Upper Tribunal for Scotland

[2019] UT 35
UTS/AP/18/0014

Land and Buildings Transaction Tax (LBTT) – appeal by Revenue Scotland against FTTS's decision allowing taxpayer's appeal against penalties under section 161 RSTPA - daily penalties – was the burden of proof to show a "decision" to charge penalties under section 161(1)(b) discharged by Revenue Scotland – no – was the FTTS obliged to invite further evidence on that point – no - was a notice validly issued under section 161(1)(c) specifying the date from which the daily penalty would run - no – appeal refused.

DECISION ON APPEAL BY MR DAVID SMALL

in the case of

REVENUE SCOTLAND

Appellants

and

BEGBIES TRAYNOR (CENTRAL) LLP

Respondents

FTT Case Reference FTS/TC/AP/17/1002

Appellants: Ruth Charteris, Advocate
Respondents: No appearance, not represented

Introduction

[1] This is an appeal by Revenue Scotland ("RS") against a decision of the Tax Chamber of the First-tier Tribunal for Scotland ("the FTTS") dated 1 February 2018 allowing in part an appeal by the taxpayer against assessments to penalties made by RS due to the late filing of a return of a land transaction for the purposes of Land and Buildings Transaction Tax ("LBTT"). No LBTT was payable but RS imposed penalties totalling £1,000 in view of the

lateness of the return. The appeal before the FTTS was classified as a "default paper case" and was decided without a hearing. The FTTS allowed the taxpayer's appeal to the extent of quashing penalties of £900, leaving £100 payable. Permission to appeal to the Upper Tribunal for Scotland ("UTS") was granted to RS by the FTTS. The taxpayer did not appeal against the decision of the FTTS to uphold penalties of £100.

[2] In the run up to the hearing before the UTS the taxpayer indicated that it supported the decision of the FTTS in respect of the penalties of £900, but did not intend to appear before the UTS, and indeed on the day of the hearing only RS appeared and was represented before the UTS. Rule 28 of The Upper Tribunal for Scotland (Rules of Procedure) Regulations 2016 (SSI 2016 No. 232) states that the UTS may proceed in the absence of a party if it is satisfied that the party has been notified of the hearing and that is in the interests of justice to proceed. I was satisfied on both points.

[3] On the same day as the FTTS issued its decision in the present case it also issued its decision (again in favour of the taxpayer) in another, very similar case - *Harrison and Ross* v *Revenue Scotland*. RS appealed to the UTS against the decision of the FTTS in that case on grounds very similar to those in the present case. I heard the two appeals together (there being no appearance for the taxpayer in either case). I have thought it best to issue a separate decision in the case of *Harrison and Ross*, although it is to the same effect and in terms very similar to the present decision.

The facts

[4] The FTTS sets out the factual background at paragraphs 4 to 14 of its decision. Nothing about the facts is controversial. For the sake of clarity, in the light of RS's

submissions in the UTS, I will adapt and expand upon the FTTS's presentation of the factual background.

[5] On 20 June 2016 the taxpayer entered into a transaction for a non-residential lease in Edinburgh. In so doing it acquired a chargeable interest in terms of section 4 of the Land and Buildings Transaction Tax Act 2013 ("LBTTA"). No LBTT was payable but the taxpayer was nevertheless obliged to submit a return of its acquisition to RS by the filing date of 20 July 2016 in accordance with section 29, LBTTA. In fact, the return was not submitted until 20 April 2017, by which time it was 274 days late.

[6] On 16 May 2017 RS wrote to the taxpayer's agents – a firm of solicitors in Edinburgh - noting that the LBTT return had been submitted after the due date, that the taxpayer might therefore be liable to a penalty under Section 159(1) of the Revenue Scotland and Tax Powers Act 2014 ("RSTPA") and asking for an explanation of the circumstances. The agents replied to RS on 5 June explaining that error on the part of their office personnel had caused the delay.

[7] On 21 June 2017 RS sent the taxpayer a document headed "Penalty Assessment Notice" stating, inter alia, that "Revenue Scotland has assessed that you are liable to penalties of £1,000" and breaking that amount down between a "First penalty for failure to make return" of £100, described as imposed under Sections 159 and 160 RSTPA, and a "3 month penalty for failure to make return (£10 per day from 21 October 2016)" of £900, described as imposed under Sections 159 and 161 RSTPA.

[8] Also on 21 June 2017 RS wrote to the taxpayer's agents enclosing a copy of the Penalty Assessment Notice and stating that

> "Revenue Scotland considers that a penalty is applicable under section 159(1) and 160 of the Revenue Scotland and Tax Powers Act 2014 for failure to make a return".

[9] On 4 July 2017 the taxpayer's agents wrote to RS asking that the penalty of £900 be waived or reduced as the failure to make the return resulted from administrative oversight in their office and no LBTT was payable in respect of the transaction. RS treated this letter as a request for a review of an appealable decision under Chapter 2, part 11 of RSTPA and wrote to both the taxpayer and its agents on 6 July 2017 notifying them of RS's view of the matter in question under section 237 RSTPA, stating inter alia that:

> "Revenue Scotland considered that penalties are due under s159, s160 and s161, as a Land and Buildings Transaction Tax return was not received on time …".

[10] On 7 August 2017 RS wrote again to the taxpayer and its agents, this time notifying them of the conclusion of the review under section 239, RSTPA, which was to uphold the penalties. Inter alia the letter stated:

> "The return was due by the filing date of 20 July 2016 and received late on 20 April 2017. Therefore the decision to apply penalties under s159, s160 and s161 was taken. …. As the return was submitted 274 days late after the filing date penalties apply under RSTPA s161(2). RSTPA prescribes the penalty as a fixed amount of £10 for each day up to 90 days. This is explained further in Revenue Scotland guidance at RSTP3006 where it advises that if your failure to make the return continues 3 months after the penalty date, we may decide that you are liable to further fixed penalties (additional to the initial fixed £100 penalty) of £10 per day for up to 90 days starting from 3 months after the penalty date."

[11] The taxpayer then appealed against the penalties to the FTTS. Its grounds of appeal were essentially that the penalties were harsh, disproportionate, unfair and unreasonable, given that no LBTT was payable.

[12] RS's Statement of Case in the appeal was dated 18 October 2017. After summarising the relevant legislation and the facts, the Statement dealt at paragraphs 32 to 45 with the question of whether the taxpayer had a reasonable excuse for being late in submitting its return, and at paragraphs 46 to 60 with the question whether special circumstances existed

to justify reducing the penalties. Paragraph 61 was headed "Discretion" and contained the following sentence;

> "[RS] decided to apply a daily penalty under section 161 of RSTPA because the statutory conditions for the application of that penalty were met in that the Appellant had failed to submit its tax return for more than three months from the penalty date."

[13] The appeal to the FTTS was allocated to the Default Paper category. Cases in that category are, in accordance with Regulation 24(2)(a) of the First-tier Tribunal for Scotland Tax Chamber (Procedure) Regulations 2017 (SSI 2017 No. 69) usually disposed of without a hearing, and the case was in fact decided by the FTTS on the basis of the papers before it.

The decision of the FTTS

[14] The decision of the FTTS has not yet been published on line (or, so far as I know, in any other form). Rather than provide a summary of the decision I feel it is best, therefore, if I simply append to this decision a copy of the relevant paragraphs of the decision of the FTTS.

[15] In paragraphs 56 to 80 of its decision the FTTS held – agreeing to this extent with RS - that the taxpayer did not have a reasonable excuse for its late filing, that no special circumstances existed to justify reducing the penalties and that the penalties were not disproportionate. However, the FTTS allowed the appeal as regards the £900 penalty (£10 per day for 90 days) imposed under section 161 RSTPA on two grounds which had not been raised by the taxpayer in its grounds of appeal. In brief, these were firstly that RS had not shown that it had taken a decision to impose the daily penalties, as required by section 161(1)(b) RSTPA, and secondly that it had not given a notice to the taxpayer specifying the date on which the daily penalty became payable, as required by section 161(1)(c) RSTPA.

[16] The FTTS thus upheld the £100 penalty but quashed the £900 penalty. The taxpayer did not appeal against the former part of the decision, but RS appealed (with the permission of the FTTS) to the UTS against the latter part.

Revenue Scotland's appeal to the Upper Tribunal for Scotland

[17] RS's appeal to the UTS contended that the FTTS had made errors of law by reference to both section 161(1)(b) and section 161(1)(c).

- As regards section 161(1)(b), the ground of appeal was that the FTTS should have found, on the evidence before it, that the decision referred to therein had indeed been made by RS. In the alternative, if the FTTS had been entitled to hold that RS had not provided sufficient evidence of such a decision having been made, RS appealed on the ground that the FTTS acted unreasonably in immediately allowing the taxpayer's appeal; it should have invited further evidence and submissions from the parties, which would have enabled RS to prove the existence of the necessary decision.
- As regards section 161(1)(c), RS appealed on two separate grounds. The first ground was that the FTTS had wrongly read section 161(1)(c) as requiring that the taxpayer must receive a warning about the risk of incurring daily penalties before the first day on which they become payable. The second ground was that the FTTS had failed to appreciate that the specification of the period over which daily penalties were payable in the Penalty Assessment Notice issued under section 179 satisfied the requirement in section 161(1)(c) that RS must give the taxpayer notice of the date from which the £10 per day penalty is payable; no separate notice of the start date was required.

[18] At the hearing in the UTS, Miss Ruth Charteris, Advocate, appeared for RS and developed the case made in a written Outline Argument which had been lodged with the UTS before the hearing. In paragraphs 30 to 65 below I will deal with the issues under section 161(1)(b) and in paragraphs 66 to 87 with the issues under section 161(1)(c), setting out the arguments advanced before me and then analysing the situation as I see it. But I think it may be helpful if before doing so I provide an overview of sections 161(1)(b) and section 161(1)(c) in their statutory context in Part 8 of RSTPA.

The statutory provisions

[19] Section 159(1) states that a penalty is payable by a person who fails to make a tax return under (*inter alia*) section 29, LBTTA. Section 159(4) defines the term "penalty date" which is used in the subsequent provisions.

