



**TC07883**

***PENALTIES – Schedule 55 to FA 2009 – late filing of ATED returns – Advantage Business Finance Limited reviewed – Donaldson followed – whether burden under para 4(1)(c) met where notice given retrospectively – construction of para 4(3)(a) in relation to the requirement under para 4(1)(c) – whether reasonable excuse or special circumstances – proportionality – appeal allowed in part***

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**Appeal number: TC/2020/01361**

**BETWEEN**

**HEACHAM HOLIDAYS LIMITED**

**Appellant**

**-and-**

**THE COMMISSIONERS FOR  
HER MAJESTY’S REVENUE AND CUSTOMS**

**Respondents**

**TRIBUNAL: JUDGE HEIDI POON**

**The Tribunal determined the appeal on 7 August 2020 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases), having first read the Notice of Appeal dated 2 April 2020 (with enclosures), and HMRC’s Statement of Case (with enclosures) dated 15 June 2020, (acknowledged by the Tribunal on 30 June 2020), and the response thereto by the Appellant’s representative dated 15 July 2020, with additional enclosures.**

## DECISION

### Introduction

1. Heacham Holidays Ltd ('Heacham') appealed against the decision of the respondents ('HMRC') to impose penalties under Schedule 55 to the Finance Act 2009 ('Sch 55') for the late filing of the Annual Tax on Enveloped Dwellings ('ATED') return for the year ended 31 March 2019. The sum of penalties under appeal is £1,300.
2. The appeal raises the legal issue as to whether a notice under para 4(1)(c) of Sch 55 could have been validly issued to discharge the burden for a daily penalty to be impossible, if HMRC could only have issued the notice retrospectively.

### Legislative framework

3. The ATED regime was introduced with effect from 1 April 2013 by the enactment of the Finance Act 2013 ('FA 2013'), whereby s 94 provides for the annual ATED tax charge, and s 159, for the filing of an ATED return, with sub-s 159(2) stating that:

'A return under subsection (1) must be delivered by the end of the period of 30 days beginning with the first day in the period on which the person is within the charge with respect to the interest.'

4. Schedules 33, 34 and 35 to FA 2013 came into force from 17 July 2013, and extended the penalty provisions under Schedules 55 and 56 to FA 2009 to the ATED regime, as respects the late filing of a return, and the late payment of the ATED tax charge.
5. The relevant provisions under Sch 55 FA 2009 include the following.
  - (1) Paragraph 3 provides for the imposition of a fixed penalty of £100 where a person fails to make or deliver a return as specified under paragraph 1.
  - (2) Paragraph 4 sets out the conditions to be met for the imposition of a daily penalty.
  - (3) Paragraph 5 provides for the imposition of the 6-month late filing penalty.
  - (4) Paragraph 16 provides for a discretionary power whereby HMRC may reduce a penalty, if they think it is right to do so due to special circumstances.
  - (5) Paragraph 18 provides for the assessment of a penalty by HMRC, with the time limit for raising such an assessment being provided under para 19.
  - (6) Under para 22, the Tribunal may reduce or cancel the penalty in question due to special circumstances, but only if the decision taken by HMRC is 'flawed when considered in the light of the principles applicable in proceedings for judicial review'.
  - (7) Paragraph 23 provides for the defence of reasonable excuse, whereby liability to a penalty under any paragraph of Sch 55 does not arise in relation to a failure to make a return if the taxpayer satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for the failure.

### Findings of fact

6. The facts in relation to the business of the appellant company are the following.
  - (1) Heacham owns four caravan parks, situated in and around the village of Heacham in Norfolk, and is a family-run business.

(2) The two main business activities engaged by Heacham are: (a) the provision of holiday facilities for caravans pitched in these parks, and (b) the provision of a suite of services related to the supply of caravans, from sale, to pitching up on site, to cleaning and maintenance services as required.

(3) The business is run by Mr and Mrs Stephen Plumb, and a small staff for office and maintenance support.

(4) The shareholder-directors are Mr Plumb and his wife (the fourth generation of the family), and Mr Plumb's parents (the third generation who used to run the business).

(5) Wheelers Chartered Accountants ('Wheelers') have acted for Heacham for over 20 years, and provide a range of professional services to Heacham, from bookkeeping and accountancy services, to advice concerning the company's and the directors' tax affairs.

(6) In February 2017, Heacham acquired a cottage in the vicinity of the caravan parks with a view of letting out the cottage as a furnished holiday let.

(7) Wheelers were consulted in relation to the purchase of Old Hall cottage.

7. As a non-natural person with the ownership of a residential property, Heacham is required to make an annual ATED return in compliance with the statutory requirement under s 159 of FA 2013. The dates in relation to the filing of the ATED returns are as follows.

(1) An ATED return is due for filing each year in advance by 30 April for the fiscal year ending 31 March following, except for the first ATED return, which is due 30 days after the date of purchase of the property.

(2) The Old Hall cottage was acquired on 6 July 2017 (per Wheelers' letter of 10 January 2020). HMRC would seem to have stated on the penalty assessments issued that the due date for the ATED return for 2017-18 was 30 April 2017.

(3) By letter dated 11 November 2019, Wheelers contended that the due date of the first ATED return should have been 6 August 2017, for the year ended 31 March 2018.

(4) The second ATED return was due by 30 April 2018 for the year to 31 March 2019.

(5) Both returns were filed and received by HMRC on 29 January 2019.

#### *Penalty assessments*

8. The correspondence in relation to the penalties for the late filing of the 2017-18 ATED return is not fully included in the bundle. Inferring from Wheelers' letter dated 11 November 2019, the following penalty notices would seem to have been issued:

(1) An initial penalty of £100 was issued and appealed by letter dated 30 July 2019; (but the penalty had been paid by the time Wheelers wrote the letter on 11 November).

(2) A penalty notice of 5 November 2019, (probably in the sum of £1,500) was appealed by Wheelers for the appellant by the letter dated 11 November 2019.

