[2016] UKFTT 766 (TC)

TC05493

Appeal number: TC/2016/01019

ANNUAL TAX ON ENVELOPED DWELLINGS – tax returns – s 159 and schedule 35 Finance Act 2013 - penalty for late filing of returns - schedule 55 Finance Act 2009 - whether defects in the penalty notices affected the penalties – yes – section 114 Taxes Management Act 1970 – whether taxpayer had a reasonable excuse for filing the returns late – no – whether HMRC's decision on special circumstances could be revisited – no – appeal allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

CHARTRIDGE DEVELOPMENTS LIMITED **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE ROBIN VOS

Sitting in public at Fox Court, London on 10 October 2016

Mr Liam Henry of Hillier Hopkins LLP, accountants, for the Appellant

Mr Steve Goulding, Tribunal Caseworker of HM Revenue and Customs, for the Respondents

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DECISION

Background

1. The annual tax on enveloped dwellings is a relatively new tax introduced by Finance Act 2013 ("FA 2013") with effect from 1 April 2013. The legislation provides for an annual tax charge on UK residential properties over a certain value which are held by companies, partnerships or collective investment schemes. In some cases, an exemption from the charge is available but a return still has to be made in order to claim the exemption.

2. The appellant, Chartridge Developments Limited ("Chartridge") is a property development company. As it owns valuable UK residential property, it is, on the face of it, within the charge to ATED. However, one of the exemptions from ATED is where the property is held by a property development company.

3. Chartridge did not submit ATED returns for the ATED period ending on 31 March 2014 and the ATED period ending on 31 March 2015 until 7 August 2015 which was well beyond the date when the returns should have been submitted.

4. HMRC decided that Chartridge had been careless in failing to submit its returns on time and therefore charged penalties under schedule 55 Finance Act 2009 ("FA 2009") for the late submission of the returns. As there were five properties involved and, at the time in question, it was necessary to submit a separate return for each property, there are five separate sets of penalties. The total amount of the penalties charged is £3,200 for the ATED period ended 31 March 2014 and £3,580 for the ATED period ended 31 March 2015.

5. Chartridge appeals against the penalties on a number of different grounds:

   (1) The penalty notices are defective as they specify incorrect dates.

   (2) There is a reasonable excuse for filing the returns late.

   (3) HMRC should have allowed a reduction for special circumstances.

Late appeal

6. Technically, Chartridge's appeal to the Tribunal was lodged three days late. HMRC notified Hillier Hopkins of its conclusions in a letter dated 15 January 2016. This was not however received by Hillier Hopkins until 20 January 2016. The appeal to the Tribunal was sent by Hillier Hopkins to the Tribunal on 12 February 2016 but was not received by the Tribunal until 17 February 2016 whereas it should have been received by 14 February 2016.

7. HMRC did not object to the late appeal.

8. Given that the appeal was only three days' late and that there were delays in the post both in relation to the review letter and the notice of appeal, the Tribunal gave permission for the appeal to be made out of time.

The evidence and the facts

9. The evidence consisted of two bundles, one prepared on behalf of the appellant and one prepared by the respondents.

10. The facts are relatively straightforward and, for the most part, are agreed. The salient facts are set out below.

11. Throughout the relevant period, Chartridge traded as a property development company.

12. In the ATED period ended 31 March 2014, Chartridge owned two properties which were potentially within the scope of ATED. Both were new build properties. The first, Tilehurst first came within the scope of ATED on 10 May 2013. The second, Chancing Rye first came within ATED on 26 July 2013.

13. There were three properties within the scope of ATED in the period ended 31 March 2015. The first property, Amberley, was not a new build property and first came within the scope of ATED on 7 July 2014. The other two properties were both new build properties. 71 Fulmer Drive came within the scope of ATED on 26 April 2014 and 80 Fulmer Drive on 9 December 2014.

14. Chartridge was fully aware that it was within the scope of ATED and that ATED returns would need to be submitted.

15. The directors of Chartridge delegated the job of finding out all about the ATED regime and submitting the relevant tax returns to a senior employee. That employee had proved to be competent and reliable in relation to similar tasks in the past.

16. The employee in question ceased employment with Chartridge in acrimonious circumstances sometime prior to August 2015. After the employee left, it was discovered that a number of matters delegated to that employee, including submission of the ATED returns, had not been completed.

17. There is contradictory evidence as to whether the employee's failure to submit the ATED returns was deliberate and malicious or whether it was as a result of a misunderstanding that the directors would submit the ATED returns. Given the seriousness of the allegation of wilful misconduct on the part of the employee, I am far from satisfied on the balance of probabilities on the basis of the evidence before me that the failure to submit the returns was a deliberate act.

18. As soon as the failure to submit the ATED returns became apparent, Chartridge made arrangements for the returns to be submitted. This was done on 7 August 2015.

19. HMRC notified the late filing penalties to Chartridge on 14 September 2015 in respect of the period ended 31 March 2014 and on 15 September 2015 in respect of the period ended 31 March 2015.

The requirements for submitting ATED returns

5 20. For the ATED periods ended 31 March 2014 and 31 March 2015, it was necessary to submit an ATED return in respect of each property which was within the charge to ATED (s 159(1) FA 2013). This was the case even if a relief was available so that no tax was actually payable (s 100(2) and s 161(3) FA 2013).

21. The normal rule (which applies for the ATED period ended 31 March 2015) is 10 that an ATED return must be submitted by the end of the period of 30 days beginning with the first day in the period on which the property is within the charge to ATED (s 159(2) FA 2013) unless the property is a new build property in which case the period is 90 days (s 159(3) FA 2013).

22. There were however transitional provisions for the period ended 31 March 2014 15 as this was the first year in which ATED applied. Paragraph 4 of schedule 35 to FA 2013 provides that the filing date for the ATED return for that period is 1 October 2013 or, if later, the end of the period of 30 days beginning with the first day in which the property is subject to ATED. It should be noted that, unlike the position in subsequent years, the 30 day period applies whether or not the property is a new build 20 property.