[20] Sections 160 to 163 are prefaced by the general heading "Amounts of penalties for failure to make returns: LBTT". In fact, sections 160 to 163 necessarily do rather more than merely state the amounts of penalties payable; they also describe the conditions precedent to the various amounts being payable, in terms of the length of the delay in making the return which must elapse.

[21] Section 160 prescribes a first penalty of £100 for failing to make a return by the filing date. There is no requirement for a decision by RS and the section does not mention any notice to the taxpayer.

[22] Section 161(1) states that a person is liable to a penalty under section 161 "if and only if" conditions (a), (b) and (c) are met. Condition (a) is that failure to make the return continues for at least 3 months beyond the penalty date (i.e., the day after the filing date).

Condition (b) is that RS decides that such a penalty should be payable. Condition (c) is that RS gives notice to P specifying the date from which the penalty is payable.

[23] Section 161(2) then specifies the amount of the penalty – £10 per day for up to 90 days – and section 161(3) states that the date specified in the notice under section 161(1)(c) may be earlier than the date on which the notice is given, but may not be earlier than 3 months from the filling date. (The latter part of section 161(3) seems to make explicit something already implicit in section 161(1)(a).)

[24] Section 162 provides that a person is liable to a penalty of the greater of (a) 5% of the tax payable and (b) £300 "if (and only if)" the return is at least 6 months late. The legislation does not make a decision by RS one of the conditions of liability and no notification to the taxpayer is required.

[25] Section 163 then imposes penalties "if (and only if)" returns are more than 12 months late. Where the person has deliberately withheld information, subsection (2) prescribes a penalty equal to the greater of (a) 100% of the tax payable and (b) £300. Absent any deliberate withholding of information, the penalty is the greater of (a) 5% of the tax payable and (b) £300. Again, there is no requirement for any decision by RS or for any notification to the taxpayer.

[26] Section 179 is headed "Assessment of penalties under Chapter 2". Subsection (1) provides that:

> "Where [a person] becomes liable to a penalty under this Chapter, RS must (a) assess the penalty, (b) notify the person, and (c) state in the notice the period, or the transaction, in respect of which the penalty is assessed."

Subsection (2) requires a penalty to be paid within 30 days of the day on which notification of the penalty is issued. Subsection (3)(a) provides for an assessment of a penalty to be treated, for enforcement purposes, as an assessment to tax.

[27] A salient feature of those provisions is that only in respect of the daily penalty under section 161 does the legislation require, as one of the "if (and only if)" conditions of liability, that RS must decide that such a penalty should be payable and that notice should be given to the taxpayer. Neither the less severe penalty under section 160 nor the more severe penalties under sections 162 and 163 embody either requirement. The legislature has here prescribed particular procedural steps for penalties under section 161 which it has not prescribed in respect of other penalties. (I have also observed that no penalty under Chapter 2 for late payment of LBTT and no penalty under Chapter 2 for late returns for, or late payment of, Scottish Landfill Tax requires either a decision by RS or notice to the taxpayer akin to that required by section 161(1)(c).)

[28] Another point which strikes one on reading the legislation is that, according to its express words, liability to a penalty under section 161 exists if (and only if) three conditions are satisfied; those conditions include RS deciding that a penalty should be payable and RS giving notice to the taxpayer. Section 179(1) then opens "Where [a person] becomes liable to a penalty under this Chapter, RS must" do certain things, including assessing the penalty and notifying the person. I again think it is fair to say that a natural first impression from the words used in sections 161 and 179 is that the steps required by section 161 must be taken in order to make the person liable to a penalty as a necessary preliminary to the operation of the assessment mechanism of section 179. On the face of things, it would appear that Section 179 cannot operate except by reference to a person who is liable to a penalty, and a person cannot become liable to a penalty unless the three "if and only if" conditions of section 161 have been satisfied.

[29] I will return to these first impressions later and consider whether they may be displaced by further and deeper considerations. I will now deal with the case advanced by

RS in respect of section 161(1)(b). Before doing so I should mention that Miss Charteris accepted that the burden of proof before the FTTS had lain on RS as regards both issues concerning which the appeal to the UTS had been taken.

Section 161(1)(b); Revenue Scotland's submissions

[30] Miss Charteris advanced two alternative submissions as regards section 161(1)(b). Her first submission was that the FTTS should have found, on the evidence before it, that RS had complied with the requirement that it "decide" to impose daily penalties under section 161(1)(b); the failure of the FTTS so to find amounted to an error of law. If I felt unable to agree with her first submission, Miss Charteris invited me in the alternative to hold that the FTTS erred in law in allowing the taxpayer's appeal without inviting oral or written submissions and further evidence from the parties on the question whether RS had made a decision to impose daily penalties under section 161(1)(b). If I were with her on her alternative motion, she invited me to arrange to hear fresh evidence on the point in accordance with Regulation 18(4) of the UTS rules of procedure, or to remit the case to a differently constituted FTTS for further evidence to be heard.

RS's primary submission re section 161(1)(b)

[31] In amplification of her primary position as regards section 161(1)(b), Miss Charteris submitted that the Penalty Assessment Notice, which referred on its face to section 161, was itself at least *prima facie* evidence that the requisite decision had been made, and in any event was sufficient evidence when taken with references in the materials before me. At paragraph 35 of its decision, the FTTS effectively acknowledged that the Notice tacitly referred to, or assumed a decision under, section 161(1)(b), but erred in law in requiring further evidence

about the nature of the decision and, in particular, whether it was an automated decision taken in execution of a policy decision to charge daily penalties, or whether it was a case-specific decision taken by an individual officer.

RS's alternative submission re section 161(1)(b)

[32] Turning next to her alternative submission about section 161(1)(b), Miss Charteris noted that under its rules of procedure the FTTS has power to order a hearing in a default paper case (Regulation 27(6)) and may require evidence on particular issues (Regulations 16(1)(a) and 5(3)(e)). In the circumstances of the present case, and notwithstanding her acceptance that the burden of proving that a decision had been made had lain on RS, Miss Charteris argued that in failing to exercise these powers to require evidence and submissions on the question whether a decision to impose daily penalties had been taken by RS, the FTTS had erred in law by making a fundamental error in its approach (that being the fourth category of error in law described in paragraph 43 of the Opinion of the Court in *The Advocate General for Scotland* v *Murray Group Holdings and others* [2015] CSIH 77). In other words the FTTS had reached a decision which no reasonable Tribunal could have reached.

[33] Developing her alternative submission further, Miss Charteris reminded me that this had been a default paper case and that the points taken by the FTTS had not been defined in the taxpayer's grounds of appeal. The taxpayer had been represented by legally qualified agents. The overriding objective of the FTTS, in terms of Regulation 2 of its rules of procedure, was to deal with cases fairly and justly and it was inconsistent with that for the FTTS to take a new and decisive point without input from the parties. The FTTS should have followed what the UK First-tier Tax Tribunal had done when faced with similar issues in *Morgan and Donaldson* v *HMRC* [2012] UKFTT 183 (TC), at paragraphs 18 and 19, and

Taliadoros-Hichri v *HMRC* [2017] UKFTT 0512 (TC), at paragraph 16, by inviting the parties to lodge further evidence and submissions before moving to a decision. Another relevant consideration was that the FTTS had already decided three appeals concerning daily penalties under section 161 RSTPA without the "decision issue" having been raised by the parties or by the Tribunal; *Classic Land and Property Limited* v *Revenue Scotland* [2016] TTFT 2; *Melanie Watts* v *Revenue Scotland* [2017] FTSTC 1 and *Redwing Property* v *Revenue Scotland* [2017] FTSTC 3.

[34] Next, Miss Charteris dealt with two issues referred to in the decision of the FTTS granting leave to appeal in the present case. The first concerned the limits on the inquisitorial role of the Tribunal in a case where the parties are legally represented, bearing in mind the observations of Lord Carnwath at paragraph 7 of his judgment in *Volkswagen Financial Services (UK) Ltd* v *HMRC* [2017] UKSC 26;

> "One of the strengths of the new tribunal system is the flexibility of its procedures … In some areas, particularly those involving litigants in person, a more inquisitorial role may be appropriate. However, when the tribunal … is dealing with substantial litigants, represented by experienced counsel, it is entitled to assume that the parties will have identified with some care what they regard as relevant issues for decision."

Miss Charteris submitted that it would not be inconsistent with these observations to expect the FTTS to have invited further evidence and submissions on a well defined point which had not been addressed in the parties' written submissions, following the same course as the Tribunals had taken in *Morgan and Donaldson* and *Taliadoros-Hichri*; that would not be an excessively inquisitorial role for the FTTS.

[35] The second issue referred to in the decision of the FTTS granting leave to appeal concerned the implications of *Burgess and Brimheath Developments Ltd* v *HMRC* [2015] UKUT 578 (TCC). In that case HMRC had made "discovery" assessments on an individual in reliance on the provisions of section 29, Taxes Management Act 1970 and on a company in

reliance on equivalent provisions to be found in Schedule 18, Finance Act 1998. The taxpayers appealed to the FTT against the assessments on grounds which did not expressly question whether certain conditions pre-requisite to the making of assessments under section 29 etc had been fulfilled ("the competence issue"), or whether the assessments had been made within the statutory time limits (the time limit issue"). On appeal to the UT the taxpayers took the point that the onus of proof on both issues lay with HMRC and had not been discharged. The UT accepted that submission and allowed the appeals. Miss Charteris argued that *Burgess and Brimheath* was distinguishable from the present case. She referred in particular to paragraphs 44, 45 and 49 of the UT's decision. In *Burgess and Brimheath* the taxpayers' skeleton arguments had expressly denied that any failure to make returns of taxable profits had been deliberate, and that argument implicitly put the competence and time limit issues in dispute. By contrast, in the present case there had been no foreshadowing whatsoever in the grounds of appeal of the issues newly identified by the FTTS and on the basis of which it had allowed the appeals. If the question of a decision under section 161(1)(b) had been raised in the grounds of appeal, RS would have responded differently. Even if the FTTS had been justified in not regarding the Penalty Assessment Notice as sufficient evidence that a decision under section 161(1)(b) had been taken, it was *prima facie* evidence and in the whole circumstances it was unreasonable for the FTTS not to have given the parties the opportunity of providing additional submissions and evidence on the point.