(3) The penalty notice of 5 November 2019 would seem to have stated the filing due date to be 30 April 2017.

9. In relation to the 2018-19 ATED return, the relevant documents are as follows.

(1) A notice dated 23 September 2019 states:

**‘You didn’t send us your [ATED] return on time for the year ended 31 March 2019 [as the heading]**

**The return should have been filed by 30 April 2018**

You now have to pay a penalty of £100 [...]

**What you need to do next**

If your return is more than 3 months late, we’ll charge you a penalty of £10 for each day it remains outstanding for a maximum of 90 days starting from 01 August 2018.’

(2) On the second page of the notice of 23 September 2019, and under the sub-heading of **‘Penalties charged on this assessment’** is a tabulation of penalties, to include:

- (a) daily penalties being charged for the period from 1 August 2018 to 30 October 2018 in the total of £900;
- (b) the fixed penalty of £300 for the return being more than six months late;
- (c) ‘total penalty you owe’ as £1,200.
- (d) The tabulation of penalties is followed by a statement: ‘This penalty is in addition to any penalties you’ve previously been charged’.

(3) On 6 December 2019, a further notice was issued, stating that the penalties of £1,200 was due for payment.

*Appeal and review*

10. By letter dated 11 November 2019, Wheelers appealed against the penalty notices issued in relation to the late filing of the ATED returns for both 2017-18 and 2018-19.

11. On 20 December 2019, HMRC refused the appeal, having considered the grounds of appeal in the light of reasonable excuse and special circumstances. An offer of review was made and was accepted by the appellant.

12. The review conclusion decision issued on 10 March 2020 stated as follows:

- (1) The penalties in relation to the late filing of the 2017-18 return were withdrawn ‘due to the error with the due date’.
- (2) The decision warned, however, that ‘while the 17/18 penalty has been withdrawn due to the wrong dates on the penalty [notice], HMRC may choose to issue you a new penalty with a corrected penalty notice’.
- (3) The penalties in relation to the late filing of the 2018-19 ATED return were upheld in full, and comprised:
  - (a) The late filing penalty of £100 under para 3 of Sch 55;
  - (b) Daily penalties totalling £900 under para 4 of Sch 55;
  - (c) The fixed six-month penalty of £300 under para 5 of Sch 55.

13. On 27 March 2020, a late-filing penalty notice for £100 in relation to the 2017-18 return was re-issued with the due date amended, presumably to 6 August 2017.

**The appellant’s case**

14. A Notice of Appeal was submitted online on 2 April 2020 by Wheelers for the appellant. The sum of penalties under appeal is not specified. The grounds are summarised as follows.

(1) It was not unreasonable for Heacham to rely on Wheelers to advise on any tax obligations which arose due to the purchase: *Nigel Barrett v HMRC* [2015] UKFTT 329 (TC) ('*Barrett*').

(a) Heacham had not previously owned a property within the ATED regime.

(b) Heacham 'spoke with Wheelers specifically regarding the plans [to purchase Old Hall cottage], but Wheelers would have also been aware of the purchase as they assisted the company with book-keeping, management accounts and VAT returns.'

(c) 'The submission of the ATED Returns was within Wheeler's competence ..., but unfortunately at the time of the purchase the partner in charge was in the process of retiring from the firm, and the responsibility for [Heacham] was being transferred to a new partner. The returns were submitted as soon as the firm became aware of the oversight.'

(2) The penalty is disproportionate as there is no liability: *Robert, Adam and Dorothy Thornton (trading as A\* Education) v HMRC* [2018] UKFTT 568 (TC) ('*Thornton*')

(3) That no notice of the penalty was issued as required under para 4(1)(c) of Sch 55: *Advantage Business Finance Ltd* [2019] UKFTT 30 (TC) ('*ABF*').

(4) The appellant had special circumstances, which include:

(a) Heacham is a small family owned and run business in the holiday trade.

(b) The property was purchased to be used within the holiday trade as a furnished holiday let.

(c) If the property had been used for 'B&B purposes', it would have been outside the ATED rules.

(d) Advice was taken at the time of purchase by the company.

(e) No liability arose under ATED.

15. In response to HMRC's Statement of Case, Wheelers' additional submissions are:

(1) The appellant had acted in a responsible manner by discussing the plans with their advisers prior to the purchase of Old Hall cottage.

(2) Generally, properties within the hospitality trade are exempt from ATED returns: ss112 and 116 FA 2013. The property was purchased as an extension to Heacham's trade but let as a furnished holiday let, which for several tax areas is treated as a trading property. The average price of the property in the area in 2017 was half the limit for an ATED return to be required at the time. The appellant therefore cannot agree that the ATED returns are not specialist returns.

(3) Special circumstances pleaded are as follows. During the preparation of the appellant's statutory accounts for the year ended 30 April 2018, the property purchased 'was identified as potentially coming within the ATED regime'. 'Additional advice was sought by the appellant's advisors as to whether the property fell within the rules' or whether the exemption under ss 112 and 116 FA 2013; the advice was that 'the exemption for hospitality property was unlikely to apply'.

### **HMRC's case**

16. From HMRC's Statement of Case, the quantum of penalties under appeal is £1,300, and relate to the late filing of the 2018-19 ATED return only.

17. It is submitted that the penalty assessments issued on 23 September 2019 and 6 December 2019 are within the statutory time limits provided under paras 19 (1) and (2) of Sch 55, with the date range being the last day of the period of two years beginning with the end of the tax month in respect of which the penalty is payable (para 6C), and for the relevant extended failure (para 6D(10)).

18. In relation to the substantive grounds of appeal, HMRC reject each ground as follows.

(1) Reliance on a third party is specifically excluded from being a reasonable excuse unless the appellant took reasonable care to avoid the failure: para 23(2)(b) of Sch 55.

(2) HMRC contend that the responsibility to file an ATED return remains that of the appellant's, regardless of whether it has been delegated to another person.

(3) HMRC do not consider that an agent's failure to fulfil the expectations of a client amount to a reasonable excuse.

