision about that appeal, I will then need to dispose of the case in accordance with section 47, Tribunals (Scotland) Act 2014 (see footnote 1 above).

[41] As we have seen, the first thing that went wrong in this case was that, once a review had been requested, a notification of RS's position was either never sent at all, or - if sent on 15 July 2016 - was not sent to the person (the appellant) to whom RSTPA requires it to be sent. The consequence of that omission (however one views its precise character) is that the period within which RS is obliged to notify the appellant of the conclusions of its review has

not yet begun. This follows from the terms of section 239, subsections (1) and (2), which I have set out in full above (see paragraph 19). In brief, section 239(1) requires RS to notify the conclusions of the review within 45 days of "the relevant day" and section 239(2) defines "the relevant day" as the day when RS notified the appellant (personally, according to section 250(2)) of RS's view of the matter in question. If RS has failed to notify anyone of its position, it seems to me to follow that "the relevant day" has not yet arrived. It also seems to me that the same conclusion must equally follow if the letter of 15 July is regarded as containing a statement of RS's position, because it did not respect the requirement of the statute that it be sent to the appellant personally.

[42] Why does it matter that "the relevant day" has not yet arrived? The significance of the point is that if the relevant day has not yet arrived it is impossible to regard RS's review as having upheld RS's original view of the matter in question under section 239(3). That subsection applies where RS is required to undertake a review but does not give notice of its conclusions within 45 days of the "relevant day"; the review is then treated as having concluded that RS's original view of the matter in question is upheld. If, as here, the "relevant day" has not yet arrived, the period of 45 days has not yet begun to run and section 239(3) is simply not in point; the condition precedent for its application (that 45 days should have elapsed since "the relevant day") has not been fulfilled.

[43] If section 239(3) is not in point, it seems to me to follow that the review which Classic requested cannot be "treated as concluded" within the meaning of section 241(4)(b). Both RS and Classic may, as a matter of fact, have regarded the review as concluded, and acted as if it were - at least until shortly before the matter came before the FTIS for decision - but in my opinion that is not enough to bring the situation within the words "treated as concluded" in section 241(4)(b). Reading Part 11, RSTPA as a whole it seems clear to me that the words

"treated as concluded" in section 241(4)(b) refer *only* to the circumstances envisaged in section 239(3). They do not include other circumstances in which the parties may have believed that the review were complete and acted as if it were.

[44] If the review requested by Classic cannot be "treated as concluded" within the meaning of section 241(4)(b), can one nevertheless say that the review had been "concluded" within the meaning of that subsection, so that Classic's appeal to the tribunal was not premature? Clearly, the reviewing officer Mr Chalmers had as a matter of fact completed his substantive work on the review by the time he sent his letter of 15 July, in which he expressed his conclusions, to Classic's agents; all that he failed to do was to take the additional procedural step of sending his letter to Classic itself. As Mr Burnet submitted, there is some attraction in construing the reference in section 241(4)(b) to a review having been "concluded" as meaning something like "the substantive work on the review having been completed by RS, whether or not the conclusions of the review have been notified to the appellant personally as Part 11 requires" because - at least in the situation where the appellant becomes aware of RS's conclusion despite the fact that he has not been personally notified - the appellant would then be able to appeal to the tribunal without waiting for RS to remedy its procedural shortcomings. By contrast, if one construes the reference in section 241(4)(b) to a review having been "concluded" as requiring not only that the review work be, as a matter of fact, at an end, but also that RS should have notified the appellant personally of the outcome, a failure by RS to take the latter step of personal notification would leave an aggrieved taxpayer dependent on RS remedying their omission before he or she could give notice of appeal to the tribunal.

[45] I have not found this an easy matter to decide but, on balance, I have come to the view that section 241 does allow a taxpayer whose review has, as a matter of fact, been

concluded by RS, to appeal against the unfavourable conclusions thereof where he or she has become aware of them (for example, as a result of a letter sent to his or her agent). I cannot believe that it would be the intention of the legislature that a taxpayer who has in that (irregular) way learned the outcome of his or her review should be made to wait for a correctly addressed letter from RS before he or she can move his or her case on to appeal.

[46] In reaching that conclusion, I have borne in mind the terms of section 242, which provides that a notice of appeal to the tribunal must be given "within" 30 days of the date on which the conclusions of a review are notified to the appellant. At first sight it might be thought that section 242 presumes that there can be no notice of appeal until the point in time at which the appellant has (personally) received notification of the conclusions of the review; at that point the window of time within which an appeal may validly be made opens, and remains open for 30 days. However, a statutory requirement that something be done "within" 30 days of a given date can be read as requiring that it be done *no later than* 30 days after that date, thereby permitting it to be done *before* the given date (see, for example, *Earl of Morton's Trustees* v *Macdougall 1944* S.C. 410). Bearing in mind the advantage of taxpayers being able to bring appeals to the tribunal without waiting for RS to remedy a failure to notify them personally of the outcome of a concluded review, I construe section 242 as allowing for appeals to be notified *before* such personal notification has occurred (if it ever occurs), and that is indeed what happened in the present case.