[36] Miss Charteris then outlined the evidence which RS would have put forward if the FTTS had given it the opportunity, and which it would lead in further procedure if I allowed it in. This could only be an outline as it had been hoped (subject to me granting permission) to call as a witness the person who was Head of Tax of RS during the relevant period to

speak to and, in certain respects, to explain the documents to which Miss Charteris intended to refer me, but unfortunately that person was ill and unable to attend.

[37] The documents began with a Revenue Scotland Board Minute of 30 September 2015 which indicated that RS had allowed a grace period from 1 April to 30 September 2015, during which penalties and interest had not been charged, but that both penalties and interest would apply from 1 October 2015. The Minute recorded that an announcement was to be made to that effect and that RS's "Scheme for Internal Delegation" was to be updated to include decision-taking around penalties and interest. My attention was drawn to a News Release by RS dated 1 October 2015 which stated, *inter alia*, that penalties for failures to make returns for LBTT would apply from that date. Neither the Minute nor the News Release expressly referred to daily penalties under section 161, but Miss Charteris said that oral evidence would confirm that the intention had been to apply them in all cases which included the daily penalties. Her position was that the evidence would thus show that a high level decision had been taken by RS on 1 October 2015 to charge daily penalties without further consideration – an automated process. This would satisfy the need for a decision in terms of section 161(1)(b), bearing in mind what the Court of Appeal's had said in *Donaldson* v *HMRC* [2016] EWCA Civ 761 in relation to equivalent UK tax penalty legislation.

[38] In the interests of full disclosure, Miss Charteris also drew my attention to an addition to RS's internal penalty guidance which appeared to have been made on 13 July 2016. This was headed "section 161 – Discretion". It stated that the phraseology of section 161(1)(b), "if … Revenue Scotland decides that such a penalty should be payable" gave RS a discretion to charge £10 per day for fewer than 90 days (or fewer than the number of days for which a return was late, if less than 90) if the circumstances merited it. If an officer of RS

considered that this might be appropriate in any particular case, he should refer the matter to the Penalties Review Group who would make the decision or ask a senior manager to do so. Miss Charteris said that oral evidence from the Head of Tax would explain that this guidance was incorrect and had never been put into effect.

[39] Miss Charteris then referred to the letter from RS dated 16 May 2017 asking the taxpayer's agents to explain the circumstances that gave rise to the late return (see paragraph 6 above). She said that oral evidence would show that this was issued as part of a pre-penalty process which RS had operated until June 2017. It had existed in the early days of LBTT and was intended to identify common mistakes by agents as to the effective date of land transactions with a view to minimising the number of occasions on which penalties were incurred, but had not proved effective in that regard and had been abolished. It would become clear that the existence of this pre-penalty process did not detract from her submission that RS had taken a high level decision in September 2015 to impose penalties under section 161(1)(b) in all cases in which the LBTT return was sufficiently late. Letters such as that of 16 May 2017 were not intended to inform individual decisions that penalties should be imposed, but rather to ascertain whether there were reasons in any particular case why the normal policy should be disapplied.

[40] At paragraph 31 of its decision (and also at paragraph 82) the FTTS referred to RS's public guidance (RSTP3006) about penalties for failing to make LBTT returns on time. This states, *inter alia*,

> "If your failure to make the return continues 3 months after the penalty date, we may decide that you are liable to further fixed penalties … of £10 per day for up to 90 days starting from 3 months after the penalty date. If we decide that you are liable to this penalty, we will notify you specifying the date from which the daily fixed penalty is payable."

Miss Charteris submitted that this guidance (issued in March 2015) was not inconsistent with a high level decision to impose the daily penalties in all appropriate cases. A decision was necessary to found the taxpayer's right of appeal under section 241 RSTPA.

[41] Miss Charteris then turned to the power of the Upper Tribunal to allow fresh evidence to be led. She asked me to have regard to the remarks of Lord Carnwath in *HMRC* v *Pendragon plc and others* [2015] UKSC 37 at paragraph 50 which are general encouraging of the Upper Tribunal making factual judgments where it is obliged to remake the First-tier Tribunal's decision. On the specific terms of Regulation 18(4) of the UTS's Rules of Procedure, Miss Charteris submitted that the further evidence in the documents and expected oral evidence which she had outlined before me could not have been obtained with reasonable diligence at the First-tier stage because nobody thought it was required. The further evidence was relevant, credible and would probably have an important influence on the hearing. Alternatively, it was in the interests of justice that it be led. RS was seeking not a second bite at the cherry but a first bite (c/f *Reed Employment and others* v *HMRC* [2014] UKUT 0160 (TCC)). RS had not had sufficient opportunity of presenting its case, based as it was on the Penalty Assessment Notice. Things would have been different had that Notice not been before the SFTT. As for the Respondents, they would not be prejudiced. In responding to the appeal in writing, they had not objected to the suggestion that new evidence might be led.

Discussion and decision re section 161(1)(b)

Was there sufficient evidence of a decision under section 161(1)(b)?

[42] RS's primary submission was that this question should receive an affirmative answer. I am unable to agree.

[43] As I have noted in paragraph 6 above, on 16 May 2017 RS wrote to the taxpayer's agents asking for an explanation of circumstances in which it seemed to RS that liability to a penalty for a late LBTT return might have arisen. The agents replied on 5 June stating that the fault lay with themselves. The next thing that happened was the issue of the Penalty Assessment Notice on 21 June 2017 which assessed penalties including daily penalties under section 161 at £10 per day for 90 days from 21 October 2016. In order to adhere to the terms of the statute, RS should at some point have taken a decision to impose the daily penalties. I did not understand Miss Charteris to suggest that there was a *legal* presumption that all steps required of RS by RSTPA as preliminary to the assessment of the penalty, including the making of a decision, had been correctly taken. Indeed, any such suggestion would have been inconsistent with her acceptance that before the FTTS the burden of proving that a decision had been taken lay on RS. Rather, as I understood her argument, it was simply that it was factually unlikely that RS would have issued a Penalty Assessment Notice without also having made the prescribed decision. However, I cannot see that the mere fact that the Penalty Assessment Notice was issued is, by itself, *prima facie* evidence that RS had made the required decision. RS *should* have made the decision, acting at an appropriate time and through appropriately authorised staff but, unless one assumes that tax authorities get most things right most of the time – a state of affairs which I hope is true but which I do not believe to be within judicial knowledge - I cannot see that the Penalty Assessment Notice is evidence that it actually did. I do not think the FTTS erred in law in failing to treat the Notice as *prima facie* evidence that RS had made the decision required by section 161(1)(b).

[44] Does widening one's view from the Penalty Assessment Notice alone to include other surrounding circumstances fundamentally change the picture? My narrative of events at paragraphs 4 *et seq.* above shows that in the course of the review process RS wrote to the

taxpayer and its agents on 6 July stating that RS "considered" that penalties were due under section 161. This could be read as akin to saying that RS had "decided" that penalties were due. In any event, RS wrote again on 7 August; this letter includes the sentence "Therefore the decision to apply penalties under s159, s160 and s161 was taken". In its Statement of Case submitted to the FTTS, at paragraph 61, RS again referred to its decision to apply a daily penalty.

[45] The FTTS (at paragraph 35 of its decision) said that paragraph 61 of the Statement of Case was a submission rather than evidence. I agree. As regards the letters which I have mentioned above, it seems to me that they are, at most, statements by RS that it had taken a decision. Such statements could be described as necessary preliminaries to the provision of evidence to show that the decision had actually been taken, or perhaps as the beginnings of evidence to that effect, but they do not seem to me – either taken alone, or viewed in the context of the Penalty Assessment Notice – to amount to sufficient evidence requiring the FTTS to conclude that the requisite decision had indeed been taken. (I have noticed that the FTTS did not actually refer in its decision to the contents of the letter of 7 August. It may be that the FTTS overlooked the reference therein to the taking of a decision. However, I do not think that even if the FTTS had taken that letter into account it should have altered its conclusion on the evidence, and in my view it did not err in law.)

[46] Miss Charteris criticised the FTTS for requiring RS to prove the nature of its decision, i.e., whether it was a general policy decision then implemented by automated means, or the decision of an individual officer. At paragraphs 29 to 37 of its decision, and at paragraph 82(a), the FTTS does seem to have found it rather unsatisfactory that RS's guidance at RSTP3006 implies that decisions under section 161 would be taken on an case by case basis, whereas dicta from *Donaldson* in the Upper Tribunal and in the Court of Appeal suggested

that a high level policy decision would be more likely. It seems to me that the FTTS is here simply describing the uncertainty it is in, looking only at publicly available material in the absence of evidence which it thought RS should have provided showing that a decision had been taken. While it is, strictly speaking, true to say that what RS had to prove is the fact of its decision rather than the nature of its decision, it seems to me that adequate proof of the decision would inevitably also show what its nature had been. I do not think this criticism of the FTTS's decision identifies any real fault in its approach.

[47] For those reasons, I cannot accept the submission that the FTTS made an error of law in concluding, in particular at paragraphs 38 and 82 of its decision, that RS had not produced sufficient evidence of a decision made by RS under section 161(1)(b).

RS's alternative submission in respect of section 161(1)(b; should the FTTS have invited further evidence and submissions?

[48] I now turn to RS's alternative submission in respect of section 161(1)(b). As I have explained at paragraphs 32 *et seq.* above, this was that the FTTS, not being satisfied that RS had proved that it had made a decision to impose daily penalties, should have invited the parties to lodge evidence and to make submissions about it instead of simply allowing the appeal. Its decision to proceed without inviting further input from the parties was unreasonable.

[49] I proceed on the basis that RS's position, as represented both to the taxpayer and to the FTTS, was that it *had* made a decision (albeit that no evidence about it was produced). I take this from the letters and Statement of Case to which I have referred at paragraph 4 *et seq.* above. I also bear in mind, of course, that the taxpayer's grounds of appeal did not include any challenge to HMRC's position that it had made the decision.