23. Applying these rules to the five properties in question, the relevant dates are as follows:

Name of property	Date first within ATED charge	New build Yes/No	Last date for submitting ATED return
Tilehurst	10 May 2013	Yes	1 October 2013
Chancing Rye	26 July 2013	Yes	1 October 2013
71 Fulmer Drive	26 April 2014	Yes	23 July 2014
Amberley	7 July 2014	No	5 August 2014
80 Fulmer Drive	9 December 2014	Yes	8 March 2015

The penalty regime

24. ATED returns were brought within the scope of schedule 55 FA 2009 when ATED was introduced. The effect of this is that penalties are payable if an ATED return is delivered late.

25. The penalties are as follows:

(1) A fixed penalty of £100 (paragraph 3 of schedule 55).

(2) Paragraph 4 of schedule 55 provides for a daily penalty of £10 up to a maximum of 90 days if the return is more than three months late. It is worth setting out paragraph 4 in full:

> "4(1) P is liable to a penalty under this paragraph if (and only if) –
>
> (a) P's failure continues after the end of the period of 3 months beginning with the penalty date,
>
> (b) HMRC decide that such a penalty should be payable, and
>
> (c) HMRC give notice to P specifying the date from which the penalty is payable.
>
> 4(2) The penalty under this paragraph is £10 for each day that the failure continues during the period of 90 days beginning with the date specified in the notice given under sub-paragraph 1(c).
>
> 4(3) The date specified in the notice under sub-paragraph (1)(c) –
>
> (a) may be earlier than the date on which the notice is given, but
>
> (b) may not be earlier than the end of the period mentioned in sub-paragraph 1(a)."

(3) A further penalty of the greater of 5% of the tax due and £300 if the return is more than six months late.

(4) An additional penalty of the greater of 5% of the tax due and £300 if the return is more than 12 months late.

26. The basic £100 penalty for the return being late and the additional penalties if the default continues for 6-12 months are automatic. The daily penalty which applies where the return is more than three months late is subject to HMRC's discretion and depends on certain conditions being satisfied.

27. These provisions relating to daily penalties have recently been considered by the Court of Appeal in *Donaldson v HMRC* [2016] EWCA Civ 761. The case is currently

being appealed to the Supreme Court. That case dealt with the assessment of daily penalties by way of a computer generated assessment in the context of late filing of self-assessment income tax returns. Both parties agreed that the arguments in *Donaldson* are not relevant to the penalties which have been assessed in this case and that it was not necessary to adjourn the proceedings pending the outcome of that case. I agree with this.

28. A taxpayer escapes liability for a penalty under schedule 55 if HMRC or the Tribunal is satisfied that there is a reasonable excuse for the failure and the failure is remedied without unreasonable delay after the excuse ceased. Reliance by the taxpayer on any other person to do anything is not a reasonable excuse unless the taxpayer took reasonable care to avoid the failure (paragraph 23 schedule 55 FA 2009).

29. If HMRC think it is right to do so because of special circumstances, they may reduce the penalty (paragraph 16 schedule 55 FA 2009). On an appeal, the Tribunal may only make a reduction for special circumstances if HMRC's decision on this aspect was "flawed" in a judicial review sense (paragraph 22(3) schedule 55 FA 2009).

Are the penalty notices defective and, if so, do those defects invalidate the penalties

30. HMRC accepted in their statement of case that some of the dates in some of the penalty notices were incorrect. However, Mr Henry submitted (and I agree) that there are mistakes in the dates set out in each of the penalty notices. These are described below.

31. Tilehurst – the last date for filing the ATED return is shown as 9 August 2013 whereas it should have been 1 October 2013. The notice states that penalties are being charged for the period from 10 May 2013 to 7 August 2015 whereas the starting date for penalties should have been 2 October 2013 (the day after the last day for filing the return) and the last day in the penalty period should have been 6 August 2015 as the returns were submitted on 7 August. As a result of the mix up over the last date for filing the return, the dates shown as being the dates between which the £10 daily penalty is charged for 90 days are incorrect. Similarly, the dates shown as the trigger for the six month penalty and the 12 month penalty are both incorrect.

32. Chancing Rye – again, due to HMRC's misunderstanding of the transitional provisions relating to ATED returns, the last day for filing the ATED return is wrongly shown as 25 October 2013 whereas it should have been 1 October 2013. All the other dates mentioned in the penalty notice are therefore also incorrect in the same way as for Tilehurst.

33. 71 Fulmer Drive – the last date for filing the ATED return is incorrectly shown as 25 May 2014. It should have been 23 July 2014. As with Tilehurst and Chancing Rye, all the other dates are therefore incorrect.

34. Amberley – the filing date is incorrectly shown as 6 August 2014 whereas it should have been 5 August 2014 (the end of the period of 30 days beginning with 7 July 2014). As with the other properties, all the other dates are therefore incorrect. In addition, the £10 daily penalty which continues for a maximum of 90 days is shown as payable from 7 November 2014 to 7 February 2015 which is 92 days although the total penalty is still shown as £900. In the case of this property, although the return was submitted more than 12 months after the due date, no 12 month penalty was charged. HMRC confirmed that they did not plan to pursue this penalty.

35. 80 Fulmer Drive – this is the only one of the five penalty notices where HMRC managed to get the last day for filing the ATED return correct (8 March 2015). The penalty notice is in a slightly different form to the other notices. Instead of showing as the "period" the dates between which the penalties are charged, the period referred to is the ATED period in question (in this case from 9 December 2014 (when the property first fell within the ATED regime) up to the end of the ATED period on 31 March 2015). Although the initial £100 penalty is referred to, unlike the other penalty notices, it is not specifically shown as having been assessed. In addition, the daily penalty is shown as payable from 8 June 2015 to 7 August 2015 which is said to be 58 days although in fact it is 61 days. The date of 8 June 2015 as the starting date for the daily penalties is correct. The final day for which a daily penalty should be charged is 6 August 2015 as the return was submitted on 7 August 2014 (and so 7 August is not a day of default). The total number of days for which a daily penalty could have been charged is therefore 60 days rather than 58.

36. Mr Henry submitted that as all of the assessments have mistakes, they are invalid as the taxpayer is entitled to know exactly what penalties are being charged and why.

37. He referred to one case, *PML Accounting Limited v HMRC* [2015] UKFTT 440. This case however dealt with a penalty for failure to comply with an information notice. It was held that the information notice was invalid. As a result of this, no penalty could be charged. That is rather different to the present case where the defects are contained in the penalty notices themselves and does not therefore provide any assistance in resolving this point.