(4) This appeal is not concerned with specialist or obscure areas of tax law for which a lack of awareness can amount to a reasonable excuse, as analysed in *David and Jennifer Hesketh v HMRC* [2017] UKFTT 871 (TC).

(5) The Upper Tribunal in *Christine Perrin v HMRC* [2018] UKUT 156 (TCC) ('*Perrin*') held that ignorance of the law may be a reasonable excuse in some instances, but it is a matter of judgement for the tribunal in each case to decide whether it was objectively reasonable for a particular taxpayer to be unaware of a particular obligation.

(6) The Upper Tribunal held in *Barry Edwards v HMRC* [2019] UKUT 131 (TCC) that the Sch 55 penalty regime is proportionate and penalties are due even in circumstances where there is no additional tax liability.

(7) HMRC disagree with the decision in *ABF*, as the decision does not consider the provision under para 4(3)(a) and (b), which allows the date specified on the notice to be earlier than the date on which the notice is given.

## **Discussion**

### ***The quantum of penalties under appeal***

19. The decision under appeal is HMRC's review conclusion dated 10 March 2020, and covers the penalties that had been issued in relation to the late filing of the ATED returns for:

(1) the year ended 31 March 2018 in the sum of £1,600; and

(2) the year ended 31 March 2019 in the sum of £1,300.

20. HMRC withdrew the assessment to the penalties of £1,600 for the late filing of the first ATED return for 2017-18, since the due date had been incorrectly stated as 30 April 2017 on the related notices, when it should have been 6 August 2017. HMRC then re-issued a late filing penalty assessment notice for £100 on 27 March 2020.

21. The Notice of Appeal does not specify the quantum of penalties under appeal, or the years to which the penalties relate. The appellant's response to HMRC's Statement of Case was made on 15 July 2020, which stated (at paragraph 4) that the £100 penalty assessment of 27 March 2020 'has been appealed'. However, inferring from Wheelers' letter of 11 November 2019, the £100 penalty had already been paid at the time of writing that letter.

22. From HMRC's Statement of Case, the appeal concerns the penalties of £1,300 arising in relation to the late filing of the second ATED return for 2018-19. Notwithstanding what has been stated in the appellant's response in July 2020, the £100 penalty by assessment dated 27 March 2020 has been settled, and does not form part of this appeal. There does not seem to be any further penalty assessments re-issued in relation to the late filing of the first ATED return.

23. The quantum of penalties under appeal is therefore £1,300, and concerns only the late filing of the second ATED return for 2018-19.

### ***Whether burden under para 4(1)(c) Sch 55 met***

#### *Parties' submissions as respects the ABF decision*

24. The appellant contends that the requisite notice for the daily penalties has not been given in the present case, relying on the authority of *ABF*, which observed:

'[28] For the daily penalties to be impossible, three conditions are stipulated under para 4 of Sch 55, the third of which is that HMRC "give notice to [the taxpayer] specifying the date from which the penalty is payable" (sub-para 4(1)(c)).

[29] The legislation is emphatic that a taxpayer is liable to a penalty under paragraph 4 "if (and only if)" the required notice has been given. For the daily penalties to be impossible, HMRC therefore have an additional burden to prove that the condition under para 4(1)(c) of Sch 55 has been met.

[30] The Court of Appeal decision in *HMRC v Donaldson* [2016] EWCA Civ 761, to a large extent, is about whether this onus has been met by HMRC in imposing the daily penalties. Decisions from the First-tier Tribunal have concluded that where the burden is not met, the daily penalties are invalidated, see for example *Mohammed Samuel Islam t/a Zainub Takeway v HMRC* [2017] UKFTT 0337 and *Thomas Richter v HMRC* [2017] UKFTT 0339.'

25. HMRC's disagreement as respects *ABF* would seem to be first ventilated in the review conclusion letter of 10 March 2020, which states:

'HMRC does not agree with the reasoning for the decision reached in [*ABF*] ... Para 4(3)(a) [states that] the start date of the daily penalties can be an earlier date than the date on which the notice of the daily penalties is given.'

26. In the Statement of Case, HMRC's objection to the reasoning in *ABF* is stated as follows:

'In the decision in [*ABF*], Poon J decided the daily penalties were invalid on the basis that the Respondents had not given the requisite notice in terms of Sch 55 FA 2009 Para 4(1)(c) because the notice was retrospective in timing.

The Respondents do not agree with the decision in this case as the decision does not consider Para 4(3)(a) and (b), which allows the date in the notice to be earlier than [sic] the date on which the notice was given.'

#### *The precedents informing the reasoning in ABF*

27. The full decision of *ABF* was released in January 2019 after a paper determination by me and was not appealed. In turn, Heacham has staked its case against the daily penalties to a large extent on *ABF*. I therefore consider it appropriate to review if there was any error in law in my interpretation of para 4(1)(c) notice as applied to the facts in *ABF*.

28. The reasoning in *ABF* followed closely the Court of Appeal judgment in *Donaldson*. The appellate history of *Donaldson* charts the development of the judicial interpretation of para 4(1)(c), which is encapsulated by the decisions from:

- (1) The First-tier Tribunal (Judge Mosedale, Richard Thomas) in *Morgan & Donaldson v HMRC* [2013] UKFTT 0317 (TC); henceforth '*Donaldson FTT*';
- (2) The Upper Tribunal (Warren J and Judge Bishopp) in *HMRC v Keith Donaldson* [2014] UKUT 0536 (TCC); henceforth '*Donaldson UT*';
- (3) The Court of Appeal (Lord Dyson MR, Kitchin LJ and Hamblen LJ) in *Keith Donaldson v HMRC* [2016] EWCA Civ 761; henceforth '*Donaldson CA*'.

#### *The salient facts of ABF*

29. The Court of Appeal judgment in *Donaldson* held that the burden under para 4(1)(c) had been discharged on the basis that Mr Donaldson had received the requisite notice from HMRC. The two notices examined by the court and tribunals in *Donaldson*, which were found to have met the burden under para 4(1)(c), were both issued *in advance of* the daily penalty period.