[50] The most relevant precedent, albeit one not binding on me, is the UK Upper Tribunal ("UKUT") case of *Burgess and Brimheath* (which has already been mentioned at paragraph 35 above). In that case HMRC made "discovery" assessments beyond the usual time limits for assessment, relying on the provisions of section 29 and 36 TMA 1970. Those sections could only justify the assessments if there had been negligent or deliberate action by the taxpayers leading to understatements of tax; HMRC made the assessments on the basis that the taxpayers had acted deliberately. In the UKUT, the question whether section 29 could apply was referred to as "the competence issue" and the question whether section 36 could apply was referred to as "the time limit issue". The taxpayers' appeals (see paragraphs 20 and 21 of the UKUT's decision) denied that profits had been omitted, and denied that returns were outstanding, but did not address the quality of the taxpayers' conduct, deliberate or otherwise that might (if omissions etc had occurred) have led to any loss of tax. Before the FTT, HMRC's Statement of Case and skeleton argument contended that the omissions were deliberate, a point denied by the appellants' skeleton arguments (UKUT paragraphs 22 to 32). HMRC's Statement of Case included the statement that

> "There has been no appeal on the ground that the discovery assessments … were not competent, and therefore [HMRC] consider that the assessments are competent unless the Appellants can show that the sums assessed are not unrecorded business receipts."

It does not seem that either party made submissions about the competency and time limit issues before the FTT, and the FTT approached the matter as if the only question at issue was whether profits had been omitted and, if so, to what extent. The FTT regarded the onus of proof as lying entirely on the appellants and made no findings about whether the omissions (which the FTT held to have been established) were the result of deliberate conduct or not (UKUT decision, paragraphs 6 to 11).

[51] On appeal by the taxpayer to the UKUT, raising the questions of burden of proof and the competence of the assessments, it was common ground that the burden of proof at first instance, in relation to the time limit and competence issues, normally lay with HMRC. However, HMRC submitted that the FTT was not required to determine those questions as they had not formed part an active part of the appellant's case. The UKUT rejected HMRC's argument that the scope of any appeal was determined solely by reference to the appellant's case. At paragraph 36 of its decision it said;

> "The scope of an appeal, and the issues that fall to be determined by the FTT, must be established by reference to all the circumstances. Those circumstances will include, in our view, the legislative framework, the burden of proof in relation to relevant issues and the way in which the respective cases of the parties have been put".

Having regard to the circumstances of *Burgess and Brimheath*, the UKUT held that the FTT had made an error of law in failing to have regard to the competence and time limit issues. At paragraph 53 it said:

> "The error of law is not that the FTT failed to address a relevant issue. It is that in the absence of a positive case put by HMRC in relation to the competence and time limit issues, the FTT erred in law in not finding that HMRC had failed to discharge the burden of proof in those respects such that the assessments could not be regarded as having been validly made and the appeals must accordingly be allowed."

[52] As I have mentioned at paragraph 35 above, Miss Charteris sought to distinguish *Burgess and Brimheath* from the present case on the basis that, even if the taxpayer's appeal had not expressly mentioned the competence and time limit issues, those issues were effectively put in issue by the denial in the taxpayers' skeleton arguments that any deliberate omissions had occurred. So the FTT should have dealt with those issues and its failure to do so vitiated its decision. By contrast, in the present case the taxpayer had at no stage suggested that it took issue with RS's statements that it had taken a decision under section

161(1)(b). It was unreasonable of the FTTS to have decided the appeal on the basis that it did, off its own bat and without further reference to the parties.

[53] I agree with Miss Charteris that there was material before the FTT in *Burgess and Brimheath* from which it should have inferred that the competence and time limit issues were disputed by the taxpayers and required to be decided, and that there was no equivalent material in the present case from which the FTTS could infer that the "decision" issue was actively disputed by the taxpayer. However, it does not seem to me that the UKUT regarded the existence of such material as essential to its decision. At paragraph 37 it referred to the relevant provisions of UK tax law about discovery assessments and time limits and said:

> "We do not construe those provisions … as mandating that, for competence or time limits to be in issue, an appellant is required to make an express objection or challenge to the validity of making an assessment".

Having referred to certain authorities, at paragraphs 43 and 44 it said:

> "In this case, therefore, HMRC had the duty of establishing their case on both the competence and time limit issues. The burden of proof lay on them in each of those respects. There was no obligation on the part of Mr Burgess or Brimheath to raise those issues. … Nor can HMRC's assertion that there had been no appeal on the competence and time limit issues serve to shift the onus of making a positive case onto Mr Burgess or Brimheath. Any concession or waiver by the appellants on those issues would have to have been clearly given, and HMRC could not assume that silence implied any such concession or waiver. It was not incumbent on the appellants to respond to HMRC's assumption as to what they would, and would not, be required to prove."

[54] It therefore seems to me that the UKUT would have decided *Burgess and Brimheath* in the same way even if the competency and time limit issues had never been mentioned, either in the grounds of appeal or elsewhere. Indeed, it is clear from the UKUT's decision that it thought that the FTT was *legally obliged* to allow the taxpayers' appeals on the grounds that HMRC had failed to discharge its burden of proof, whether the taxpayers took the point

or not; see paragraph 53 of the UKUT's decision, quoted at paragraph 51 above, and also paragraph 58;

> "In the absence of HMRC having put a positive case to the FTT on the competence and time limit issues, the only course open to the FTT was to allow the appellants' appeals. In those circumstances, to remit the appeals would allow HMRC to have a second bite at the cherry. That, in our judgment, would not be in the interests of justice or fairness."

[55] Were I to follow and apply in the present case the wide *ratio* which seems to underpin the UKUT's decision *Burgess and Brimheath* then RS's submissions about section 161(1)(b) would inevitably fall to be rejected. I was not addressed on whether that wide *ratio* was right or wrong. I am inclined to think it is right. However, in case I am wrong about that, and in recognition of the fact that I did not hear any counter argument, I have also considered whether my decision in this case would be different if the *ratio* of *Burgess and Brimheath* is narrowed to include the circumstance that the taxpayer had indirectly put the competence and time limit issues in play (as Miss Charteris suggested it should be). Doing so leaves open the question whether the FTTS reached an unreasonable decision in the present case. I am not persuaded that it did.

[56] I do not accept that any reasonable tribunal, having regard to the overriding objective in Rule 2 of the FTTS's Rules of Procedure (dealing with cases fairly and justly) would have invited further evidence and submissions on the question whether a decision had been made under section 161(1)(b). RS does not dispute that the burden of proof of the material preconditions for the validity of these penalties lay on it before the FTTS and, bearing that in mind, I do not see it as inconsistent with the general concept of fairness and justice for a tribunal immediately to allow the taxpayer's appeal if the burden is not discharged by evidence put forward by RS in the papers before the tribunal when it sits to reach its decision, whether or not the appeal is on those grounds. It was not suggested that I

should infer from the taxpayer's silence that it had conceded that a decision under section 161(1)(b) had been made, or that it had waived the need for RS to prove that the decision had been made. My views on this issue might have been different if the point on which RS failed to submit (sufficient) evidence had been an obscure one, but the need to prove a decision for the purposes of section 161(1)(b) is clear by reference to the very words of the legislation (see my review of the legislation above, especially at paragraph 27). It may also be said that the *Donaldson* litigation in the UK Tribunals and English Court of Appeal can be seen as another circumstance which should have focussed RS's mind on the need to prove that a decision had been taken under section 161(1)(b), although I see that as a factor additional, or secondary, to the plain terms of the legislation. The penalties totalled £1,000 in all and I cannot say that no reasonable FTTS could have taken the view, on the information before it, that an immediate decision would also, on balance, most effectively further the various particular objectives in Rule 17(2) (particularly those of dealing with cases in ways which avoid delay and are proportionate to the importance of the case and the anticipated expenses and resources of the parties).

[57] I do not think that the fact that this was a default paper case can be said in any way to have prevented RS participating fully in the proceedings. RS had the opportunity of discharging the burden of proof and did not take it. If the case had been conducted under the Standard procedure, with a hearing, I do not see how the outcome would have been any different; on prompting, RS might have asked during the hearing to be allowed to submit fresh evidence, but the Tribunal could reasonably have refused that request, on the ground that a further chance to submit evidence would allow RS two opportunities to get right something which it should have got right the first time. There is also the point that under Rule 24 of the FTTS Rules of Procedure no case is allocated to any category of procedure

unless the FTTS makes an order to that effect, and orders (Rule 6) are only made after parties have been given the opportunity of making representations. In its decision giving RS permission to appeal, the FTTS mentions that in this case RS opted for a hearing on paper. Further, parties may ask at any time that a case is re-allocated to a different category (Rule 24(3)). So, even if allocation of the appeal to the Default Paper category did have any deleterious effects on RS's ability properly to put forward its case, RS was largely responsible for its own handicap.

[58] As I mention at paragraph 34 above, Miss Charteris referred me to observations of Lord Carnwath in the *Volkswagen Financial Services* case;

> "when the tribunal … is dealing with substantial litigants, represented by experienced counsel, it is entitled to assume that the parties will have identified with some care what they regard as relevant issues for decision".

That quotation had been used by the FTTS in its decision granting leave to appeal to RS as a reason for deciding to allow the taxpayer's appeal at the paper stage. Now, of course, the quotation could be thought of as cutting both ways – why not hold the solicitors representing the taxpayers to the terms of their appeal? I think, however, the difference again lies in the fact that the onus of proof was accepted to remain with RS and it was not suggested before me that the failure of the solicitors for the taxpayer to raise the decision issue in their overt grounds of appeal amounted to waiving the need for proof of it.