38. Mr Goulding argued that the penalty notices were saved by s 114(1) Taxes Management Act 1970 ("TMA 1970"). This provides as follows:

> "114(1) An assessment or determination, warrant or other proceeding which purports to be made in pursuance of any provision of the Taxes Acts shall not be quashed, or deemed to be void or voidable, for want of form, or be affected by reason of a mistake, defect or omission therein, if the same is in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts, and if the person or property charged or intended to be charged or affected thereby is

> designated therein according to common intent and understanding."

39. In support of his argument, Mr Goulding referred to the decision of the High Court in *Pipe & Others v HMRC* [2008] STC 1911. That case dealt with daily penalties for late filing of a tax return under what was in effect the predecessor to schedule 55 FA 2009 – s 93 TMA 1970.

40. In that case, the penalty notice inadvertently stated that the penalty was being charged for the period from 15 April 2004 to 28 April 2004 whereas it was in fact clear that the penalty was being charged for the period from 15 September 2004 to 28 September 2004.

41. Henderson J reviewed various previous authorities on the scope of s 114(1) TMA 1970 and discusses issues such as whether s 114 TMA 1970 can ever remedy a gross error which is likely to mislead the taxpayer. In the end however, in finding for HMRC, Henderson J relied on s 114(2) TMA 1970 and the distinction between the decision or determination that a penalty is payable on the one hand and the notice to the taxpayer of that decision on the other. The relevant part of s 114(2) TMA 1970 provides as follows:

> "114(2) An assessment or determination shall not be impeached or affected -
>
> …
>
> (b) by reason of any variance between the notice and the assessment or determination."

42. Henderson J made the point that any appeal was only against HMRC's decision that a penalty is payable (or against the amount of the penalty) and not against the notice. As the taxpayer had not alleged that HMRC had made any mistake in the determination of the penalty as opposed to the notice, it must be assumed that the determination was correct. On this basis, Henderson J found that s 114(2)(b) TMA 1970 applied so that any mistake in the notice did not affect the determination itself.

43. Had HMRC needed to rely on s 114(1), they would have been in more difficulty. Henderson J said [at 51] that:

> "If the case were one where HMRC had to rely on section 114(1) to cure the defect in the penalty notices, I would agree with Mr Connolly that the mistake was of too fundamental a nature to fall within the scope of that sub-section. It was indeed a gross error, and one that, viewed objectively, might have been misleading … If the penalty notices were the documents which founded liability to the penalties, there would be much to be said for the view, echoing Slade LJ in *Bayliss v Gregory*, that specifying the correct dates is something HMRC must get right."

44. *Pipe* was however dealing with a different statutory provision and it is necessary to look closely at the requirements of schedule 55 FA 2009.

45. The starting point is paragraph 1(1) schedule 55 TMA 2009 which provides that a penalty is payable where a taxpayer fails to deliver his return before the filing date.

46. As mentioned above, the initial penalty of £100 and the further penalties of £300 where the return is more than six or 12 months late are automatic.

47. The daily penalty under paragraph 4 only applies if (and only if) HMRC decide that the daily penalty should be payable and gives a notice to the taxpayer specifying the date from which the penalty is payable. That date may be earlier than the date of the notice but may not be earlier than the end of the period of three months beginning with the day after the last day for filing the return (paragraph 4(3) schedule 55 FA 2009).

48. Paragraph 18(1) schedule 55 FA 2009 provides that:

> "18(1) Where P is liable for a penalty under any paragraph of this schedule HMRC must –
>
> (a) assess the penalty,
>
> (b) notify P, and
>
> (c) state in the notice the period in respect of which the penalty is assessed."

49. There are therefore specific requirements as to the contents of the penalty notice including the period in respect of which the penalty is assessed and the date from which the daily penalty is payable. These requirements as to the content of the penalty notice were not a feature of the previous regime in TMA 1970 which Henderson J was considering in *Pipe*.

50. Having said this, as was the case in *Pipe*, the taxpayer only has certain rights of appeal which are contained in paragraph 20 schedule 55 FA 2009:

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

51. However, taking all of these provisions together, it seems to me that it is difficult in the context of schedule 55 FA 2009 to draw the same distinction as Henderson J did in *Pipe* between the determination of the penalty (i.e. HMRC's decision) and the notice which is sent to the taxpayer.

52. Whilst the taxpayer's right of appeal is against HMRC's decision that a penalty is payable or their decision as to the amount of the penalty which is payable, given the specific requirements as to dates which must be shown in the penalty notices, it must have been intended that the penalties shown in the penalty notice are the same as, and therefore reflect, the decision against which the right of appeal is conferred. It was

not suggested to me that there is any separate record maintained by HMRC of its penalty decisions which might differ from what is contained in the penalty notices.

53. If this is right, there is no scope for s 114(2) TMA 1970 to apply as, in this particular case, there cannot be a variance between the assessment or determination (i.e. the decision) on the one hand and the notice on the other – they are one and the same thing.

54. I turn therefore to s 114(1) TMA 1970.

55. The authorities reviewed by Henderson J in *Pipe* led him to agree that a gross error which is likely to mislead the taxpayer is unlikely to be saved by s 114(1) TMA 1970 (see paragraph [44] above).

56. The Court of Appeal in *Donaldson* approved of Henderson J's conclusions in *Pipe*. The Master of the Rolls said [at 28] that:

> "Henderson J said that a mistake may be too fundamental or gross to fall within the scope of the sub-section. I agree."

57. In *Donaldson*, the defect in the penalty notice was that it did not specify the period for which the daily penalty was payable as required by paragraph 18(1)(c) schedule 55 FA 2009. However, the Master of the Rolls concluded that s 114(1) applied, saying [at 29] that:

> "Although the period was not stated, it could be worked out without difficulty."