- (1) The first notice was the 'SA Reminder' issued to Mr Donaldson after the deadline for submitting a paper return had expired, and was cited in the FTT's decision at [53]:

'If we still haven't received your online tax return by 30 April (31 January if you're filing a paper one) a £10 daily penalty will be charged every day it remains outstanding. Daily penalties can be charged for a maximum of 90 days, starting from 1 February for paper tax returns or 1 May for online tax returns.'

- (2) The second notice was the SA326D which notified Mr Donaldson of the imposition of the fixed £100 penalty, with the forewarning contained in the middle paragraph being cited in the FTT decision at [54]:

**'Your tax return for the year ended 5 April 2011 was not sent in on time.**

**Because of this a penalty of £100 is payable.**

This is in accordance with paragraph 3 of Schedule 55 to the Finance Act 2009.

**What to do next**

- If you still haven't sent us your tax return please do so now to avoid further penalties.
- If your tax return is more than three months late we will charge you a penalty of £10 for each day it remains outstanding.
- Daily penalties can be charged for a maximum of 90 days starting from 1 February for paper returns or 1 May for online returns.'

30. The material findings of fact in *ABF* concerned whether correspondence in terms similar to the SA Reminder, or the SA326D had been issued to discharge the burden under para 4(1)(c). The following obtainable facts in *ABF* were not in dispute.

- (a) The return in question was the first ATED return due for the year 2016-17;
- (b) The due date for filing was 30 April 2016; (parties did not dispute that being the filing date though the purchase date was noted to be 15 January 2016);



- (c) The return was filed on 30 January 2017;
- (d) HMRC's assessment to penalties was by a letter dated 22 December 2017;
- (e) The penalties assessed under appeal were the daily penalties of £900, and the six-month fixed penalty of £300; (the fixed penalty of £100 had been paid).

31. Based on the obtainable facts as stated above, I concluded in *ABF* that the requisite notice was not served for the daily penalties to be imposable for the following reasons.

'[31] ... HMRC's letter of 22 December 2017 ... stated that the daily penalties of £900 are in relation to the period of delay between 1 August and 29 October 2016, the notice was retrospective in timing. ...

[32] The forewarning of daily penalties being imposable is routinely contained in the initial fixed penalty notice of £100, which specifies the date the daily penalties will start to accrue. ... In the instant case, the £100 penalty notice was only issued to the appellant on 27 October 2017, a year after the end of the daily penalty period and would not have given the requisite notice under para 4(1)(c).'

*The substance of HMRC's objection*

32. So far as I can deduce, HMRC's disagreement focuses on the conclusion at [31] of *ABF* where I found 'the notice [by way of the letter of 22 December 2017] was retrospective in timing'. The objection to that conclusion would seem to be two-fold.

- (1) First, that the decision in *ABF* has failed to consider the provision under para 4(3)(a), which expressly states that the date specified in a para 4(1)(c) notice can be 'earlier than the date on which the notice is given';
- (2) Secondly, if para 4(3)(a) has been taken into account, then it is clear that there is no statutory restriction against a para 4(1)(c) notice being served retrospectively.

*The statutory provisions under para 4 of Sch 55*

33. The relevance of para 4(3)(a) to para 4(1)(a) is to be discerned within the context of the statutory provisions of paragraph 4 of Sch 55 as a whole, which reads as follows.

'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).' (emphasis as in HMRC's review conclusion)

34. A critical issue being considered in all the three decisions in *Donaldson* concerns the timing of the giving of a notice under para 4(1)(c). As stated by the Upper Tribunal at [34]: ‘*a critical question is, when must, or may, HMRC serve the notice on P?*’

35. *Donaldson CA* settles the question that a para 4(1)(c) notice can be given prospectively for the purposes of para 4(1)(c), in the sense that a para 4(1)(c) notice can be given in advance of the default in question, as observed by Lord Dyson MR at [21]:

‘... I reject the submission that para 4(1)(c) does not permit a notice to be given until P becomes liable for a penalty i.e. 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.’

36. Furthermore, a purposive interpretation on the timing of the service of a para 4(1)(c) notice seems to have been applied when Lord Dyson MR continued at [21] as follows.

‘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 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....’ (italics added)

37. The words in italics highlight the purposive interpretation being given by Lord Dyson MR in relation to the function of a para 4(1)(c) notice, which is ‘to inform P ... that he will be liable for a daily penalty ... if the failure continues during the following 90 day period’. A purposive interpretation of para 4(1)(c) therefore predicates the timing of the notice to be given in advance of the commencement of the daily penalty period, so as to *inform P* of the penalty that he *will* be liable for: a para 4(1)(c) notice is to be given before such a liability accrues.

38. Similarly, the Upper Tribunal when considering the ‘purpose’ of a para 4(1)(c) notice observed at [39] of *Donaldson UT* as follows.

‘It follows from our analysis of the para 18(1)(c) notice that, if it is properly given, it fulfils the function which Mr Vallat [representing HMRC] suggested might be performed by the notice required by para 4(1)(c), that is to inform P of the amount of the penalty or penalties he has incurred and, so far as relevant, the periods in respect of which they have been incurred. We therefore reject his suggestion, as it seems to us *improbable that the draftsman intended that there should be two notices performing the same function*. We must therefore look for some other purpose for a para 4(1)(c) notice.’ (italics added)

39. The Upper Tribunal continued at [40] of *Donaldson UT* to articulate what they considered to be ‘one purpose’ of a para 4(1)(c) notice:

‘It seems to us that, ... one purpose, at least, of a para 4 notice is to *give the taxpayer warning* that, if he does not file his return, he *will suffer* the daily penalties. On Mr Vallat’s approach, that notice can be *given before any penalty is incurred* so that the taxpayer is reminded of his obligation to file and informed of the further consequences (*ie* in addition to the £100 penalty) which *will* occur if he does not file before the end of the three-month period. He can take steps to avoid the whole penalty by filing his return. This is a sensible and coherent result.’ (italics added, underlined italics reflects original emphasis)

40. In *ABF*, I followed the reasoning of the Upper Tribunal at [39] that a para 4(1)(c) notice is intended to perform a function distinct from that of para 18(1)(c). I found the notice by the letter dated 22 December 2017 to be a notice served under para 18(1)(c), and not a notice

under para 4(1)(c). The peculiar facts to the case meant that HMRC could only have given a notice of assessment under para 18(1)(c), after the daily penalty period, and could not have given a prospective notice in terms similar to the SA Reminder or SA326D for para 4(1)(c) purposes.