[59] Miss Charteris drew my attention (see paragraph 33 above) to the fact that the FTT in *Donaldson* (Judge Mosedale) did not simply allow the taxpayer's appeal in circumstances where HMRC initially failed to provide evidence about a particular issue on which it had the burden of proof; rather, it allowed HMRC an adjournment to produce the evidence – see paragraphs 18 and 19 of the FTT's decision. And the FTT in *Taliadoros-Hichri* (Judge Richards), in a similar situation, invited submissions from the parties rather than

immediately allowing the taxpayer's appeal. I accept, of course, that these are examples of tribunals not doing what the FTTS did in this case – allowing an appeal where the revenue authority fails to discharge its burden of proof at first instances. However, I note that in neither case does there seem to have been any detailed consideration of what the most appropriate course of action was. Further, the FTT's decision in *Donaldson* pre-dates the UKUT decision in *Burgess and Brimheath*, and the latter decision does not appear to have been cited in *Taliadoros-Hichri*. Moreover, it is not clear to me that the submissions which the judge invited in *Taliadoros-Hichri* extended to the production of more evidence. So it does not seem to me that one can say there is any clear and soundly based pattern of FTT's inviting further evidence rather than allowing appeals for want of evidence. (I am also aware of a number of other decisions of the FTT about UK tax penalty legislation (similarly worded to section 161) which have followed and applied the view expressed in *Burgess and Brimheath* that a failure by HMRC to discharge its burden of proof in respect of material preconditions to the validity of a penalty ***must*** lead to the taxpayer's appeal being allowed, even if the grounds of appeal do not expressly put the point in issue; see *Islam* [2017] UKFTT 0337 (TC), *Sudall* [2017] UKFTT 0404 (TC) and *Spacia Grocers* [2018] UKFTT 0344 (TC).)

[60] Finally, I should also mention Miss Charteris' reference (paragraph 33 above) to three decisions of the FTTS or its predecessor in which the absence of evidence of a decision under section 161(1)(b) passed without notice. That is unfortunate, but I do not think that three decisions is a sufficiently long and consistent practice to make it unreasonable for the FTTS in the present case to depart from it without notice. In any event, it was not suggested that RS actually relied on the previous practice of the FTTS and its predecessor (such as it was) in preparing their original submissions on paper for the FTTS in the present case.

[61] For all those reasons, I reject RS's submission that the FTTS acted unreasonably in allowing the taxpayer's appeal in this case on the basis (not forming part of the grounds of appeal) that RS had not proved that it had taken a decision under section 161(1)(b). If I am right in that conclusion I strictly need not consider whether to admit the fresh evidence which Miss Charteris outlined to me. However, in case I am wrong and my decision is appealed I will indicate my views on that point.

Fresh Evidence?

[62] Under Rule 18(4) of the Upper Tribunal for Scotland's Rules of Procedure, fresh evidence may only be led in an appeal if the UTS is satisfied that at least one of two alternative criteria is satisfied. The first criterion has three cumulative requirements, *viz.* that the evidence could not have been obtained with reasonable diligence at the FTTS stage, is relevant and will probably have an important influence on the hearing and is apparently credible. The second and alternative criterion is that it is in the interests of justice for the evidence to be led.

[63] As regards the first criterion, I was satisfied that the evidence which Miss Charteris outlined would probably have an important influence on the hearing. I had no reason to doubt that it would be credible evidence (although I did not actually hear the proposed oral evidence). But, in any event, I do not think that the first criterion is satisfied, because the evidence could have been obtained with reasonable diligence at the FTTS stage. The fact that no-one thought to obtain it does not mean it could not have been obtained, with reasonable diligence. To put it shortly, someone should have thought to obtain it.

[64] However, if I am wrong in my view that the FTTS's decision in this case to allow the taxpayer's appeals without seeking further evidence was not an unreasonable decision, then

I would regard the second criterion as being satisfied; the interests of justice will justify the evidence being heard. That is what I would have decided if I had overturned the FTTS's decision.

[65] I will now turn to the second part of this appeal, which concerns section 161(1)(c) and section 179.

RS's submissions re sections 161(1)(c) and 179

[66] In relation to section 161(1)(c) and section 179, Miss Charteris submitted that the FTTS had erred in law in two respects; firstly in thinking that the taxpayer must be warned (i.e., must receive a notice under section 161(1)(c) in advance of the day on which daily penalties begin to be payable), and secondly in failing to appreciate that the specification of the penalty period in the Penalty Assessment Notice satisfied the requirement in section 161(c) that RS must give the taxpayer notice of the date from which the £10 per day penalty is payable.

Must RS issue advance warning of a penalty under section 161?

[67] Miss Charteris noted that at paragraphs 41 and 42 of its decision, and also at paragraphs 86 and 87, the FTTS seemed to interpret the Court of Appeal's decision in *Donaldson*, and the UK FTT decision in *McGreevy* v *HMRC* [2017] UKFTT 0690 (TC) (a decision about the penalty regime for Non-Resident Capital Gains Tax), as meaning that section 161(1)(c) (or at least its exact equivalent in UK tax legislation) required notice to be given to the taxpayer before any daily penalty could become payable; in other words, before any of the 90 days in respect of which a taxpayer could be charged a £10 penalty had elapsed. But that could not be right, because it ignored the express provision in section

161(3) that the date specified in the notice (*viz*., the date from which the £10 per day penalty was payable) could be earlier than the date on which the notice was given. The FTTS had misquoted section 161(1)(c) at paragraph 42 of its decision; the FTTS said that section required a notice specifying the date from which a penalty *would* be payable, whereas the correct reference should be to the date from which a penalty *is* payable. Miss Charteris also drew my attention to paragraph 35 of the decision of the Upper Tribunal in *Donaldson* [2014] UKUT 0536 (TCC) in which it had been observed – correctly, in her submission - that HMRC's power to back-date a notice under the equivalent UK legislation was not restricted to exceptional cases but was available in all cases.

[68] At paragraph 44 of its decision the FTTS said "Further, RS have not followed their own guidance and have simply issued the Penalty Notice with no preliminary notice or warning …". Miss Charteris took this to be a reference to the statement in RSTP3006 that "If we decide that you are liable to this penalty, we will notify you specifying the date from which the daily fixed penalty is payable." However, that phrase had to be read subject to the phrase which followed shortly thereafter, "The start date we specify in the notice may be earlier than the date on which the notice is given … ". In any event, a breach of its public guidance by a tax authority – even if proved - would not be directly relevant in appeal proceedings (as opposed to judicial review).

[69] The FTTS referred at paragraph 49 of its decision to *McGreevy* v *HMRC* [2017] UKFTT 690 (TC) (and implicitly referred to it again at paragraphs 86 and 87). That case was about penalties for late returns in respect of Non-Resident Capital Gains Tax. The NRCGT legislation included a provision similar to section 161 but HMRC announced that it would not charge daily penalties akin to those under section 161. Miss Charteris submitted that the reason for HMRC's action about the non-imposition of penalties in respect of NRCGT was

wholly unclear from the case report and nothing of relevance to the present case could be inferred from it. The FTTS had erred in thinking that daily penalties were unworkable in the context of LBTT and no support for such an idea could be drawn from the NRCGT experience as reported in *McGreevy*.

May the Penalty Assessment Notice under section 179 also contain the notice under section 161(1)(c)? Or must the notice under section 161(1)(c) be issued before the Penalty Assessment Notice?

[70] Miss Charteris submitted that there was no need for a notice under section 161(1)(c) to be given prior to and separately from the Penalty Assessment Notice issued under section 179. RS regarded the Penalty Assessment Notice as fulfilling the requirements of both sections.

[71] Miss Charteris recognised that her submission ran counter to the approach of the FTT in *Taliadoros-Hichri*. In paragraphs 17 and 18 of his decision in the FTT, Judge Richards said:

> "My overall conclusion is that Paragraph 4 of Schedule 55 [the equivalent of section 161, RSTPA] sets out a list of requirements that must be satisfied before a taxpayer can be liable to daily penalties … Parliament must have intended that notice of daily penalties has to be given before daily penalties can be assessed."

Taliadoros-Hichri was followed in *McGreevy* (at paragraph 90 of the decision).

[72] Miss Charteris urged me to prefer and adopt a different approach to this issue building upon what the UKUT had said in *Donaldson* at paragraphs 34 et seq of its decision. Although in *Donaldson* the penalty assessment notice had not actually stated the period in respect of which the penalty had been assessed, so that it could not constitute notice under [the equivalent of] section 161(1)(c), the UKUT had at least countenanced the possibility that

in an appropriate case a notice under [the equivalent of] section 179 could also be a notice under [the equivalent of] section 161(1)(c). In the present case the Penalty Assessment Notice conveyed all the information required both by section 179 and section 161(1)(c) and satisfied both sections. To require separate notices under each section would be burdensome to RS and confusing for the taxpayer (potentially leading, for example, to duplication of appeals).

[73] Miss Charteris asked me to bear in mind that LBTT was different to Income Tax in that in the great majority of cases RS did not know in advance that a taxpayer was or might be obliged to make a return. The first indication RS would normally get would be a return of the land transaction made at the time of the application to the Keeper of the Registers for registration of title (see section 43, LBTTA). Therefore, there was no good reason why (i) the requirement under section 161(1)(c) to give a taxpayer notice of the commencement date of the daily penalties, and (ii) the requirement under section 179(1)(c) to state in the Penalty Assessment Notice the period in which the penalty had been assessed, should not be satisfied in the same notice, *viz* the Penalty Assessment Notice. Any question of giving a warning of a late return incurring daily penalties did not usually arise because RS was not in a position to know, in advance of the due date for the return, that a return should be submitted. (In the exceptional case of reviews of tax chargeable under Part 4, Schedule 19 LBTTA – three year reviews under leases, etc - it was RS's practice to issue a reminder where it was in a position to know when a tax charge might arise). Whatever its merits in relation to taxes such as Income Tax where the taxing authority knew it was likely that the taxpayer should be making a return, and had issued a notice to the taxpayer requiring the return to be made, the chronological approach of the FTT in *Taliadoros-Hichri* (see paragraph 71 above) was inapplicable to LBTT.

[74] Miss Charteris referred me to the decision of the Special Commissioner in *Corbally-Stourton* v *HMRC* [2008] STC (SCD) 907. Paragraphs 90-93 of that decision deal with the question of the time at which an assessment is made. The Special Commissioner held that an assessment is made when the responsible official, having decided to make it, authorises its entry onto the taxing authority's computer system. Miss Charteris accepted that the same should apply to the making of penalty assessments for the purposes of LBTT. It followed that under section 179 RS would normally assess the penalty a short time before issuing the Penalty Assessment Notice (containing the notice required by section 161(c)). I was invited to regard any such delay as immaterial. Miss Charteris took me to the observations of Lord Dunedin in *Whitney* v *CIR* [1926] A.C. 37 at 52 where he said that in the absence of clear reason not to do so a court should endeavour to make effective the assessment of a liability to tax. She reminded me that section 179 applies to both Scottish Landfill Tax and LBTT, whereas section 161 only applies to LBTT; the draftsman had presumably not seen fit to go to the lengths of adapting the general provisions of section 179 for one type of penalty in one of the Scottish taxes.