58. In my view, the position in this case is the same in respect of the penalty notice which relates to 80 Fulmer Drive (where the filing date for the ATED return had been correctly stated). The penalty notice contains the following explanation:

> "**Penalties charged on this assessment**
>
> **Penalties for filing your ATED tax return late**
>
> Because your return was not delivered by the filing date you will be charged a penalty.
>
> The penalty is £100 where the return is delivered within 3 months of the filing date. This is a fixed penalty for late filed returns.
>
> For returns received more than 3 months late a daily penalty of £10 a day charged for up to 90 days.
>
> Additionally for returns received more than 6 months late a penalty of either 5% of the tax due or £300, whichever is the greater, will be charged.
>
> For returns received more than 12 months after the filing date, a further penalty of either 5% of the tax due or £300, whichever is the greater, will be charged."

59. This explanation is unambiguous. Although the notice was defective in that it contains incorrect dates relating to the period for which the penalties are charged and the wrong number of days for the daily penalty, it also contains a very clear explanation as to how the penalties are charged which is, in the words of s 114(1) TMA 1970 "in substance and effect in conformity with or according to the intent of the meaning of the Taxes Acts". The fact that, in applying the rules described, HMRC have misinterpreted the dates does not therefore invalidate the notice or the decision that is evidenced by that notice.

60. The position is however different in relation to the four penalty notices which contain the wrong date for the last date by which the ATED returns should have been filed. This was due to HMRC's misunderstanding of the ATED legislation. This error affects the calculation of all of the dates for the various penalties and is clearly not "in substance and effect in conformity with or according to the intent and meaning of" the ATED legislation. This is not like the position in *Donaldson* where information was missing as opposed to wrong. It is also not cured by any other part of the penalty notices as these do not contain any explanation as to what the cut-off date for filing the ATED returns should have been.

61. In my view, this falls within the category of gross error likely to mislead the taxpayer referred to in *Pipe* and cannot therefore be cured by s 114(1).

62. I therefore need to consider whether, in the light of these mistakes, HMRC's decision to charge the penalties set out in the penalty notices should be affirmed or whether it should be cancelled.

63. I was not referred to any authority on this point. However, looking at Henderson J's decision in *Pipe* and in the cases he refers to in his judgment, it generally appears to have been assumed that, if there was a defect in the penalty notice which cannot be cured by s 114 TMA 1970, the penalty has not been validly assessed and should therefore be cancelled.

64. This may however be as a result of the fact that, in those cases, if the defects could not be remedied, there was no possibility of the penalty having been validly assessed.

65. In *Pipe* itself, the penalty was assessed as being for the period from 15 – 28 April 2004 whereas it was in fact for the period from 15 – 28 September 2004. HMRC could not, in the circumstances, have charged a penalty for the period from 15 – 28 April 2004 and so it is clear that, had Henderson J not found that the defects were cured by s 114(2) TMA 1970, the penalties would have been cancelled.

66. In *Baylis (Inspector of Taxes) v Gregory* [1987] STC 297 an assessment for the tax year ended 5 April 1976 mistakenly referred to the tax year ended 5 April 1975. The Court of Appeal decided that s 114 TMA 1970 did not apply and that the assessment was therefore not valid as the gains in question had arisen in a different tax year to the one purportedly covered by the assessment.

67. *Austin v Price (Inspector of Taxes)* [2004] STC(SCD) 487 was another case dealing with daily penalties, in that case for failure to comply with an information notice. The errors in the penalty notices included, in one case, referring to an information notice for the wrong year, in both cases referring to a daily penalty of £340 per day rather than £10 per day and both notices also included an incorrect description of what the taxpayer had failed to do. The Special Commissioner decided that s 114 TMA 1970 did not cure these defects and the penalties were cancelled. Given that the legislation did not allow HMRC to charge a penalty of £340 per day, the decision to charge the penalties clearly could not be upheld.

68. There has however been another case in the First Tier Tribunal which bears some similarity to the current situation. In *Sokoya v HMRC* [2009] UKFTT 163, the taxpayer had been charged a penalty for failure to comply with an information notice. The penalty determination contained the wrong date for compliance with the information notice. The Tribunal decided that the error could not be cured by s 114 TMA 1970. Failure to comply with the information notice within the required timescale gave rise to a fixed penalty of £50 (similar to the penalty of £100 in this case). The Tribunal's decision was that, as the penalty determination had the wrong date for compliance with the information notice (in that case a date which was earlier than the actual date for compliance), the penalty was invalid. That is not however surprising given that the taxpayer in that case was not in default on the date specified in the penalty determination.

69. None of these cases provide authority for the proposition that, just because there is a mistake in a penalty notice/assessment which cannot be ignored as a result of s 114 TMA 1970, the penalty must be cancelled. It is in my view therefore necessary to examine the penalties which have been assessed and to determine whether, on the basis of the information in the penalty notice and the legislation in question, HMRC was correct in deciding that the taxpayer was liable to a penalty.

70. It should be remembered in reviewing the four penalty notices in question in this case that there are two specific statutory requirements in relation to the dates which must be shown on the penalty notice. The first (in accordance with paragraph 18(1)(c) schedule 55 FA 2009) is that, for each penalty which is chargeable, the notice must state the period in respect of which the penalty is assessed. The second relates to daily penalties. Paragraph 4(1)(c) schedule 55 FA 2009 requires HMRC to give the taxpayer a notice specifying the date from which the daily penalty is payable and that date cannot be earlier than the end of the period of three months beginning with the day after the last day on which the ATED return should have been filed (paragraph 4(3)(b) schedule 55 FA 2009).

71. Looking first at the penalty notice relating to the property known as "Tilehurst", this incorrectly showed the last date for filing the ATED return as being 9 August 2013 instead of 1 October 2013.

72. In relation to the fixed £100 penalty for late submission of the return, the penalty notice states that:

> "You have been charged penalties for the period from 10/5/2013 to 7/8/2015 (the date we received your tax return)."

The penalty should however have been payable for the period from 2 October 2013 (i.e. the day after the last day for filing the return) to 6 August 2013 (i.e. the day before the return was actually filed). This does not therefore comply with paragraph 18(1)(c) as a penalty would be due for failing to file the return by 2 October 2013, not 10 May 2013. The £100 penalty is not therefore valid.

73. The penalty notice then goes on to assess the daily £10 penalty. The notice states that:

> "This is for the period 10/11/2013 to 10/2/2014."