*The construction of para 4(3)(a) in Donaldson authorities*

41. HMRC's contention is that *ABF* had failed to consider para 4(3)(a) in relation to the timing of the giving of a para 4(1)(c) notice. I now consider that contention in the light of what has been said of para 4(3)(a), starting with *Donaldson FTT* at [58]:

‘We take into account that paragraph 4(3)(a) permits HMRC to specify a commencement date earlier than the date of the notice. Does this mean that Parliament intended HMRC could in all or a significant percentage of cases *exercise their discretion* such that the commencement date specified would precede the giving of the notice so that the taxpayer would have incurred liability before he was warned about it?’ (italics added)

42. The FTT answered the question in the negative, giving its reasons at [59] to [62] which are summarised as follows.

(1) If a para 4 penalty had been intended as ‘a revenue generating measure’ or a one-off penalty like para 3, the provisions would have been different, and HMRC would not have been required to give a warning.

(2) A para 4 penalty is clearly intended primarily as a measure to incentivise compliance rather than merely to punish non-compliance.

(3) The FTT referred to the Explanatory Notes for the legislation of Sch 55, which stated, under the heading of ‘*Amount of penalty: occasional returns and annual returns*’, that para 4(3) is relevant to cases where HMRC will be unaware of certain returns for taxes such as SDLT and IHT until they are received.

(4) The FTT inferred from the Explanatory Notes that para 4(3)(a) ‘must have been intended as an exception to a general expectation that notices would be given on or before the commencement date’.

(5) The FTT concluded that if HMRC have a discretion to impose a daily penalty, and a discretion to backdate the commencement date, it would appear that Parliament intended the backdating to be in ‘an exceptional case’, since to do otherwise would defeat ‘the object of paragraph 4’.

43. The reasoning by the FTT is that a para 4(1)(c) notice needs to be prospective in its timing to fulfil its purpose, and that purpose was stated at [57] of *Donaldson FTT* as follows:

‘We think this legislation should be interpreted purposively. It seems obvious that the purpose of small, *daily* penalties was to encourage compliance by making it more expensive each day the taxpayer delays in filing his return. This is particularly the case when the legislation provides for the taxpayer to be given notice of the date from which the daily penalties would start. We also take into account that the penalty is significantly greater (£900 if charged for the full 90 days) than the first one-off penalty and larger than the minimum six month penalty (of £300), which again suggests that Parliament intended taxpayers to be given notice *before* the daily penalties started accruing so that they would be encouraged to file in order to avoid this very substantial liability.’ (italics original, underlining added)

44. Pausing here, the purpose of a para 4(1)(c) notice as articulated by the FTT, to all intents and purposes, was being endorsed by the Upper Tribunal when it distinguished the purpose of a para 4(1)(c) notice from that of a para 18(1)(c) notice (see §§38-39 above).

45. While there is convergence between the FTT and the Upper Tribunal in their purposive interpretations of a para 4(1)(c) notice, there is divergence in their respective interpretations of the relevance of para 4(3)(a) to the timing of the giving of a para 4(1)(c) notice. The Upper Tribunal rejected the FTT's conclusion that para 4(3)(a) is applicable only to exceptional cases, and gave its reasons at [35] of *Donaldson UT*.

‘It cannot be right, we consider, that as a matter of construction of para 4, HMRC’s power to back-date a notice under para 4(3) is available only in exceptional circumstances. There is no principle of statutory construction which would permit the implication of such a qualification. The power is clearly available in some cases [such as SDLT and IHT] which we do not consider can be described as exceptional. Rather, the structure of the provision allows for a back-dated notice in all cases. But that is a power which HMRC do not ordinarily perceive the need to exercise since they see the SA Reminder, which is of course given in advance, as a notice within para 4.’

#### *The practical difficulty of a back-dated para 4(1)(c) notice*

46. I find it difficult to reconcile the Upper Tribunal’s construction of para 4(3)(a) stated at [35] with the purpose it then attributed to a para 4(1)(c) notice at [40] of *Donaldson UT*. If a para 4(1)(c) notice is to ‘give the taxpayer warning’ as found by the Upper Tribunal, then to fulfil that function necessarily predicates the notice to be given in advance of the default period.

47. On one interpretation, the construction of para 4(3) as given by the Upper Tribunal at [35] would seem to contradict the purposive interpretation given to a para 4(1)(c) notice at [40] of its decision. If HMRC’s ‘power’ under para 4(3) to back-date a para 4(1)(c) notice is at large, as suggested by the wording at [35] of *Donaldson UT*, subject only to the fact that HMRC do not *ordinarily* perceive the need to exercise it, then it begs the question as how a para 4(1)(c) notice, given by ‘exercising the power’ under para 4(3)(a), can ever be considered to fulfil the function of giving warning to a taxpayer. It seems a corollary that the essence in being a warning is by its timing being in advance of the daily penalty period.

48. In the alternative, it is plausible to take the Upper Tribunal’s construction of para 4(3) as saying no more than how para 4(3) should be construed in principle, but does not attempt to resolve the anomaly that arises in practice as concerns how a para 4(1)(c) notice, if given retrospectively, can serve a function different from that of a para 18(1)(c) notice of assessment.