[47] As I have said, I have not found this an easy point to decide. Part of my difficulty has been an awareness that on slightly different facts the legislation would *not* seem to enable a taxpayer to take his appeal to the tribunal before procedural failings by RS had been remedied. Suppose that a taxpayer requests a review and (for whatever reason) RS omit to do anything whatsoever in response, ie they neither notify their position under section 237

nor do they actually carry out a review. In that situation - unlike the present case - there is no actually concluded review; nor, as I have already indicated, can the review be "treated as concluded" within the meaning of sections 239 and 241. A taxpayer faced with such drastic, complete inaction by RS would, as it seems to me, fall squarely within section 241(4)(b) and be unable to advance his or her appeal without RS playing their part. That situation would be unfortunate, because a taxpayer faced with complete inaction by RS would seem to be even more deserving of protection than Classic, whose case was handled with rather less dramatic procedural failings. Of course, I cannot imagine that drastic failings by RS in response to requests for reviews will be at all common. If and when they do occur, I expect that they will quickly be remedied on prompting by the taxpayer. If I am wrong in that supposition, there remains the possibility of challenge to RS's inaction by judicial review, even if Part 11 itself does not offer a solution. In any event, the words of Part 11 seem to me to be capable of bearing the meaning I have put on them in the circumstances of this case and I have preferred to apply a construction which protects a taxpayer's right to advance its appeal, even if one can envisage other situations in which a taxpayer's interests might turn out to be less than fully protected.

[48] As I have said, in the circumstances before me, RS had as a matter of fact completed its review and had notified Classic's agents of its conclusions; I have decided that the appeal which the agents subsequently made to the tribunal was not premature and came properly before the FTTS, despite RS's failures to notify Classic properly (if at all) (1) of RS's position at the outset of the review, or (2) of RS's conclusions at the end of the review. I therefore need not express a view on any question which might have arisen had I decided that the appeal was premature and thus not validly before the FTTS. Rather, I must now go on to decide how to deal with the case in terms of section 47, Tribunals (Scotland) Act 2014 (see

footnote 1 above). Having quashed the decision of the FTTS allowing Classic's appeal against the penalty notices, the most obvious course would be to reach the opposite conclusion, i.e. that Classic's appeal against the penalty notices must. However, before committing myself to that conclusion I wish to give some consideration to the question whether Classic had a reasonable excuse for failing to make its LBTT return on time.

Reasonable excuse.

[49] I am not entirely at ease with the way in which the FTTS dealt with this question. I have quoted the relevant parts of the decision of the FTTS at paragraph 9 above. For convenience, I will repeat extracts here;

> " 14. Classic's solicitors candidly admit that it is their fault that a completed LBTT tax return languished on their file. They apportion the blame in part to difficulties discovered after settlement preventing registration of title and to their focus on continued negotiations with the selling solicitors.
>
> 15. The argument for Classic does not amount to a reasonable excuse because Classic relied on their solicitors to submit the return timeously. Section 178(3)(b) of the 2014 Act operates against Classic."

In this compressed passage the FTTS does not give much, if any, overt consideration to the particular facts of the case before concluding that the taxpayer had no reasonable excuse. It does not explain in what respects Classic (as opposed to its agents) fell short of the standard of reasonable care, or what it could have done differently to meet that standard. Indeed, I wondered at first whether the FTIS had read section 178 as meaning that any lack of reasonable care by an agent on whom the taxpayer relies to do something must necessarily imply that the taxpayer himself has failed to take reasonable care; that, clearly, is *not* what section 178 means. On reflection, however, it seems to me to be more likely that what the

FTIS meant was that Classic had simply not shown what steps it itself had taken which, in all the circumstances, would amount to the taking of reasonable care.

[50] As I have indicated in paragraph 28 above, Classic signed and sent back to its agents the LBTT return which the agents had prepared (showing no tax payable) and did so in good time for it to be submitted punctually. The evidence (in the form of correspondence which was before the FTTS) shows that Classic's solicitor was well experienced in making LBTI returns, was familiar with the deadlines for submission and made a practice of meeting them; this clearly was not a case of a taxpayer unwisely choosing an agent on whom it was unreasonable to rely. Before me Mr Burnet nevertheless submitted that in order to be able to show that it had taken reasonable care Classic would have to show that it took some kind of follow up steps to assure itself that the return had been sent in to RS, under reference to the First-tier Tribunal case of *Chartridge Developments Limited* v *HMRC* [2016] UKFTI 0766 (TC).

