



**TC08225**

*Annual tax on enveloped dwellings – penalties - late filing of returns – paragraphs 4(1)(c) and 4(3)(a) of Schedule 55 to the Finance Act 2009 - whether or not sufficient notice given in respect of the daily penalties – yes – whether or not the penalties should be reduced for special circumstances no – whether or not the penalties were disproportionate – no – appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**Appeal number: TC/2019/00238**

**BETWEEN**

**PRIORY LONDON LIMITED**

**Appellant**

**-and-**

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

**Respondents**

**TRIBUNAL: JUDGE RICHARD CHAPMAN QC  
MRS CATHERINE FARQUHARSON**

**The hearing took place on 25 August 2020 by the Tribunal Video Platform. A face-to-face hearing was not held by virtue of the Covid-19 pandemic. Further written submissions were directed and received dated 1 September 2020, 7 September 2020, 7 April 2021, and 14 April 2021.**

**Mr Michael Dawson, Chartered Accountant, for the Appellant.**

**Miss Loretta McLaughlin, Litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents.**

## DECISION

### INTRODUCTION

1. This appeal relates to penalties imposed upon the Appellant, Priory London Limited (“Priory”) pursuant to schedule 55 of the Finance Act 2009 (“Schedule 55”). The penalties are in the sum of £12,800 and are in respect of the late filing of Annual Tax on Enveloped Dwellings (“ATED”) returns for the 2013/14 and 2014/15 tax years. The appeal raises issues as to the efficacy of the notice of daily penalties, special circumstances, and proportionality.

### ATED RETURNS

2. There was no dispute as to Priory’s obligation to file ATED returns. However, the circumstances of this obligation are an important part of the background to this appeal and so deserve mention at the outset.

3. The ATED legislation was introduced by the Finance Act 2013. In essence, a dwelling is “enveloped” when it is owned by a non-natural person (namely, a company, partnership with a corporate member, or a collective investment vehicle). A tax is charged annually and is payable unless an exemption can be claimed.

4. The onus is upon the taxpayer to file an ATED return in respect of properties meeting the threshold for doing so. Prior to 1 April 2015 (and so for the whole of the periods in question within this appeal), this required a return for each property pursuant to section 159 of the Finance Act 2013. A return was due even where an exemption applied. With effect from 1 April 2015, legislation allowed for a single return to be filed as a relief declaration return as an alternative to individual returns.

5. For the tax years 2013/2014 and 2014/2015, the threshold property value for the charge to tax was £2,000,000 as at 1 April 2012 or later acquisition. For the tax year 2015/16, the value was reduced to £1,000,000 as at 1 April 2012 or later acquisition. For the tax year 2016/2017, the value was reduced to £500,000 as at 1 April 2012 or later acquisition. The legislation also provides for fixed revaluation dates every five years regardless of when the property was acquired.

6. By virtue of paragraphs 1(5) and 2 of Schedule 55 the penalties at paragraphs 3 to 6 of Schedule 55 apply to the failure to file an ATED return. For the periods in question in the present appeal, these penalties were imposed in respect of each return due for each property. However, with effect from the chargeable period beginning 1 April 2015, where the failure to file is in respect of multiple properties for which the taxpayer would have been entitled to file a single relief declaration return, only one set of penalties is imposed.

### FINDINGS OF FACT

7. There was no dispute between the parties as to the facts of the case. Neither party adduced any written or oral witness evidence. In the circumstances, we make the following findings of fact in the light of the agreed facts and the documents placed before us.

8. Priory is the owner of four residential properties in London, being 2a Grove End Road, 8 Grove End Road, 10 Grove End Road, and 706 Pavilion Apartments (“No 2A”, “No 8”, “No 10” and “No 706” respectively and together “the Properties”). Priory leased each of the Properties to third parties.