#### *Paragraph 4 provisions concern ‘burden’ rather than ‘power’*

49. The practical difficulty in reconciling the purposive interpretation of para 4(1)(c) with what was said by the Upper Tribunal in rejecting FTT’s interpretation of para 4(3)(a) might have originated with an incorrect emphasis in the FTT’s interpretation of para 4(3)(a) as a provision to confer a discretionary power on HMRC to back-date a para 4(1)(c) notice.

50. While the statutory wording ‘may’ often connotes the provision of a discretionary power, para 4(3)(a) does not allow such an interpretation. Where ‘may’ is used to provide for a discretionary power, the subject (in the form of a nominative noun), and the verb, which follows the modal verb ‘may’, are readily identifiable. For example, at para 16(1) of Sch 55:

‘If HMRC think it right..., they may reduce a penalty ...’

The subject is denoted by the nominative noun ‘HMRC’, which becomes the pronoun ‘they’, followed by the modal verb ‘may’, and the main verb ‘reduce’.

51. In contrast, the statutory wording in para 4(3)(a) does not suggest that it provides HMRC with a discretionary power, since the nominative noun is plainly not HMRC.

‘(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).’

52. Parsing the sentence structure of para 4(3) shows the provision as a whole serves no more than to qualify ‘the date specified’ in para 4(1)(c) by setting the boundary of the date-range.

(1) The nominative noun is not HMRC, but ‘The date specified’, which is plainly not a sentient agent with the faculty to exercise discretion to permit the modal verb ‘may’ that follows to be interpreted as connoting a discretionary power.

(2) The modal verb ‘may’ in sub-para (a) is to be read in conjunction with ‘may not’ in sub-para (b), and in the sense of what is permissible and what is prohibited.

(3) The pair of modal verbs (‘may’ and ‘may not’) set the upper and lower limits for ‘the date specified’ in a para 4(1)(c) notice.

(4) By reading ‘may’ in sub-para (a) in tight conjunction with ‘may not’ in sub-para (b), the provision under para 4(3) as a whole is to cover certain eventualities that depart from the normal expectation of a para 4(1)(c) notice being given in advance of ‘*the date specified*’ on the notice ‘*from which the penalty is payable*’.

53. As I see it, para 4(3)(a) is to be interpreted within the context as concerns the burden to be discharged, rather than the conferment of a discretionary power, since:

(1) Paragraph 4(1) establishes the burden for HMRC to prove that the three conditions specified under paras 4(1)(a) to (c) are met for imposing a daily penalty.

(2) Paragraphs 4(2) and 4(3) are complementary provisions to para 4(1)(c), whereby:

(a) Para 4(2) quantifies the daily penalty at £10 a day, beginning with ‘*the date specified*’ in the para 4(1)(c) notice, and sets the upper limit of 90 days;

(b) Para 4(3) qualifies the date-range that may be specified on a notice given under para 4(1)(c).

54. In my view, the ‘may’ in para 4(3)(a) is designed to cover particular occasions rather than a general condition. It covers, for instance, the issue of the 30-day Penalty Reminder, and the 60-day Penalty Reminder, both of which are given during the currency of the daily penalty period. The date specified in these Penalty Reminders will be earlier than the date on which the 30-day or the 60-day Penalty Reminders are given; and hence, covered by para 4(3)(a).

55. These Penalty Reminders, whilst issued *after* ‘the date specified’ on the notice for a daily penalty to be payable, are still to be regarded as notices given under para 4(1)(c), as these Reminders are given during the currency of the daily penalty period, and perform the function of warning against further daily penalties. Furthermore, these Penalty Reminders, given at 30-and-60-day intervals, are served in addition to other para 4(1)(c) notices, such as the SA Reminder and SA326D, which are given in advance of the daily penalty period.

*The absence of any time-limit provisions*

56. Finally, if para 4(3) were supposed to provide for a discretionary power to back-date a para 4(1)(c) notice, then there must be limits provided for the exercise of this discretionary power at the same time. At the minimum, it would be necessary to legislate for the time limit for the exercise of this back-dating power, and also for the extent of back-dating permissible for a para 4(1)(c) notice to remain valid.

57. Within Sch 55, a notice of penalty assessment under para 18(1)(c) is subject to the time-limit provisions under para 19, which are to be read in conjunction with the highly articulated provisions under paras 6C and 6D. No such time-limit provisions are evident for the supposed back-dating power under para 4(3)(a) within Sch 55; nor can any time limit be referred from other statutes. It would have been highly amiss of the legislature to provide for a power to back-date, and not to have, at the same time, set boundary as to the exercise of this power. The absence of such accompanying provisions therefore does not support that para 4(3) is to be construed as providing a general power to back-date a para 4(1)(c) notice.

*Whether an error in law in ABF?*

58. The authorities of *Donaldson* from the tribunals and the Court of Appeal are in agreement that a purposive construction is to be given to para 4(1)(c). In this respect, I have special regard to the Upper Tribunal's conclusion that a para 18(1)(c) notice cannot serve the function of a para 4(1)(c) notice. In *ABF* I reached the conclusion that the notice of penalties dated 22 December 2017 was a notice of penalty assessment under para 18(1)(c) and not a valid notice under para 4(1)(c).

59. As observed by the Court of Appeal and the Upper Tribunal, a para 4(1)(c) notice is intended to function as a pre-emptive notice, and thereby affords some safeguard against a taxpayer incurring a daily penalty without prior warning.

60. For these reasons, and having considered the implications of para 4(3)(a) in some detail, I do not consider that I made an error in law in the way the appeal in *ABF* was determined as concerns the daily penalties.

*Whether the daily penalties to be discharged in the present case*

61. The facts in the present appeal are similar but not four-square to those in *ABF*. Heacham's appeal concerns the penalties arising from the late filing of its *second* ATED return due, while the appeal in *ABF* concerned the penalties arising from the late filing of a first ATED return. Is the appeal against the daily penalties in relation to the late filing of a second ATED return to succeed as in *ABF* for the reason that HMRC have not met the burden under para 4(1)(c)?