On the face of it, this is valid as it identifies the period in respect of which the penalty is assessed and also the start date for the penalty (as required by paragraphs 4 and 18 of schedule 55 FA 2009). However, as mentioned above, paragraph 4(3)(b) is clear that the start date for the daily penalties cannot be earlier than the end of the period of three months beginning with what is referred to in schedule 55 as the "penalty date". The penalty date is the day after the last day for filing the return – in this case 2 October 2013. The earliest date which could be shown as the start date for the 90 day penalty in the case of Tilehurst is therefore 1 January 2014 (the end of the period of three months beginning with 2 October 2013).

74. I have considered whether the daily penalty is 90 separate penalties of £10 or a single penalty of £10 multiplied by the number of days for which the penalty is charged. The opening words of paragraph 4 read:

> "P is liable to a penalty under this paragraph …"

It is clear from those words that the penalty charged under paragraph 4 is a single penalty which must therefore stand or fall in its entirety. On this basis, the daily penalty in respect of Tilehurst is invalid as the start date for the penalty is one which HMRC could not, consistent with the legislation, have chosen.

75. The next penalty assessed by the penalty notice is for returns over six months late. The notice describes this as a penalty:

> "For the period from 11/2/2014."

Arguably, a period with a start date but no end date is not a "period". However, in the context of a penalty which is triggered by a return being more than six months late, it seems to me to be necessary to interpret the reference to a "period" in paragraph 18(1)(c) schedule 55 FA 2009 as including the identification of the date which triggers the penalty. The problem is that the date is wrong as the six month penalty was triggered on 2 April 2014 and so the six months penalty is also invalid.

76. Exactly the same analysis applies to the penalty for the return being more than 12 months late where the trigger date is referred to as 11/08/2014 whereas it should have been 2/10/2014.

77. My conclusion therefore is that none of HMRC's decisions about the penalties payable in respect of Tilehurst were in accordance with schedule 55 and should therefore be cancelled.

78. The next property is "Chancing Rye". The position here is different as HMRC stated in the penalty notice that the last date for filing the return was 25 October 2013 whereas in fact it was 1 October 2013 – i.e. HMRC thought the date was later than it actually was (whereas in the case of Tilehurst, they showed the filing date for the return as being earlier than was actually the case).

79. The £100 fixed penalty is shown as having been charged for the period from 26/7/2013 to 7/8/2015. As with Tilehurst, the period should have been 2 October 2013 to 6 August 2015. Chartridge was not liable to a penalty on 26 July 2013 and so the £100 penalty is invalid.

80. The daily penalty is shown as being payable for the period from 26 January 2014 to 26 April 2014. The earliest date from which the daily penalty is payable is 1 January 2014 (the end of the period of three months beginning with 2 October 2013). The start date shown by HMRC in the penalty notice is after that date. There is nothing in paragraph 4 which requires the daily penalties to start on the earliest possible date. Indeed it is clear from paragraph 4(3)(b) schedule 55 FA 2009 that HMRC can decide that the penalty should only start being payable from a later date as that paragraph states that the start date "may not be earlier than" the date I have mentioned.

81. In this case, HMRC have therefore made a decision which, on the face of it, complies with the legislation. The start date for the daily penalty is valid in accordance with paragraph 4 schedule 55 FA 2009 and the period for which the penalty is charged has also been notified in accordance with paragraph 18(1)(c) schedule 55 FA 2009.

82. The only question in my mind is whether the fact that the last date for filing the ATED return in respect of Chancing Rye is stated incorrectly in the penalty notice, and that this is the reason why HMRC chose the start date for the daily penalties which it did, is enough to invalidate what otherwise appears to be a penalty which fulfils the requirements of schedule 55.

83. Judge Berner in *Sokoya* stated [at 20]:

> "It is well established that an error in a penalty notice with regard to the date for compliance with a section 19A notice can render the penalty notice invalid (see, for example, *R (on the application of Murat v IRC* [2005] STC 184; *Jacques v HMRC*[2006] STC(SCD) 40)."

84. In *Murat*, it was in fact decided that the date for compliance with the notice was not defective. Moses J said [at 18]:

> "I do not decide, because I do not need to decide, whether the penalty notice needed to have specified any date at all. Still less do I decide, because I do not need to decide, whether even if it did, an inaccuracy in the date that it gave would vitiate the effect of the penalty notice. Those matters, if they ever need deciding, can wait for another date."

85. The defect in *Jacques* was an incorrect reference to the date of the information notice itself and not a mistake in relation to the date by which the information notice had to be complied with.

86. In *Sokoya*, the question the Tribunal had to deal with was whether the penalty notice could be saved by s 114 TMA 1970. There would of course have been no need to consider s 114 if the penalty had been correctly assessed even taking into account the error in the penalty notice. However, as mentioned above, in that case the penalty could not have been correctly assessed on the basis of the information in the penalty notice as the penalty in question was a £50 fixed penalty for failure to comply with the information notice by the date in question and the date shown on the penalty notice was earlier than the actual date for compliance. As Judge Berner said [at 20]:

> "The due time is therefore one of the substantive bases for the imposition of a penalty."

By this, I take Judge Berner to have been saying that the date for compliance with the notice was the trigger for the fixed penalty and that, as I have decided in this case, the fixed penalty cannot be valid if the wrong date is shown for compliance as the trigger date is therefore wrong and the penalty is not in compliance with the penalty legislation.

87. In the case of the daily penalty in relation to the late filing of the ATED returns for Chancing Rye however, the due date for compliance is a factor in working out the period for which the penalty can be charged but it is not the sole trigger for the penalty (unlike the fixed £100 penalty and the penalties which arise after six months/12 months' non-compliance).

88. Having said this, it is in my view necessary to consider the reasons why Parliament included the notification requirements in paragraph 18(1)(c) and paragraph 4(1)(c) schedule 55 FA 2009. These provisions can only have one purpose which is to make sure that the taxpayer knows exactly what period the penalty relates to so that he can work out whether the penalties have been correctly assessed and whether he should therefore appeal against the penalties.

89. In the case of a daily penalty, the start date for the daily penalties is inextricably linked to the date when the return should have been filed given that the liability for a daily penalty only arises if the failure continues after the end of the period of three months beginning with the penalty date (the day after the last date for filing the return) and that the start date for the daily penalties cannot be earlier than that date. If the taxpayer does not know what the filing date is, he cannot work out whether the daily penalties have been correctly imposed.