9. Priory was required to file returns for each of the Properties for the tax years 2013/14 and 2014/15. The returns for 2013/14 were due on 1 October 2013 and received on 7 April 2017, and so 3 years, 6 months and 6 days late. The returns for 2014/15 were due on 30 April 2014 and received on 7 April 2017, and so 2 years, 11 months and 8 days late. No tax was payable in respect of any of the returns. This is because the Properties were all eligible for exemption.

10. Priory had been aware of the need to submit the returns. However, there was a breakdown in communications between Priory’s accountants and Priory’s director as to who was going to do this; each assumed that the other would file the returns with the effect that neither did so. The oversight was discovered when the matter was queried by another director’s personal accountants and remedied soon after.

11. HMRC issued the penalties pursuant to Schedule 55 of the Finance Act 2009 (“Schedule 55”), paragraph 3 (“Initial Late Filing Penalties”), paragraph 4 (“Daily Penalties”), paragraph 5 (“6 Month Late Filing Penalty”) and paragraph 6 (“12 Month Late Filing Penalty”) as follows:

<i>Property:</i>	<i>Tax year:</i>	<i>Date of issue:</i>	<i>Penalty:</i>	<i>Amount:</i>
No 2a	2013/14	13 October 2017	Initial Late Filing Penalty	£100.00
		19 January 2018	Daily Penalties	£900.00
		19 January 2018	6 Month Late Filing Penalty	£300.00
		19 January 2018	12 Month Late Filing Penalty	£300.00
	2014/15	13 October 2017	Initial Late Filing Penalty	£100.00
		23 January 2018	Daily Penalties	£900.00
		23 January 2018	6 Month Late Filing Penalty	£300.00
		23 January 2018	12 Month Late Filing Penalty	£300.00
No 8	2013/14	13 October 2017	Initial Late Filing Penalty	£100.00
		19 January 2018	Daily Penalties	£900.00
		19 January 2018	6 Month Late Filing Penalty	£300.00
		19 January 2018	12 Month Late Filing Penalty	£300.00
	2014/15	13 October 2017	Initial Late Filing Penalty	£100.00
		23 January 2018	Daily Penalties	£900.00
		23 January 2018	6 Month Late Filing Penalty	£300.00

		23 January 2018	12 Month Late Filing Penalty	£300.00
No 10	2013/14	13 October 2017	Initial Late Filing Penalty	£100.00
		19 January 2018	Daily Penalties	£900.00
		19 January 2018	6 Month Late Filing Penalty	£300.00
		19 January 2018	12 Month Late Filing Penalty	£300.00
	2014/15	11 October 2017	Initial Late Filing Penalty	£100.00
		23 January 2018	Daily Penalties	£900.00
		23 January 2018	6 Month Late Filing Penalty	£300.00
		23 January 2018	12 Month Late Filing Penalty	£300.00
No 706	2013/14	13 October 2017	Initial Late Filing Penalty	£100.00
		23 January 2018	Daily Penalties	£900.00
		23 January 2018	6 Month Late Filing Penalty	£300.00
		23 January 2018	12 Month Late Filing Penalty	£300.00
	2014/15	11 October 2017	Initial Late Filing Penalty	£100.00
		23 January 2018	Daily Penalties	£900.00
		23 January 2018	6 Month Late Filing Penalty	£300.00
		23 January 2018	12 Month Late Filing Penalty	£300.00

12. The total sum of the penalties is £12,800, being £1,600 per Property per tax year.

13. By letters dated 16 and 22 February 2018, Priory appealed to HMRC against the penalties. HMRC rejected the appeal by a letter dated 9 March 2018. Priory requested a review by a letter dated 6 April 2018. HMRC upheld the penalties in separate review conclusion letters dated 29 November 2018.

14. An appeal was received by the Tribunal on 19 January 2019. HMRC do not object to the appeal being made late and so we grant any necessary extension of time.