62. The purposive interpretation of para 4(1)(c), when applied to its logical conclusion, poses a practical difficulty for HMRC in meeting the burden under para 4(1)(c), due to the peculiar context in which the filing obligation for a first ATED return is to come to HMRC's knowledge.

(1) Where the return in question is the first ATED return, HMRC have no means of knowing of the filing obligation to generate a forward notice for para 4(1)(c) purposes.

(2) An ATED return is not an *occasional* return like SDLT or IHT to which the Explanatory Notes on para 4(3) refer.

(3) ATED returns represent an annual filing obligation, and as such, the comparator in terms of administrative burden should be with another annual return filing obligation such as that of a Self-Assessment return.

(4) A taxpayer who registers in arrears to notify an obligation to file an SA return is served the SA316, and is given 3 months from the date of the issue of the SA316 to file a prior-year return before a Sch 55 penalty is triggered. There is no similar dispensation measure in relation to the filing of a first ATED return which is notified in arrears.

(5) An ATED return is due in advance of a fiscal year, with the first return being due 30 days after the date of purchase of a relevant property. The relatively short filing window for a first ATED return means a daily penalty is notionally chargeable 4 months after the date of purchase.

63. If the taxpayer's failure to notify its obligation to file an ATED return continues into the second filing period, the same practical difficulty presents itself, since HMRC would still not have the knowledge to give a para 4(1)(c) notice in advance of the relevant daily penalty period. In other words, where HMRC are unaware of the filing obligation to give a para 4(1)(c) notice in advance of the daily penalty period in question, it would appear that it is logistically impossible for the burden under para 4(1)(c) to be met for a daily penalty to be imposed.

64. It follows that while the default in *ABF* concerned the first ATED return, and the default under appeal in *Heacham* concerned the second ATED return, there was no material difference in the practical difficulty posed to HMRC to serve a notice that could have met the purpose of para 4(1)(c). The critical fact concerns the filing of ATED returns 'for the first time', rather than the first return *per se*, as the first time can be filing two returns at once, as is the case here.

65. In this appeal, the notice given to *Heacham* was dated 23 September 2019 (at §9), and under a heading in bold typeface: '**What you need to do next**' it was stated:

'If your return is more than 3 months late, we'll charge you a penalty of £10 for each day it remains outstanding for a maximum of 90 days starting from 01 August 2018.'

66. This post-dated notice of 23 September 2019 carries the wording that befits a forewarning notice. However, the fact remains that this notice, supposedly to be given under para 4(1)(c), was given nearly 14 months after 1 August 2018, being the date specified from which the penalty was payable. By the time the notice was given in September 2019, it made no sense whatsoever to mention: 'What you need to do next' to avert the daily penalties.

67. A purposive interpretation of para 4(1)(c) seems to give rise to anomalies, such as:

(1) If a taxpayer company filed its three ATED returns in one go for the first time, then three sets of daily penalties notionally impossible are not impossible because HMRC could not have known of the filing obligation to serve a timely para 4(1)(c) notice for each of the three returns. It would seem that the more dilatory a taxpayer is in filing its ATED returns for the first time, the more sets of daily penalties would have to be vacated due to the logistic impossibility in serving a timely para 4(1)(c) notice.

(2) In another scenario, *P Ltd* was in a situation similar to *Heacham*, but *P Ltd* managed to file its first ATED return *before* its second ATED return was due. HMRC then became aware of *P Ltd*'s filing obligation on receiving its first (late) ATED return, and gave a timely para 4(1)(c) notice in relation to its second ATED return. *P*

Ltd filed its second return late just like Heacham. HMRC would be able to impose the daily penalties on P Ltd in relation to the second ATED return. P Ltd would seem to have been more harshly treated than Heacham, because unlike Heacham, P Ltd managed to file its first ATED return before its second return was due.

(3) If P Ltd filed its first ATED return late during the currency of the daily penalty period for its second return, and HMRC gave a para 4(1)(c) notice during the daily penalty period when the penalties have accrued, say, for 60 days. Was the notice effective for the full 90-day period, or would HMRC only have given effective notice for the remaining penalty period of 30 days? On the basis that there had been no para 4(1)(c) notice preceding this mid-term notice, and taking the purposive interpretation of para 4(1)(c) to its logical conclusion, such notice given under the terms of para 4(3)(a), would seem to be effective only for the 30 days remaining, and not for 90 days.

68. On the one hand, these anomalies may suggest that I am wrong in following a purposive interpretation of para 4(1)(c), and in relegating the relevance of para 4(3)(a) to the overriding objective of para 4(1)(c). However, the interpretative difficulty is not resolved, but rather augmented, if para 4(3)(a) is to be interpreted as giving HMRC a back-dating power which is unqualified. It would mean HMRC could back-date notices by a number of years, where for instance, the taxpayer company filed its first few ATED returns in a row in arrears. This contrary scenario appears to be more problematic than the anomaly outlined at §67(1), for it would mean an unqualified power to enforce a sanction without the requisite forewarning under para 4(1)(c). Weighing between these two ends of anomalies, I think it is right and proper to err on the side of leniency when the matter is concerned with the basis for penalisation.

69. In the context of Sch 55, a notice under para 4(1)(c) is unique to the imposition of a daily penalty and is not required in like manner for the imposition of other penalties such as the £100, or the £300 fixed penalty. This extra requirement for a daily penalty to be impossible would seem to be a legacy of the predecessor provisions for the imposition of a daily penalty under s 93 of the Taxes Management Act 1970 ('TMA').

70. Prior to the enactment of Sch 55 to FA 2009, an application under s 93(3) TMA had to be made to this Tribunal before a person could become liable to a daily penalty. In my judgment, the unique requirement under para 4(1)(c), to some extent, is to compensate for the removal of the safeguard that was formerly under s 93(3) TMA.