[51] In that case the directors of a company delegated the responsibility for making certain tax returns about the Annual Tax on Enveloped Dwellings to one of their senior employees, a person who had previously been regarded as competent and reliable. However, on this occasion he failed to prepare and submit the returns before leaving the company. Although it acted quickly on finding out what had happened, the company was late submitting the returns and incurred penalties. On appeal against the penalties it relied on "reasonable excuse" provisions similar to those of section 178, in particular making the argument that it had taken reasonable care by delegating the task to the person concerned. The First-tier Tribunal said;

> " 108. Paragraph 23(2)(b) is clear that reliance on another person to do something cannot be a reasonable excuse unless the taxpayer took reasonable care to avoid the failure. This carries a clear implication that the taxpayer must do something more than delegate the task to that person and assume that it has been done. No evidence has been provided that Chartridge took any steps to ensure that the A

> TED returns would be submitted on time or to check that they had in fact been submitted other than delegating the task to the employee in question.
>
> 109. Even in the absence of paragraph 23(2)(b), it is not in my view a reasonable excuse for a taxpayer simply to rely on another person to submit a tax return without taking some steps to check that the return has in fact been submitted. A reasonable person, intending to comply with his obligations would certainly want to be sure that the person he was relying on had in fact done what he said he would."

Clearly, the situation in *Chartridge* was different to that in the present case. In *Chartridge* the directors had no knowledge at all of how far, if at all, preparation of the returns had advanced, whereas Classic knew its return was complete, signed and ready to be submitted. I also bear in mind, of course, that *Chartridge* is not a binding authority. Further, I am aware that there are other First-tier Tribunal decisions on this point, to which I was not referred. Without putting excessive reliance on *Chartridge,* however, I can see sense in the underlying principle that even a taxpayer in Classic's position takes reasonable care only if it puts in place some simple mechanism to assure itself that a signed tax return becomes, via its agents' actions, a signed *and punctually submitted* tax return. For example, a taxpayer when sending its signed return might ask its agent to confirm submission to RS in a short email to the taxpayer.

[52] Although I have wide powers to make my own decision on the reasonable excuse point under section 47, Tribunals (Scotland) Act 2014, I bear in mind that in terms of section 178, RSTPA the onus is on the taxpayer to show that it has a reasonable excuse for a failure and that there has been no cross appeal by the taxpayer on the reasonable excuse point in this case. I have not had the benefit of full argument on the implications for tax penalties of what may be a relatively common situation (where the taxpayer signs and sends back to the agent his completed return, expecting the agent to submit it but the agent fails to do so). Although I have some misgivings about the way the FTTS dealt with this issue, it is not

clear to me that it made any error of law in its consideration of the point. For all those reasons, and while recognising that there might be more to be said on this question on another occasion, I consider that the most appropriate course for me to take is to respect and adopt the view formed by the FTTS that Classic did not have a reasonable excuse for the late submission of its LBTT return.

Disposal

[53] I allow RS's appeal against the decision of the FTTS and quash that decision. I re-make the decision of the FTTS by dismissing Classic's appeal against the penalty notices and upholding the penalty notices as issued by RS.

Appeal Provisions

[54] A party to this case who is aggrieved by this decision may seek permission to appeal to the Court of Session on a point of law only. A party who wishes to appeal must seek permission to do so from the Upper Tribunal within 30 days of the date on which this decision was sent to him or her. Any such request for permission must be in writing and must (a) identify the decision of the Upper Tribunal to which it relates, (b) identify the alleged error or errors of law in the decision and (c) state in terms of section 50(4) of the Tribunals (Scotland) Act 2014 what important point of principle or practice would be raised or what other compelling reason there is for allowing a further appeal to proceed.

Appendix

Revenue Scotland's letter to Miller, Beckett and Jackson dated 2 June 2016.

Dear Sirs,

Acknowledgment of receipt of notice of appeal Classic Land and Property Ltd

I write to confirm receipt of the notice of review you submitted to Revenue Scotland, received on 9 May 2016.

I am the member of Revenue Scotland who will undertake the review. I have had no previous involvement with any aspect of the decision for which you have requested a review.

I will write to you again by 18 July 2016 to notify you of Revenue Scotland's view of the matter in question that he/she will review [sic] and to explain the next steps in the review.

You have a statutory right to make representations during the review, for example by putting forward new arguments. I will take these representations into account during the review, provided that I have a reasonable opportunity to consider these. As a result, you should make any such representations to me as soon as possible.

I enclose a copy of our Factsheet "Dispute Resolution; Review" which sets out further information on the review process.

Please quote the Dispute Resolution reference noted above in any correspondence regarding this notice of review.

Yours sincerely,

Marcus Chalmers
Dispute Resolution Officer
Revenue Scotland.