## THE ISSUES

15. The grounds of appeal refer to previous correspondence between Priory's accountants and HMRC. However, the grounds helpfully summarise that correspondence as follows:

“... Our arguments have been rejected by HMRC in their 8 identical letters of 29 November 2018. This is ironic given that the first of our arguments is that HMRC should consider the special circumstances of raising 8 sets of penalties for the same offence.

The second argument is that HMRC have wrongly applied the penalty provisions in Schedule 55 FA 2009. As there is no tax liability, para 17(3) makes it clear that no penalties should apply under paras 5 and 6. Despite HMRC not accepting our analysis, the Tribunal in the recent *Jagger* case (copy attached) has confirmed that this is the correct position.

In summary, we consider that penalties of £12,800 are clearly disproportionate for a failure to file the ATED returns for two years where no tax was payable. £4,800 of these penalties are incorrectly raised and we consider that HMRC should consider the “special circumstances” in respect of the remaining £8,000 which involve 8 identical failures to file an ATED return. ...”

16. Mr Dawson helpfully made it clear at the outset of the hearing that Priory does not pursue the grounds relating to paragraph 17(3) of Schedule 55. Similarly, whilst HMRC's statement of case anticipated the possibility of submissions as to reasonable excuse, Mr Dawson again confirmed that Priory did not argue that there was a reasonable excuse.

17. In the course of the hearing, the parties also made submissions as to whether or not a sufficient notice had been given for the purposes of the Daily Penalties. We also subsequently drew to the parties' attention decisions which had been released after the hearing and so invited (and received) further written submissions.

18. The parties agreed that the following matters remain in issue:

- (1) Whether or not a valid notice of the Daily Penalties had been given.
- (2) Whether or not the penalties should be reduced for special circumstances.
- (3) Whether or not the penalties were proportionate.

## THE NOTICE OF DAILY PENALTIES

### Legislation

19. Paragraph 4 of Schedule 55 provides 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.

(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).

(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 subparagraph (1)(a).”

## **Submissions**

20. It follows that the notice requirement is mandatory and that a taxpayer is not liable for the Daily Penalties if a valid notice has not been given. The dispute between the parties is as to whether or not the notice may be given, as here, retrospectively (“retrospectively” being in this context shorthand for the notice being given after the date specified in the notice as being the date from which the penalty is payable and, indeed, after the end of the 90-day penalty period). HMRC submits that a valid notice can be given in such circumstances whereas Priory submits that it cannot.

## **HMRC**

21. Miss McLaughlin’s central submission was that paragraph 4(3) of Schedule 55 constitutes an express power to serve a notice which specifies a date from which the penalty is payable that is earlier than the date the notice is given. She said that this has already been determined by the Court of Appeal in *Donaldson v HMRC* (“*Donaldson (CA)*”), which endorsed the findings of the Upper Tribunal in *Donaldson v HMRC* (“*Donaldson (UT)*”).

22. Further, Miss McLaughlin noted that the First-tier Tribunal decisions relied upon by Priory of *Advantage Business Finance Ltd v HMRC* [2019] UKFTT 0030 (TC) (“*Advantage*”), *Harrison and Ross v Revenue Scotland* [2019] FTSTC 5 (“*Harrison*”), *Heacham Holidays Ltd v HMRC* [2020] UKFTT 406 (TC) (“*Heacham Holidays*”), *D&G Thames Ditton Ltd v HMRC* [2020] UKFTT 489 (TC), *Bennedy’s Developments Ltd v HMRC* [2020] UKFTT 489 (TC), *Jocuguma Properties Ltd v HMRC* [2021] UKFTT 20 (TC) are not binding, and, on HMRC’s case, are incorrect.

23. In any event, Miss McLaughlin submitted, these decisions are inconsistent with the First-Tier Tribunal decisions of *Chartridge Developments Ltd v HMRC* [2016] UKFTT 0766 (TC) and *Tysim Holdings Limited v HMRC* [2019] UKFTT 0606 (TC). Miss McLaughlin notes that *Jocuguma Properties Ltd* is being appealed to the Upper Tribunal.