[75] In conclusion, under reference to authorities such as *Barclays Mercantile Business Finance Ltd* v *Mawson* [2004] UKHL 51, Miss Charteris asked me to interpret the provisions of RSTPA with which we were concerned in a purposive rather than a literal manner. The purpose of the penalty regime for late LBTT returns was to promote compliance and deter non-compliant behaviour in the form of late filing. Penalties should be certain and efficient (two of the well-known principles of Adam Smith). A taxpayer in receipt of a Penalty Assessment Notice like those issued in the present case had all the information he or she needed to take effective steps by way of review and appeal, if so minded, and it would be wrong to insist upon a separate notice under section 161(1)(c) (which might require a

separate appeal) to be issued before the assessment was made. There was no question of the notice under section 161(1)(c) being issued long after the assessment (c/f the concerns of the FTT judge in *Taliadoros-Hichri* expressed at paragraph 18 of that decision) as the Penalty Assessment Notice would be issued automatically within a short time of the decision to assess being input to the computer. If I were not with her on this point, Miss Charteris asked me to give what guidance I could on the role and effect of a notice under section 161(1)(c), given that in the majority of cases under LBTT it could not act as an advance warning to a taxpayer that he or she was about to, or had recently become, liable to daily penalties.

Discussion and decision re sections 161(1)(c) and 179

Must RS issue advance warning of a penalty under section 161?

[76] I agree with Miss Charteris' submissions on this point (see paragraphs 67 to 69 above). The answer to the question above is "no" and in reasoning to the contrary I respectfully think that the FTTS made an error of law.

[77] It will be recalled that the statutory provisions are as follows. If a tax return is more than 3 months late and RS decides that a penalty under section 161 should be payable, section 161(1)(c) provides that RS must give notice to the taxpayer specifying the date from which the penalty is payable. Under section 161(2) the penalty is £10 per day for up to 90 days starting with the date specified in the notice given under section 161(1)(c). Section 161(3)(a) provides that the date so specified may be earlier than the date on which the notice is given.

[78] At paragraph 41 of its decision the FTTS quoted paragraph 21 of the judgment in the Court of Appeal in *Donaldson*, emphasising in bold text the following passage;

> "All that HMRC is required to do is to inform P that it has decided that, if he continues to fail to file his return after the end of the three month period he will be liable for a daily penalty of £10 for each day that the failure continues during the following 90 day period. Sub-para (c) requires notice to be given specifying the date from which the penalty "is" payable. That can be done in advance of any default by P. It is a fair and sensible provision."

[79] At paragraph 42 of its decision the FTTS commented on that passage from *Donaldson* as follows;

> "Section 161(1)(c) imposes the condition that a notice must be issued specifying the date from which the penalty **would become** payable. We have highlighted in bold the Court's clear intimation that a warning notice must be served stipulating the date from which the penalty is payable. No warning letters were issued by Revenue Scotland." [Emphasis added.]

[80] I fear that the FTTS has here lost sight both of the particular question which that passage from *Donaldson* addresses and of the exact wording of section 161(1)(c). In the first place, the question being addressed in paragraph 21 of *Donaldson* was whether (under the equivalent of section 161(1)(c)) HMRC could validly issue a notice before the taxpayer's return was at least 3 months late. The Court was *not* applying its mind to the entirely different question of whether the notice had to be issued before the 90 day period began. Secondly, as Miss Charteris pointed out, section 161(1)(c) requires notice to be given specifying the date from which the penalty "is" payable, not the date on which it "would become" payable; using the exact statutory word is less likely to lead to the conclusion which the FTTS reached. And, finally, the stipulation in section 161(3)(a) that the start of the 90 day period specified in the notice under section 161(1)(c) can be earlier than the date of the notice itself is incompatible with the view that no such notice can be valid unless it is in time to act as an advance warning to the taxpayer.

[81] It does seem to me that the FTTS has erred in law in this respect. If one abandons the idea (for which there is no foundation in the words of the statute) that an essential part of

the role of a notice under section 161(1)(c) is to give a taxpayer advance warning that he or she is at risk of incurring daily penalties, there is no reason to think (as the FTTS suggests at paragraphs 86 and 87 of its decision) that daily penalties are unworkable in the scheme of LBTT. Miss Charteris' submissions (see paragraphs 67 to 69 above), with which I agree, dealt with the FTTS's other observations on this topic and I need say no more about them.

[82] I will now turn to the second question in the appeal about notices under section 161(c), which also concerns section 179.

May the Penalty Assessment Notice under section 179 also contain the notice under section 161(1)(c)? Or must the notice under section 161(1)(c) be issued before the Penalty Assessment Notice?

[83] The FTT in *Taliadoros-Hichri* decided (paragraphs 17 and 18) that valid imposition of daily penalties required notice under section 161(1)(c) to precede the Penalty Assessment Notice issued under section 179, a view shared by the FTT in *McGreevy* (paragraph 90). In the present case, the FTTS indicated at paragraph 44 of its decision that it agreed with *Taliadoros-Hichri*. I am of the same view.

[84] In paragraphs 19 to 29 above I summarised and analysed the relevant legislation and set out my first impressions as to its meaning. Paragraphs 27 and 28 are particularly in point. Despite Miss Charteris' eloquent submissions to the contrary (see paragraphs 70 to 75 above) I have been unable to depart from those initial impressions. In particular, the legislation states that a person is liable to a penalty under section 161 if and only if (*inter alia*) a notice has been given to him or her specifying the date from which the penalty is payable. Then section 179 provides that where a person becomes liable to a penalty under Chapter 2, Part 8 RSTPA (and Chapter 2 includes section 161) RS must assess the penalty, notify the person

and state the period or the transaction in respect of which the penalty is assessed. The only way I can interpret these two provisions, taken together, is that the notice under section 161 must be given before action can validly be taken under section 179.

[85] I can well imagine that requiring RS to issue two separate notice, one under section 161(1)(c) and the other under section 179, will serve no useful function in the case of many LBTT penalties for late returns and, where it is unnecessary, would be potentially confusing for the taxpayer and could involve him or her in making an redundant, additional appeal. I would prefer to avoid such a situation and have borne in mind Miss Charteris' submissions about how statutes should be interpreted. However I simply cannot see a way to interpret the words of RSPTA in a way that she urged upon me. To repeat, the Act says that a taxpayer is liable to a penalty if and only if RS give him or her notice under section 161, and that where he or she becomes so liable then RS are to assess the penalty and notify the person etc. All I can make of those provisions is that the first type of notice must precede the second. *Corbally-Stourton* (paragraph 74 above) indicates that the time of assessment precedes the issue to the taxpayer of the notification of the assessment. If that is correct (as Miss Charteris accepted it to be), a single document which purports to be a notice under both section 161(1)(c) and section 179 inevitably gets the events in the wrong order; the penalty is assessed before the notice under section 161(1)(c) is issued, contrary to the requirements of the statute. Even if we were to disregard *Corbally-Stourton*, and treat the assessment as made at the time of issue of the single notice, I do not think the terms of the RSTPA would be met; assessment depends on becoming liable and becoming liable depends on notice being given under section 161(1)(c).

[86] I cannot readily respond to Miss Charteris' request that I say what the role of a separate, prior notice under section 161(1)(c) is, because I share her view that such a notice is

probably largely redundant in many cases. Where we differ is on the question whether this Tribunal can do anything about it. To be frank, I suspect that the potential difficulties to which she drew my attention arise from a legal transplant from one penalty regime to another having been made without all the consequences being foreseen. If the difficulties are sufficiently serious it may be that an exercise of the Scottish Ministers' power under section 181 to make regulations changing the penalty provisions of Chapter 2, Part 8 RSTPA is required.

[87] Before leaving this topic entirely I should perhaps add that the Penalty Assessment Notice in this case did seem to me to include within it the information required under section 161(1)(c). In other words, if I had taken the view that a section 161(1)(c) notice could validly be issued at the same time as a notice under section 179, I would have regarded the Penalty Assessment Notice as fulfilling the requirements of both sections.

Nil penalty under section 162

[88] Section 162, RSPTA provides for penalties in the case of LBTT returns which are more than six months late. The penalty is to be the greater of (a) 5% of any liability to tax which would have been shown in the return in question, and (b) £300. In the present case the taxpayer's return was more than six months late but RS imposed a NIL penalty under section 162, no doubt being of the view that the penalties imposed under sections 160 and 161 were sanction enough. In paragraphs 50 to 54 of its decision the FTTS considered whether this was correct and concluded that it was not; the reality was that RS has simply imposed no penalty. The FTTS therefore allowed the taxpayer's appeal against the £0 penalty.

[89] RS did not appeal to the UTS against that aspect of the FTTS's decision. However, in its decision granting RS leave to appeal the FTTS suggested that the UTS might comment on the concept of Nil penalty assessments. Miss Charteris informed me that RS thought its practice was lawful and she was ready to make submissions on the topic if I wanted to hear them. However I preferred not to. The matters which fell to be decided in this appeal seemed to me to be difficult enough, and likely to require a sufficiently lengthy written decision, without taking on a further topic which did not immediately seem of pressing practical importance and on which anything I said would essentially have been *obiter dicta*.

Disposal

[90] Although I think the FTTS went wrong on one aspect of the case (see paragraphs 76 to 81 above) that is insufficient for RS to succeed in its appeal. Save as indicated in those paragraphs I uphold the FTTS's decision and I refuse RS's appeal.

Appeal Provisions

[91] 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 – extracts from the decision of the FTTS

Factual background

[4] The appellant entered into a transaction for a non-residential lease in Edinburgh. The appellant's agent submitted an electronic return in relation to that transaction on 20 April 2017. That return specifies that the "Effective date of transaction" was 20 June 2016.