90. The fact that, unlike the position in relation to Tilehurst, the period for which the daily penalties have been charged in respect of Chancing Rye is a period which HMRC could legitimately have chosen is clearly more by luck than judgement. HMRC intended to charge a daily penalty which started on the earliest possible date allowed under paragraph 4 schedule 55 FA 2009 – i.e. from the date when the return was three months late. However, the decision which is evidenced in the penalty notice is a different decision – it is a decision to charge daily penalties starting from a date which was 25 days later than the end of that three month period. HMRC's decision that a penalty was payable by Chartridge for the period for which they thought they were charging the penalty was therefore clearly incorrect on the basis of the dates stated in the penalty notice. Chartridge could not work out from the penalty notice whether HMRC had got it right and my conclusion is that HMRC's decision that a daily penalty is payable should therefore be cancelled.

91. As far as the six month and 12 month penalties are concerned, the analysis is the same as for Tilehurst (i.e. the trigger dates are incorrect) and HMRC's decision to impose these penalties should therefore also be cancelled.

92. The position in relation to Amberley is exactly the same as for Chancing Rye. HMRC state in the penalty notice that the last day for filing the ATED return was 6 August 2014 whereas in fact it was 5 August 2014 (the end of the period of 30 days beginning with 7 July 2014). The decision that these penalties are payable should therefore also be cancelled.

93. The position in relation to 71 Fulmer Drive is the same as for Tilehurst. The penalty notice showed the last day for delivering the ATED return as 25 May 2014 whereas it should have been 23 July 2014. All of the penalty decisions relating to 71 Fulmer Drive are therefore cancelled.

94. Mr Henry put forward one further argument as to why the penalty notices were defective. This relates to the daily penalties charged under paragraph 4 schedule 55 FA 2009 and in particular the requirement under paragraph 4(1)(c) that HMRC give notice to the taxpayer specifying the date from which the penalty is payable. Mr Henry submitted that the implication of this requirement was that the notice must be given before the daily penalty can start running. In this case, the penalty notices were issued long after the end of the period for which the daily penalties were charged.

95. It is however clear from the legislation that Mr Henry's argument is misconceived. Paragraph 4(3)(a) provides that the date specified in the notice which is to be given under paragraph 4(1)(c) may be earlier than the date on which the notice is given. There is therefore no doubt that the penalty notice can be given after the date on which the daily penalties start to be payable.

96. As there are still some penalties payable (in respect of 80 Fulmer Drive) despite the defects in the penalty notices, I go on to consider whether Chartridge had a reasonable excuse for its failure to submit the returns on time and whether HMRC's decision not to allow a special reduction is flawed.

Reasonable excuse

97. In accordance with paragraph 23(1) schedule 55 FA 2009, liability to a penalty does not arise if the taxpayer satisfies the Tribunal that there is a reasonable excuse for the failure to make the return on time.

98. Paragraph 23(2)(b) provides that, where a taxpayer relies on any other person to do anything, that is not a reasonable excuse unless the taxpayer took reasonable care to avoid the failure.

99. Mr Henry's principal submission is that it was reasonable for Chartridge to delegate the task of submitting the ATED returns to a senior employee who had in the past proved to be both competent and reliable. It should not be expected he said that the directors should micro manage an employee in this situation by, for example, checking that the returns had been properly completed or that they had been filed on time.

100. Mr Henry told us that the employee had informed the directors that he had submitted the ATED returns. However, there is no support for this in any of the evidence before us (for example, in the notice of appeal or in any of the correspondence with HMRC). This is therefore new evidence which Mr Henry is not in a position to give and, in the absence of any of the directors of Chartridge at the hearing, it is not therefore evidence which I am willing to accept given that it is unsupported by any of the documents in front of me.

101. Mr Henry relied on two cases in support of his argument that Chartridge had acted reasonably. The first case is *Anthony Leachman t/a Whiteley & Leachman v HMRC* [2011] UKFTT 261. In that case, the taxpayer believed that his accountant would file the employer's P35 form whilst the accountant believed that the taxpayer would be filing the form. The Tribunal agreed that the taxpayer had a reasonable excuse. Mr Henry submits that this shows that reliance on a third party (in this case the accountant) can be a reasonable excuse.

102. The second case is *Jaswinder Dhariwal v HMRC* [2015] UKFTT 41. That case dealt with the late filing of the appellant's self-assessment tax return. Mr Dhariwal had relied on his accountant to submit the return. The accountant told him that it had been submitted even though he had not in fact done so. This case does not really support Mr Henry's argument as the Tribunal decided that Mr Dhariwal's reliance on his accountant to submit the return did not constitute a reasonable excuse although the Tribunal did take the fact that the accountant had assured Mr Dhariwal that the return had been submitted into account in deciding to reduce the amount of the penalty.

103. There was some discussion as to whether there was any difference between relying on a third party (such as an external accountant) or relying on an employee. Paragraph 23(2)(b) schedule 55 FA 2009 does not draw any distinction and simply talks about reliance on "another person". It is therefore still necessary to show that, even if Chartridge did rely on another person to file the return, it took reasonable care to avoid the failure.

104. Mr Henry also suggested that Chartridge had a reasonable excuse for failing to file the returns on time on the basis that HMRC did not send out any notices or reminders that a return was needed in the same way as they do, for example, in relation to an individual's self-assessment tax return. It would, he said, be perfectly possible for HMRC to search the Land Registry for properties owned by companies and to send notices to the companies in question reminding them of their obligation to submit an ATED return.

105. Mr Goulding, on the other hand, argued that reliance on somebody else (whether an employee or a third party) to file a tax return is not a reasonable excuse. He argued that it is up to the taxpayer to make sure that its obligations are complied with and that it would be reasonable to expect a business in Chartridge's position to put in place a safeguard mechanism to ensure that tax returns were submitted by the due date. In this context, he drew attention to the fact that Chartridge confirmed in correspondence with HMRC that it has now put in place a procedure to have secondary checks carried out by a different individual to ensure that returns are filed in a timely fashion which, he says, shows that it would have been both sensible and reasonable to do this at the outset.