## **Priory**

24. Mr Dawson submitted that *Advantage* and *Heacham Holidays* were on all fours with the present case and adopted in full the reasoning set out within them. He also relied upon the additional cases referred to in paragraph 22 above. Mr Dawson submitted that HMRC’s attempt to distinguish *Harrison* as a discretion exercised by Revenue Scotland was undermined by HMRC’s own reliance upon *Anderson v Revenue Scotland* [2016] TTFT 1 (albeit in the context of proportionality) which he said also related to the discretion exercised by Revenue Scotland and in fact cited *Harrison*.

25. We note that there is considerable overlap between the cases relied upon by Mr Dawson and that the fullest exposition of the argument that the notice cannot be given retrospectively is in *Heacham Holidays*. It follows that Mr Dawson’s submissions can best be summarised by reference to the following key elements of *Heacham Holidays*, a decision of Judge Heidi Poon.

26. The starting point is that Judge Poon found at paragraphs [36] to [40] that the purpose of the giving of a notice under paragraph 4(1)(c) of Schedule 55 is to inform the taxpayer that he will be liable for a daily penalty if the failure continues during the following 90-day period and that this purpose requires the notice to be given in advance of the commencement of the daily penalty period.

“[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."

27. Judge Poon noted at [45] that the Upper Tribunal in *Donaldson UT* considered the ability to back-date the notice pursuant to paragraph 4(3)(a) and that this was not restricted to exceptional cases:

"[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 at 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.’

28. However, Judge Poon held that there was a contradiction within *Donaldson UT* between its finding that the purpose of the notice was to give the taxpayer warning and the ability to back-date a notice in all cases. Judge Poon explained this contradiction as follows at [46] to [48]:

“[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) 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.”

29. Judge Poon resolved this tension by construing paragraph 4(3)(a) such that it does not confer a discretionary power at all. Instead, she found that the back-dating is simply covering particular occasions rather than providing a power to give a notice retrospectively. She stated as follows at [53] to [55]:

“[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.”

30. Judge Poon returned to the central purpose of a paragraph 4(1)(c) notice at [59]:

“[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.”

31. Judge Poon did note at [62] to [72] that this led to various practical difficulties and anomalies, but, at [68] held that those were overridden by the need to avoid an unqualified sanction without forewarning (the absence of a limitation period having already been noted at [56] and [57]). In particular, Judge Poon stated as follows:

‘[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.

[62] 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.

...

[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 in §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."

## Discussion

32. With the greatest of respect to the careful reasoning of Judge Poon, adopted in its entirety by Mr Dawson, we disagree with the approach taken in *Heacham Holidays* and decline to follow it. Instead, we find that a valid paragraph 4(1)(c) notice can be given retrospectively (at least in a case such as the present) and the notice in the present case was therefore valid. We reach this conclusion for the following reasons.

33. First, we find that *Donaldson CA* and (to the extent that it can be said that the point was not dealt with in *Donaldson CA*) *Donaldson UT* are binding authority for the principle that a valid paragraph 4(1)(c) notice can be given retrospectively.

34. One of the issues in the *Donaldson* litigation was as to whether or not a paragraph 4(1)(c) notice could be given in advance of a default. The First-Tier Tribunal held that a notice could not be given in advance but both *Donaldson UT* and *Donaldson CA* found that it could.

35. *Donaldson UT* is clear at [35] (as cited within *Heacham Holidays* at [45] and also as set out at paragraph 27 above) in finding that the structure of paragraph 4(3) allows for a back-dated notice in all cases rather than just in exceptional circumstances. *Donaldson CA* did not deal directly with the effect of paragraph 4(3). However, at [22] of *Donaldson CA* the Master of the Rolls noted that his reasons for rejecting the appellant's submissions as to the timing of a section 4(1)(c) notice were, "not, in substance, different from those given by the UT."