[5] In terms of Section 29(3) LBTTA the return must be made before the end of 30 days beginning with the day after the effective date of the transaction. Accordingly the filing date for that return was 20 July 2016 and therefore since the return was submitted on 20 April 2017 it was 274 days late.

[6] There was no LBTT payable in respect of the transaction.

[7] On16 May 2017, Revenue Scotland requested information about the circumstances that gave rise to the late return. The appellant's agents responded to the effect that the submission was late because of an error on their part.

[8] On 21 June 2017, the Penalty Notice was issued imposing

(a) a £100 penalty for what is termed a first penalty for failure to make a return in terms of Sections 159 and 160 RSTPA,

(b) a £900 penalty for what is termed a 3 month penalty for failure to make a return (being £10 per day from 21 October 2016) in terms of Sections 159 and 161 RSTPA (hereinafter referred to as "daily penalties") , and

(c) a £0 penalty for what is termed a 6 month penalty for failure to make a return in terms of Sections 159 and 162 RSTPA.

[9] On the same day Revenue Scotland wrote to the appellant's agent stating that "Revenue Scotland considers that a penalty is applicable under section 159(1) and 160 … for failure to make a return." No mention was made of Section 161.

[10] On receipt of the request for review, Revenue Scotland wrote to the appellant and it's agent on 6 July 2017 stating: "Revenue Scotland's view in this case is as follows: Revenue Scotland considered that a (sic) penalties are due under s159, s160 and s161 as a Land and Buildings Transaction Tax return was not received on time and payment was received late." Of course, no tax was due so there could not be late payment.

[11] The appellant's agents responded on 4 July 2017 acknowledging that the first penalty of £100 was indeed due. However, they argued that the penalty of £900 was a discretionary penalty and should either not be payable or should significantly be reduced given that the reason for the late submission was simply an administrative oversight and there was no LBTT actually due in respect of the transaction.

[12] Revenue Scotland upheld the penalties on review, on 7 August 2017 stating that there was no reasonable excuse for the late submission of the return. They did not accept that reliance on a solicitor constituted a reasonable excuse unless there was evidence of reasonable care having been taken by the taxpayer and in this case there was no evidence of reasonable care. There were no special circumstances.

[13] As far as quantum of the penalty was concerned, Revenue Scotland stated that since the failure had continued for three months after the penalty date, RSTPA "… prescribes the penalty as a fixed amount of £10 for each day up to 90 days." It goes on to refer to its guidance RSTP3006 (but do not appear to have enclosed it) pointing out that it says that "… we may decide that you are liable" to the daily penalties.

[14] Lastly, Revenue Scotland pointed out that the fact that there was no tax due does not make the daily penalties excessive. The conclusion was simply to uphold all of the penalties because there was no reasonable excuse or special circumstances.

Discussion

[19] In this appeal it may be that only the 3 month penalty, ie the daily penalties, is in contention. However we discuss Sections 160-162 as they are specified in the Penalty Notice. The only issues are reasonable excuse, special circumstances, proportionality and fairness and we discuss those at paragraphs 56-80 below in relation to all of the penalties.

Section 160

[20] It is not disputed that the return was late. Therefore there is a *prima facie* liability for a penalty.

Section 161

[21] As we explained at paragraph 30 in *Straid:*

> "…the Explanatory Notes to RSTPA state:
>
> 'The effect of [the legislation] is that the jurisprudence concerning the proper bounds of the tax authority's role is imported into the devolved tax system. This jurisprudence includes not only case law from the UK jurisdictions but other English-speaking jurisdictions'".

[22] That is particularly relevant in this instance since Section 161 RSTPA is phrased in precisely the same terms as paragraph 4 of Schedule 55 Finance Act 2009 ("Schedule 55").

That has been extensively litigated in the UK courts. (Section 160 replicates paragraph 3 and Sections 162 and 163 replicate paragraphs 5 and 6 of Schedule 55.)

[23] The lead case is *Donaldson* v *HMRC*[1] ("Donaldson"). In that case, as in this, the appellant's failure continued after the end of the period of three months beginning with the penalty date, so the condition in the first sub-paragraph was met.

Section 161(a)

[24] It is not disputed that the condition in Section 161(1)(a) is met.

Section 161(1)(b)

[25] The Court in *Donaldson* considered the second sub paragraph in detail. One of HMRC's arguments was that in June 2010 a high level policy decision had been taken to the effect that all taxpayers who were at least three months late in filing their returns would be liable to daily penalties. At paragraph 18, the Court found that "… a generic policy decision of the kind taken by HMRC … is a decision which satisfies the requirement of para 4(1)(b)."

[26] Has Revenue Scotland made a similar policy decision? Neither the Statement of Case nor the review decision addresses that point. Indeed there is no explanation as to how or why the daily penalties were upheld beyond paragraph 61 in the Statement of Case stating that because it had been decided that the return was more than three months late the penalty was quantified by the duration of the default. It goes on to argue that the only discretion lies in the provisions for reasonable excuse, special circumstances and disclosure. Disclosure is not an issue in this appeal.

[27] The Policy Memorandum to RSTPA was prepared by the Scottish Government and that sets out the context and intention for the penalty regime. Paragraph 105 explains that:

[1] 2016 EWCA Civ 761

> "The penalties will be able to be made cumulative, for example the same non-compliant behaviour could be subject to both the fixed penalty and a daily penalty. The expectation is that the different types of penalties will form a hierarchy, with the mildest being the fixed penalties and the most serious being penalties based on a percentage of the tax calculated as being due."

The daily penalties fall in the middle. However, there is no indication that daily penalties, or indeed any penalties, must always be imposed.

[28] On the contrary, paragraph 108 reads:

> "Revenue Scotland will be permitted to use its discretion to reduce or waive some penalties in certain circumstances. Revenue Scotland will be expected to issue guidance on how this discretion will be exercised … In addition, penalties may be waived when the taxpayer has a reasonable excuse."

[29] Paragraph 10 makes it explicit that the policy objective was that there would be "… three kinds of financial penalties for non-compliant behaviour – fixed penalties, daily penalties and percentage-based penalties where the penalties linked to the potential loss in tax revenue". In this case, of course, there is no loss in tax revenue.

[30] More pertinently, that paragraph also states "It will also have the power to apply discretion with respect to reducing or waiving penalties in certain circumstances and must issue guidance on how discretion will be exercised." It has issued guidance.

[31] That guidance reads as follows:-

> "RSTP3006 – Penalties for failing to make LBTT return on time
> In this page of guidance the 'penalty date' means the day after the filing date.

If you fail to make a LBTT return (outlined in the table in RSTP3005) on or before the filing date (specified in column 4 of that table) then on the penalty date you become liable to a fixed penalty of £100.

If your failure to make the return continues 3 months after the penalty date, we may decide that you are liable to further fixed penalties (additional to the initial fixed £100 penalty) of £10 a day for up to 90 days starting from 3 months after the penalty date.

If we decide that you are liable to this penalty, we will notify you specifying the date from which the daily fixed penalty is payable. The daily fixed penalty is payable from this date until the earlier of either 90 days after this date or the date on which you submit the return. The start date we specify in the notice may be earlier than the date on which the notice is given, but may not be earlier than the date 3 months from the penalty date.

If your failure to make the return continues six months after the penalty date, we may decide that you are liable to a further penalty (additional to any other penalties already imposed). The penalty amount is the greater of:
5% of any tax liability which would have been shown in the tax return in question (had you made it to us); and
£300.

If your failure to make the return continues 12 months after the penalty date, we may decide that you are liable to a further penalty (additional to any other penalties already imposed). The penalty amount is the greater of:
5% of any tax liability which would have been shown in the tax return in question (had you made it to us); and
£300.

unless, by failing to make the return, you are deliberately withholding information which would enable or assist us to assess your tax liability, in which case the penalty amount is the greater of:
100% of any tax liability which would have been shown in the tax return in question (had you made it to us); and
£300.

You are liable to the daily penalties or the 6 month and 12 month further penalties even if we have not charged some or all of the previous penalties. For example, you can become liable to the six month further penalty even if we have not previously charged the daily penalties."

[32] As can be seen, the final sentence seems to suggest that daily penalties might not be charged even although other penalties have been applied. Similarly at paragraphs three and

four in saying: "….we may decide…" and "If we decide that you are liable to this penalty…" the suggestion is also that the daily penalties might not always be charged.

[33] In *Donaldson* the Court agreed with the Upper Tribunal that "…it is inherently unlikely that Parliament intended that HMRC should be required to make a decision by exercising the discretion on an individual taxpayer-by taxpayer basis" and that was because the issue of individual circumstances, such as reasonable excuse, had been addressed elsewhere in the legislation. Again that is precisely the position in this appeal. Reasonable excuse and other individual circumstances where discretion can be exercised are to be found at Sections 174 *et seq* of RSTPA and, as we indicate at paragraph 28 above, the policy intention is that there is the possibility of waiver of penalties in addition to that.

[34] The Court in *Donaldson* quoted the Upper Tribunal with approval at paragraph 14 making it explicit that: "In other words, what was contemplated was that the discretion conferred by the provision should be capable of being exercised in respect of all taxpayers, or none."

[35] Unfortunately, although the Penalty Notice includes the daily penalties, at no stage has Revenue Scotland explained whether that is a policy decision or a decision consciously taken by a decision maker having considered all of the individual circumstances. Although paragraph 61 in the Statement of Case (see paragraph 26 above) may be capable of being interpreted as suggesting the latter, there is no evidence to that effect. That paragraph is simply a submission.

[36] It is not known if the Penalty Notice is automatically generated, as is the case with Schedule 55 penalties. If it is automatically generated then, since the covering letter makes no reference to Section 161, it seems unlikely that a decision maker addressed daily penalties given the terms of the covering letter (see paragraph 9 above).

[37] Further if daily penalties are addressed on a case by case basis that would conflict with the reasoning articulated in *Donaldson.* We agree with both the Court of Appeal and Upper Tribunal in *Donaldson.*

[38] Lastly, in this context, and pertinently, we are very conscious that in all penalty cases the burden of proof initially lies with Revenue Scotland[2]. They have not established that a policy decision has been taken or when. Nor have they proved that a decision maker looked at the daily penalties, considering anything other than reasonable excuse or special circumstances. We find that there has been no compliance with Section 161(b).