106. Mr Goulding also drew attention to the lengthy period between 1 October 2013 and 8 March 2015 during which the various returns were due coupled with the fact that the returns were only submitted on 7 August 2015. He assumed that Chartridge had complied with its other tax return filing obligations during this period and it therefore seemed to him surprising that the ATED return filing obligation had not been complied with.

107. As far as notification from HMRC is concerned, Mr Goulding argued that, as ATED is a self-assessment tax, taxpayers cannot expect there to be a notification mechanism in circumstances where HMRC does not know that they are within the scope of the tax. Until HMRC has received an ATED return from a particular taxpayer, they would not know that the taxpayer in question was subject to ATED. He also told us that HMRC does in fact send reminders to taxpayers who have submitted an ATED return in previous years.

108. Paragraph 23(2)(b) is clear that reliance on another person to do something cannot be a reasonable excuse unless the taxpayer took reasonable care to avoid the failure. This carries a clear implication that the taxpayer must do something more than delegate the task to that person and assume that it has been done. No evidence has been provided that Chartridge took any steps to ensure that the ATED returns would be submitted on time or to check that they had in fact been submitted other than delegating the task to the employee in question.

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

110. Assuming it is right that the employee to whom the task of filing the ATED returns had been delegated did not fail to do so deliberately but that instead, the failure occurred as a result of the employee's belief that the directors would submit the return and the directors' belief that the employee would submit the return, there is some similarity to the situation in *Leachman* referred to above. However, it seems to me that there is a significant difference between a misunderstanding between a taxpayer and his accountant (as was the case in *Leachman*) and an internal misunderstanding between officers/employees of a taxpayer which is a company. The key issue in *Leachman* was whether the taxpayer had a genuine (but mistaken) belief that the form P35 would be filed by his accountant and whether, assuming that was the case, such a mistake of fact is capable of being a reasonable excuse.

111. In the present case, it was always intended that Chartridge (the taxpayer) would itself submit the ATED return. It was not relying on an accountant or another third party to do so on its behalf. Whilst there may have been an internal misunderstanding as to who within the company was going to submit the return, the fact remains that the return was to be submitted by Chartridge. One way or another, Chartridge (i.e. its directors) should have taken steps to ensure that the return was filed and an internal misunderstanding as to who had the responsibility to do this cannot in my view amount to a reasonable excuse.

112. It is also not in my view reasonable to expect HMRC to remind a taxpayer of his obligation to submit a tax return. As Mr Goulding pointed out, HMRC would have no way of knowing that Chartridge was subject to ATED until it had submitted its first return. It would clearly not in my view be reasonable to expect HMRC to search Land Registry records for evidence of properties which might be worth over the relevant threshold and which are owned by companies and then to write to each of those companies to enquire whether an ATED return is due. In any event, Chartridge was, by its own admission, aware of its obligation to file an ATED return and so the fact that HMRC had not sent any notice to the company requiring it to submit an ATED return cannot on any basis amount to a reasonable excuse for failing to file the returns on time.

113. My conclusion therefore is that Chartridge does not have a reasonable excuse for its failure to file the ATED returns on time.

Special reduction

114. HMRC may reduce a penalty if they think it is right to do so because there are special circumstances (paragraph 16 schedule 55 FA 2009).

115. On an appeal against the amount of the penalty, the Tribunal may only come to a different view on whether there should be a reduction (or the amount of the reduction) for special circumstances if the Tribunal thinks that HMRC's decision in relation to a special reduction is flawed in a judicial review sense.

116. Mr Henry's first point was that HMRC had not properly considered whether a special reduction should be made until it issued its statement of case on 3 June 2016.

117. In fact, HMRC did consider in their review letter dated 15 January 2016 whether there were any special circumstances which may justify a special reduction. However, this was limited to observing that no special circumstances had been put forward by the appellant at that stage rather than considering whether any of the information provided by the appellant might in fact amount to a special circumstance which could justify a special reduction. On that basis, I do consider that the decision on 15 January 2016 was flawed.

118. As I have said, there was however a further consideration of special circumstances in HMRC's statement of case issued on 3 June 2016. This explained that, in order to justify a special reduction, the circumstances either have to be uncommon or exceptional or the penalty resulting from the correct application of the law has to produce a result that is contrary to the clear compliance intention of that penalty law. The statement of case concluded that HMRC had not identified any such circumstances in this particular case.

119. Mr Henry complained that this did not give adequate reasons for HMRC's decision. However, in circumstances where the appellant has not put forward any specific suggestions as to what circumstances might be "special" and thus justify a special reduction, there is in my view no requirement for HMRC to go into any more detail than they have done in this case.

120. Mr Henry also suggested that addressing the question of special circumstances only in the statement of case was too late and that the issue should have been addressed at a much earlier stage – i.e. in advance of any involvement of the Tribunal.

121. This point was addressed in detail by the Tribunal in *Bluu Solutions Limited* [2015] UKFTT 95. The Tribunal in that case acknowledged that there are conflicting decisions of the Tribunal as to whether special circumstances must be considered at the time the decision is made that a penalty should be charged or whether it can be considered at a later stage including at the time of any review, before an appeal to the Tribunal or before the Tribunal reaches a decision.

122. The Tribunal in *Algarve Granite v HMRC* [2012] UKFTT 463, for example, took the view that HMRC had to consider special circumstances at the time it made the decision to impose the penalty.

123. In *Morgan & Donaldson* [2013] UKFTT 317, the Tribunal on the other hand was of the opinion that special circumstances could be considered after the penalty had been assessed but must be considered before the taxpayer lodged an appeal with the Tribunal.

124. In reaching a different conclusion, the Tribunal in *Bluu Solutions* took account of the following [at 109 – 110]:

> "109 Para 9 does not stipulate that HMRC must exercise this discretion at any specific time. In particular, it does not require HMRC to consider special circumstances (a) before issuing a penalty assessment; (b) before providing the

> conclusions of a statutory review under Taxes Management Act 1970, s 49B or s 49C ('a review decision'), or (c) before the notification of an appeal to the Tribunal.
>
> 110 Instead, the provision points clearly in the opposite direction. Para 9(3)(b) says that the reference in para 9(1) to reducing a penalty 'includes a reference to … agreeing a compromise in relation to proceedings for a penalty.' HMRC can therefore exercise their discretion at the time they settle a case which is under appeal to the Tribunal, i.e., when there are 'proceedings for a penalty.' Furthermore, since compromises can be made to settle appeal proceedings even after a Tribunal hearing has begun, it seems to us that para 9(3)(b) allows HMRC to exercise their discretion at any point up to the conclusion of the hearing."