36. Secondly, the proposition that a paragraph 4(1)(c) notice cannot be given retrospectively is wholly inconsistent with paragraph 4(3)(a) and would leave the ability to backdate a notice with no application. Further, there is nothing in the wording of paragraph 4(3)(a) to support an interpretation that a notice can be backdated to the extent that it is still within the 90 day penalty period but not where the 90 day penalty period has passed (which interpretation would be the logical extension of the analysis at [55] of *Heacham Holidays*).

37. Thirdly, it is clear from *Donaldson UT* and *Donaldson CA* that one of the purposes of the paragraph 4(1)(c) notice is to inform a taxpayer in advance of the liability to Daily Penalties. However, the purposive construction in the present case must be of paragraph 4 as a whole,

and so must take into account the purpose of paragraph 4(3)(a). The Explanatory Notes to the Finance Act 2009 assist in identifying that purpose and indicate that paragraph 4(3) provides for circumstances where HMRC is unaware of the taxpayer's liability to file returns until they are received. Paragraph 10 of the notes relating to section 106 and Schedule 55 state as follows:

“[10] Paragraph 4(3) provides for the date specified in the notice from which the penalty is payable to be earlier than the date on which the notice is given. This is because HMRC will be unaware of certain returns for taxes such as SDLT and IHT until they are received. The date specified in the notice may not be earlier than the end of the period of three months after the filing date.”

38. The significance of SDLT and IHT in this context is that HMRC will be unaware of the need for returns. As such, ATED returns are comparable with SDLT and IHT returns rather than self-assessment returns. The fact that ATED returns are not referred to in the Explanatory Notes is of no relevance as the ATED legislation post-dates the Finance Act 2009.

39. When seen in this context, therefore, we find that a notice given retrospectively in the present circumstances is still consistent with the purpose of paragraph 4 as a whole; the primary purpose is to give advance notice but, where advance notice is not capable of being given, paragraph 4(3) enables it to be given retrospectively.

40. Fourthly, we do not agree with the argument in *Heacham Holidays* that there is no discretionary power to backdate. It is HMRC that gives the paragraph 4(1)(c) notice and so the date specified in the notice for the purposes of paragraph 4(3) is the date specified by HMRC.

41. Finally, we do agree that the absence of a limitation period is an anomaly. However, we find that it would be an even greater anomaly for the legislation expressly to provide for a penalty which could never be imposed.

42. Before leaving this issue, we note that we have not analysed any of the other First-Tier Tribunal decisions referred to by the parties within this decision (although we have of course considered each of them). As regards those relied upon by Priory, this is because *Heacham Holidays* refers to and analyses *Advantage*, whereas the other authorities effectively adopt the reasoning in *Heacham Holidays* or are similar to it. As regards those relied upon by HMRC, this is because they pre-dated *Heacham Holidays* and so necessarily do not address the analysis within it.

## **SPECIAL CIRCUMSTANCES**

### **Legislation**

43. Paragraph 16 of Schedule 55 allows for the reduction of penalties by HMRC for special circumstances as follows:

“16.

(1) If HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of this Schedule.

(2) In sub-paragraph (1) “special circumstances” does not include –

(a) ability to pay, or

(b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

(2) In sub-paragraph (1) the reference to reducing a penalty includes a reference to –

(a) staying a penalty, and

(b) agreeing a compromise in relation to proceedings for a penalty.”

44. Paragraph 20 of Schedule 55 provides for an appeal to this Tribunal against a decision of HMRC that a penalty is payable and as to the amount of a penalty payable. Paragraph 22 provides for this Tribunal's powers on appeal as follows:

“22.

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

## **Submissions**

### ***HMRC***

45. Miss McLaughlin submitted that HMRC's decision as to special circumstances was not flawed as it could not be said to be *Wednesbury* unreasonable. She relied upon *David Collis v HMRC* [2011] UKFTT 588 (TC) at [36] to the effect that the decision must be irrational or perverse such that no reasonable authority could have reached it.