[39] If we are wrong on Section 161(1)(b) then we must consider the following sub paragraph.

Section 161(1)(c)

[40] In the Policy Memorandum, paragraph 107 is headed "Penalties – warning letters" and reads:

> "The Bill does not contain provision for warning letters from Revenue Scotland to the taxpayer in relation to penalties but as set out in Sections 150-151, 160, 162-163 and 181 of the Bill, the Scottish Ministers will have regulation making powers to make further arrangements for penalties (including provision for warning letters for example)."

No such regulations have been promulgated to date.

[41] We focus on warning letters because paragraphs 21 and 22 of *Donaldson* read:

> "21. I cannot accept these submissions. First, to the extent that they depend on establishing the existence of a discretion, I have already rejected them. Secondly, the notices did not "merely" inform Mr Donaldson that he "might" be liable to a penalty. They both stated in terms that he *would* be liable to a £10 daily penalty for every day after 31 January 2012 that the return was not filed: "a £10 daily penalty will be charged" (SA Reminder); and "if your tax return is more than three months late we will charge you a penalty of £10 for each day it remains outstanding" (SA 326

[2] Khawaja v HMRC 2012 UKFTT 183 (TC)

> Notice). Thirdly, I reject the submission that para 4(1)(c) does not permit a notice to be given until P becomes liable for a penalty ie in advance of a failure to file the return after the end of the three month period. There is nothing in the language of sub-para (c) which restricts the timing of the giving of a notice in this way. Ms Murray has not suggested any reason why Parliament would have intended to do this. **All that HMRC is required to do is to inform P that it has decided that, if he continues to fail to file his return after the end of the three month period, he will be liable for a daily penalty of £10 for each day that the failure continues during the following 90 day period. Sub-para (c) requires notice to be given specifying the date from which penalty "is" payable. That can be done in advance of any default by P. It is a fair and sensible provision.**
>
> 22. These reasons for rejecting Ms Murray's submissions are not, in substance, different from those given by the UT."

[42] Section 161(1)(c) imposes the condition that a notice must be issued specifying the date from which the penalty would become payable. We have highlighted in bold the Court's clear intimation that a warning notice must be served stipulating the date from which the penalty is payable. No warning letters were issued by Revenue Scotland.

[43] That reasoning in *Donaldson* has since been analysed in a number of cases in the UK FTT. At paragraphs 17 and 18 of *Taliadoros-Hichri* v *HMRC*[3], Judge Richards stated:

> "17. My overall conclusion is that Paragraph 4 of Schedule 55 sets out a list of requirements that must be satisfied before a taxpayer can be liable to daily penalties. Those conditions must be satisfied before HMRC can assess the penalty. I do not consider that conclusion to be at odds with the decision in *Donaldson*. Both in the Upper Tribunal and the Court of Appeal, the relevant issue in *Donaldson* was whether HMRC were entitled to issue a notice under paragraph 4(1)(c) before the tax return in question was over three months late. Neither the Upper Tribunal nor the Court of Appeal considered the completely different question of whether HMRC could give notice under paragraph 4(1)(c) after daily penalties had been assessed.
>
> 18. My interpretation of paragraph 4 of Schedule 55 is consistent with the plain meaning of the words. Moreover, if the position were otherwise, HMRC could assess a taxpayer to daily penalties and issue a notice under paragraph 4(1)(c) months or years later. That would rob the requirement to serve notice of daily penalties of any force. I do not consider Parliament can have intended this outcome. On the contrary, Parliament must have intended that notice of daily penalties has to be given before daily penalties are assessed. That conclusion, together with the finding at [9] means that the daily penalties charged under paragraph 4 of Schedule 55 are not due."

[3] 2017 UK FTT 512

We agree.

[44] Further, Revenue Scotland have not followed their own guidance and have simply issued the Penalty Notice with no relevant preliminary notice or warning. They had issued a letter dated 16 May 2017 but that simply sought an explanation for the late filing and stated that the appellant "might" be liable to a penalty.

[45] We therefore find that there has been no compliance with Section 161(c). Therefore the daily penalties cannot be upheld.

Daily penalties in general

[46] *Donaldson* was concerned with penalties relating to the self-assessment regime where returns must be submitted by 31 October or 31 January. Accordingly HMRC can, and do, issue reminders and the £100 penalty automatically when a return is late. Of course, for LBTT the relevant date is linked to the transaction so Revenue Scotland cannot and do not know about any failure to file until the return is eventually submitted.

[47] A similar problem has recently arisen in UK jurisprudence in relation to Non-Resident Capital Gains Tax Returns ("NRCGT"). In summary, HMRC utilised the same penalty provisions with which *Donaldson* and we are concerned. As with LBTT, the NRCGT return must be filed within 30 days of the date of the transaction but of course, until the return is filed HMRC will not be aware of the transaction and could not issue reminders, warnings or Notices. The penalties, including the daily penalties, were appealed by many taxpayers.

[48] In the summer of 2017, a number of professional bodies including the Institute of Chartered Accountants in England and Wales and the Chartered Institute of Taxation issued a news item explaining that, having sought clarification from HMRC, HMRC had now

confirmed that they had reviewed daily penalties and these would no longer be issued and past such penalties would be withdrawn.

[49] As Judge Thomas put it succinctly in *McGreevy* v *HMRC*[4] at paragraph 208 having observed that the penalty regime in Schedule 55 was by no means ideal and was not used for Stamp Duty Land Tax:

> "And no one seems to have noticed that in relation to non-SA [self-assessment] cases the daily penalty regime in paragraph 4 Schedule 55 is wholly unsuited to a system where there is no continuing record and no notice to file."

That is precisely the case with LBTT.

Section 162

[50] We observe that although HMRC do not now impose daily penalties for NRCGT (and have repaid those previously imposed) they still impose the other penalties in terms of Schedule 55 which are the equivalent of Sections 160, 162 and 163 of RSTPA.

[51] For obvious reasons, prior to the issue of the Statement of Case by Revenue Scotland neither party addressed Section 162 since the penalty was stated to be £0. However, for completeness it should be noted that at paragraph 14 Revenue Scotland state:

> "Further penalties are potentially applicable where a person's failure to make a return continues for a period of 6 and 12 months after the penalty date (section 162 and 163). The penalty payable is, generally speaking, either 5% of the tax liability or £300. The application of penalties determined by reference to a liability to tax is restricted by the terms of section 159(3) which provides that the aggregate of any such penalties (applied under sections 159 to 167) must not exceed 100% of the tax payable. The Respondent has thus far interpreted those provisions to mean that where the liability in the return is nil these further penalties are not applicable. This is because the tax liability must be referred to in order to determine the level of penalty applied: being either the greater of the applicable percentage rate or the set £300. That being the case section 159(3) bites to the effect that these further penalties cannot exceed the nil tax liability and therefore cannot be applied."

[4] 2017 UKFTT 690 (TC)

We note the use of the words "thus far" and it may be that that might change.

[52] However, we have a problem with the stated penalty of £0. In the Upper Tribunal decision of Mr Justice Nugee and Judge Greenbank in *R & J Birkett t/a The Orchards Residential Home and others* v *HMRC*[5] they stated:

> "Nor do we think that it is an answer to this point to say that a penalty could be imposed of nil. It is true that para 40(2) lays down no minimum amount for a penalty, so that a penalty of £1 per day would be permissible. But that does not we think mean that a penalty could be imposed of £0 per day. A purported decision to impose a penalty of £0 per day would in truth be a decision not to impose a penalty at all. The assessment of a penalty imposes an obligation to pay the amount assessed. But a purported assessment of a penalty of £0 would impose no obligation to pay, would not penalise the taxpayer and would in fact have no effect. That does not seem to us to be a penalty."

[53] We agree. On the balance of probability, we find that the reality is that currently Revenue Scotland has made a decision that where there is no tax payable then there should be no 6 or 12 month penalty.

[54] Therefore there should not be a penalty of £0 in terms of Section 162, as Revenue Scotland have simply imposed no penalty.

Summary of Conclusions

Can a penalty or penalties be imposed?

[81] Firstly, the £100 penalty imposed in terms of Section 160 RSTPA, whether challenged or not, has properly been imposed since the return was late.

[82] Secondly, as far as daily penalties are concerned, whilst the condition in Section 161(a) is clearly met, we find that as far as Section 161(b) is concerned, Revenue Scotland have not proved that either:

[5] 2017 UKUT 89 (TCC)

a) A policy decision has been made by Revenue Scotland, not least because that flies in the face of the last line of their own guidance, or

b) The decision-maker had made a conscious decision looking at the individual circumstances (not just reasonable excuse and special circumstances).

[83] Thirdly, ultimately in this appeal, that does not matter because there has been no compliance with Section 161(1)(c). No notice "… specifying the date from which the penalty is payable" has been issued and therefore Section 161(2) cannot be engaged.

[84] It is abundantly clear from the wording of Section 161(1) that the intention of the Scottish Parliament was clearly that each and every one of these conditions had to be met before the daily penalties could be imposed. It is for that reason that the preamble reads **if (and only if)** and then lists each of the conditions.

[85] The daily penalties imposed in terms of Section 161 cannot be confirmed.

[86] Furthermore, we have drawn attention to the jurisprudence relating to NRCGT, and particularly at paragraph 49 because if one looks at the interaction of Section 161(1)(c) and (3)(b) it is not actually possible for Revenue Scotland to impose these daily penalties where a return is filed late. That is because the penalty date is the day after the filing date and the date specified in the Notice, that must be given in terms of Section 16(1)(c) and cannot be earlier than three months after the penalty date in terms of Section 161(3)(c).

[87] That works for matters like self-assessment returns where the taxing authority and the taxpayer both know the filing and the penalty date. Where there is a stand-alone transaction as for LBTT and NRCGT only the taxpayer knows the filing and penalty dates. The taxing authority only becomes aware once the return is filed so the failure cannot continue beyond that point. By that time the three months, if applicable, will have expired.

Decision

[88] We accept Revenue Scotland's view of the matter in relation to the £100 penalty but, for the detailed reasons given above, we cancel the daily penalties of £900 and the £0 penalty.