71. Notwithstanding the anomalies outlined at §67, a taxpayer company which has delayed the filing of its ATED returns for the first time would incur the fixed penalties in proportion to the length of delay. Furthermore, where an ATED tax charge is due, the late filing of the relevant ATED return could give rise to a tax-geared penalty under Sch 55, as well as penalties under Sch 56 for the late payment of the ATED charge.<sup>1</sup> In other words, while a daily penalty may not be impossible for the lack of a valid notice having been given under para 4(1)(c), the suite of other penalties that remain impossible regardless of para 4(1)(c) is a sufficient deterrent against prolonged delay.

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<sup>1</sup> The suite of penalties impossible consequent to a failure to file a timely return may include, in some cases, the 'Failure to Notify' (FTN) penalty under Sch 41 FA 2008. Schedule 34 FA 2013 has extended the penalty regimes to the ATED filing obligation to include: (a) the error penalty regime under Sch 24 FA 2007 (para 6); (b) Sch 55 FA 2009 for late filing (para 7); and (c) Sch 56 FA 2009 for late payment (para 8), but not the Sch 41 FTN regime. (While Corporation Tax is included in the tabulation under para 1 of Sch 41, it is referable to the obligation under para 2 of Sch 18 to FA 1998, and does not extend to include the ATED filing obligation under s 94 FA2013.)



72. In conclusion, I find no competent notice was given to Heacham to discharge the burden under para 4(1)(c). It is not because HMRC were not diligent in giving a timely notice for para 4(1)(c) purposes. It is simply a logistic impossibility when it comes to a company filing its arrears ATED return(s) for the first time, when no equivalent grace period is afforded by the service of a notice in terms similar to SA316 under the Self-Assessment regime before a Sch 55 penalty can be triggered. For these reasons, the appeal against the daily penalties succeeds.

***Whether reasonable excuse for the fixed penalties***

73. Having discharged the daily penalties, I need to consider whether any reasonable excuse existed in relation to the late filing penalty of £100, and the six-month fixed penalty of £300.

74. In terms of reasonable excuse, Wheelers stated at various points in their submissions that:

- (a) Heacham consulted Wheelers about the purchase of Old Hall Cottage;
- (b) the submission of ATED returns was within Wheelers' competence;
- (c) the partner in charge retired at the time the returns were due;
- (d) there was a delay with the incoming partner assuming responsibility for filing the returns;
- (e) further delay was due to seeking additional advice outside Wheelers to decide if the exemption under ss 112 and 116 FA 2013 applied.

75. The submissions on reasonable excuse would seem to suggest that Wheelers were aware of the ATED return obligation but were uncertain as to whether Old Hall cottage fell within the ATED regime. It seems to me that the failure to submit the returns on time was attributable to Wheelers' omission to take the necessary actions timeously to resolve this uncertainty. None of the reasons given for the delay occasioned by Wheelers' failure to taking appropriate actions for Heacham amount to a reasonable excuse. I have special regard to: (a) the professional capacity in which Wheelers acted for Heacham in this matter, and (b) the duration of the delay.

76. As the Upper Tribunal observed at [6] in *Ryan v Revenue & Customs Comrs* [2012] UKUT 9 (TCC), the failure of Wheelers to take timely actions for Heacham is a matter between the adviser and the client and is not a matter that could give rise to a reasonable excuse.

‘... The plain purpose of the legislation is to encourage the prompt submission of returns by imposing penalties on those who submit them late. The penalty is imposed on the person concerned, and not upon his solicitor or any other representative. The purpose of the legislation would be defeated if a penalty could be escaped by the expedient of placing the blame on a dilatory solicitor. If Mr Ryan believes he has been let down by his solicitor, his remedy is to take the matter up with the solicitor.’

77. Notwithstanding the fact that HMRC have discharged £1,500 of the penalties originally imposed in relation to the late filing of the first ATED return, it was the same reasons that led to the first return being filed late as for the second return. The duration of delay relevant to the consideration of reasonable excuse in this case is therefore from 6 August 2017 to the actual filing date on 29 January 2019, which was a period of nearly 18 months. Even if there was a reasonable excuse at 6 August 2017, that excuse would have to continue for the duration of 18 months. To fail to take appropriate action to resolve the ATED status as

regards Old Hall cottage for such a duration by a professional adviser cannot be regarded as a reasonable excuse.

***Special circumstances and proportionality***

78. HMRC have considered special circumstances and found none to merit special reduction. On appeal, the Tribunal's power in respect of special reduction is limited to reviewing HMRC's decision as provided under para 22. I do not consider HMRC's decision in this respect to be 'flawed' in the judicial review sense for the Tribunal to interfere and re-make that decision.

79. The reliance of the authority of *Thornton* is misguided. The relevant provision that was engaged in *Thornton* is under s 100B(2)(6)(ii) of the Taxes Management Act 1970, which provides for the Tribunal to reduce a penalty if it considers it excessive. The penalties being imposed here are under Sch 55, and the specific provision under s 100B TMA is not engaged. Consequently, the submission that no loss of tax being a relevant factor for special reduction as considered by Judge Popplewell in *Thornton* is not one relevant to my consideration as concerns a Sch 55 fixed penalty.

80. Had Heacham been in arrears with an ATED tax charge, HMRC would have been entitled to assess a further penalty under Sch 56 calculated with reference to the quantum of tax arrears and the duration of the delay from the payment due date. The fact that no tax liability arose following the submission of the ATED returns has in effect been taken into account in relation to whether an additional penalty under Sch 56 could have been imposed for any tax arrears.

81. Finally, I must dismiss the ground that the penalties are disproportionate, since this Tribunal has no jurisdiction to consider the issue of proportionality; see *HMRC v Hok* [2012] UKUT 363.

**DISPOSITION**

82. For the reasons stated, the appeal is allowed in part.

83. The daily penalties assessed under para 4 of Sch 55 in the sum of £900 are discharged.

84. The fixed penalties assessed under paras 3 and 5 of Sch 55 totalling £400 are confirmed.

**RIGHT TO APPLY FOR PERMISSION TO APPEAL**

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

**DR HEIDI POON  
TRIBUNAL JUDGE**

**RELEASE DATE: 14 OCTOBER 2020**