125. That case was dealing with a penalty for late payment of tax under schedule 56 FA 2009 but the provisions relating to special reduction in paragraph 9 of schedule 56 are exactly the same as those contained in paragraph 16 of schedule 55, including the reference to agreeing a compromise in relation to proceedings for a penalty contained in paragraph 16(3)(b) schedule 55 FA 2009.

126. As far as considering special circumstances in the statement of case is concerned, the Tribunal in *Bluu Solutions* went on to say [at 123]:

> "For example, if HMRC consider special circumstances at the time of the statement of case, and decide there are no special circumstances, HMRC's decision as to the amount of the penalty is unchanged: it is the figure on the original penalty assessment, or in the review decision. When the Tribunal decides the appeal, it can substitute HMRC's decision about the amount of the penalty with another sum, but in making that substitute decision the Tribunal can only take special circumstances into account if the decision made by HMRC when preparing the statement of case was flawed."

127. I would respectfully agree with the approach taken by the Tribunal in *Bluu Solutions*. It does not make any sense for Parliament to have provided in paragraph 16(3) schedule 55 FA 2009 that the reference to reducing a penalty includes a reference to agreeing a compromise in relation to proceedings for a penalty if special circumstances can only be considered at the time the penalty is imposed or at some point before any appeal proceedings are commenced.

128. In case I am wrong on this point however, I consider briefly whether there are in fact any circumstances in this case which would justify a special reduction.

129. Mr Henry submitted that, charging the penalties which are proposed in this case would be contrary to the compliance intention of the penalty regime. He referred in particular to an article which appeared in The Guardian on 30 May 2015 commenting

on HMRC's practice of waiving the first £100 late filing penalty for self-assessment tax returns for individuals who could show mitigating circumstance and who appealed after paying their tax bill. The suggestion was that this was a more proportionate approach to the penalty regime rather than insisting on the strict HMRC interpretation of what constitutes a "reasonable excuse" as set out in published HMRC guidance.

130. Mr Goulding's response to this was that HMRC's practice in this respect related only to the £100 initial penalty and not to the subsequent daily penalties or the penalties which became due after the tax return was still outstanding after six months or 12 months. He also made the point that HMRC's practice in relation to self-assessment tax returns did not mean that HMRC would be prepared to waive the £100 penalty irrespective of the excuse which was offered, nor that it would necessarily do so in other contexts.

131. I agree with Mr Goulding that the fact that HMRC may have decided to take a more relaxed approach in relation to self-assessment tax returns is not relevant to this case given that the returns were outstanding long enough to incur further penalties and not just the £100 penalty.

132. Mr Henry also suggested that the fact that ATED is a new tax amounted to a special circumstance. Whilst it is possible to have some sympathy with that view (particularly as HMRC clearly did not understand the ATED return filing dates), it would be surprising if Parliament intended that this should justify a reduction in the penalties which are applicable when the penalty regime had specifically been applied to the tax in question. In any event, by its own admission, Chartridge was aware of its need to file ATED returns. The fact that the tax was new was not the cause of the failure.

133. A further circumstance put forward as a special circumstance was the fact that an apparently reliable employee appeared to have acted maliciously in not filing the ATED returns. This is in my view capable of amounting to special circumstances. However, there is in this case no compelling evidence that the employee did in fact act maliciously as opposed to there being a misunderstanding between the employee and the directors as to who was actually going to file the returns.

134. The final point put forward by Mr Henry was that, in 2015, the rules relating to ATED returns were changed for ATED periods starting on or after 1 April 2015. Since then, it has been possible for a taxpayer to submit a "relief declaration return" which can relate to more than one property in circumstances where one of the ATED reliefs is available for all of the properties in question. The relief declaration return covers not only properties held at the start of the ATED period in question, but also any property which is subsequently acquired during the same ATED period and which qualifies for the same relief.

135. Had these provisions been in place when ATED was first introduced, Chartridge would only have been liable for two sets of penalties: one for the period to 31 March 2014 and one for the period to 31 March 2015 rather than five separate sets of penalties.

136. Whilst this may be an indication that Parliament took the view that the previous regime could be streamlined, this does not in my view amount to a special circumstance which would justify a reduction in the penalties applicable under the regime that applied before the change was made.

5 137. The Oxford and English Dictionary defines "circumstances" as:

> "The logical surroundings or 'adjuncts' of an action; the time, place, manner, cause, occasion, etc., amid which it takes place."

138. A subsequent change in the law is not something that has any bearing on the failure to file the tax returns on time. It is not therefore a "circumstance" and cannot
10 therefore be a special circumstance justifying a special reduction.

139. Therefore, even if HMRC's decision in relation to special circumstances was flawed and the Tribunal is able to consider whether there are any special circumstances justifying a reduction in the penalty, my conclusion would be that, in this case, there are no such special circumstances.

15 **Conclusions**

140. The penalty notices were defective. In the case of the penalty notices for Tilehurst, Chancing Rye, Amberley and 71 Fulmer Drive, these defects are not cured by s 114 TMA 1970.

141. Chartridge's appeal against all of the penalties which have been imposed in
20 relation to the late filing of the ATED returns for each of these four properties therefore succeeds and those penalties should be cancelled.

142. As a result of s 114(1) TMA 1970, the defects in the penalty notice relating to 80 Fulmer Drive do not invalidate that notice.

143. The penalties relating to 80 Fulmer Drive are affirmed.

25 144. Chartridge did not have a reasonable excuse for its failure to submit the ATED returns on time.

145. HMRC made a valid decision in its statement of case that there were no special circumstances which justify a special reduction.

146. Even if HMRC's decision on special circumstances was flawed, there are in my
30 view no special circumstances which would justify a reduction in the amount of the penalties.

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

“Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

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ROBIN VOS
TRIBUNAL JUDGE

RELEASE DATE: 16 NOVEMBER 2016

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