46. The question of special circumstances was considered by HMRC in their review conclusion letters dated 28 November 2018 and took into account the matters raised by Priory. In particular, HMRC considered the change in the law to the effect that only one return was required for each tax year rather than a return for each property for each tax year. HMRC also considered the authority of *Welland v HMRC* [2017] UKFTT 0870 (TC) (Judge Barbara Mosedale) (“*Welland*”).

47. Miss McLaughlin also drew our attention to the authority of *Crabtree v Hinchcliffe* [1971] 3 All ER 967 to the effect that special circumstances must be exceptional, abnormal or unusual. She then submitted that there was nothing exceptional, abnormal or unusual in the present case.

### ***Priory***

48. Mr Dawson submitted that special circumstances were not properly considered at any stage of the review process.

49. The special circumstances relied upon by Priory were that no tax was at stake and the same penalties were being applied on multiple returns emanating from a single taxpayer mistake. Mr Dawson also noted that the regime had changed with the effect that only one return per tax year is now required with only one set of penalties. Further, Mr Dawson said that the ATED regime does not provide for a notice to file.

50. Mr Dawson relied heavily upon *Welland* to the effect that penalties are designed to allow taxpayers to learn from their mistakes and so successive penalties for a recurring mistake which do not allow time for that opportunity can constitute special circumstances for a reduction. In particular, Mr Dawson drew our attention to [135] to [138]:

*“Three penalties in a row*

[135] Although Mr Welland did not raise this as a ground of appeal, it is obvious that the penalties amount to £1,800 because he sold three properties in one tax year: had he sold two of the properties in a later tax year he would no doubt have learned from bitter experience that an NRCGT return had to [be] made 30 days after completion. Mr Welland was unable to learn from his mistakes, as he was late filing all three returns before he learned of his filing obligation.

[136] Does the fact Mr Welland sold three properties in one tax year amount to special circumstances?

[137] Taking into account the principles explained in *Warren*, I find that the circumstances are unusual but not unique. Can it be said it is significantly unfair for Mr Welland to bear the whole penalty? A taxpayer selling a single valuable property who failed to make the return would be penalised once; Mr Welland, selling three not so valuable properties, was penalised three times. And it is clear that he did learn from his mistakes: he filed as soon as he realised his mistake and avoided the 12 months penalty on the last of the three sales.

[138] I think that does amount to special circumstances, particularly in circumstances (which is not in dispute) where the taxpayer has previously had a good compliance record. Parliament, while intending to penalise non-compliance, must have intended taxpayers to learn from their non-compliance. Because of the three sales in quick succession. Mr Welland was unable to do so. I consider that the penalties should be reduced so that only the penalty on the first sale in tax year 15/16 should be payable. In other words, I reduce the penalty to £700.

51. Mr Dawson also referred us to *Walker v HMRC* [2019] UKFTT 402 (TC) (Judge Kameel Khan) (“*Walker*”), in which it was found that special circumstances had not been considered and a reduction was made because it was (in the Tribunal’s view) disproportionate.

### **Discussion**

52. We find that HMRC’s decision as to special circumstances was not flawed. The letters of 28 November 2018 considered all the matters which had been raised by Priory, including specific reference to *Welland*. Although the fact that there was no liability to tax was not referred to under the heading “Special Reduction” it was expressly considered under the heading “Proportionality” including an analysis of *Welland*. In any event, HMRC make it clear in their skeleton argument that all Priory’s arguments were considered again prior to the hearing. In essence, HMRC’s position on special circumstances is that there is nothing unusual about Priory’s situation, that the later change in the law cannot be taken into account, and that *Welland* turned on its own facts and is not binding. We find that there is nothing irrational or perverse about HMRC’s decision, nothing that has been taken into account that should not have been taken into account or that has been given undue weight, and nothing that should have been taken into account that was not taken into account or not given enough weight.

53. Even if we had found that HMRC’s decision was flawed, we would have declined to interfere with it as we do not agree with Mr Dawson that there are special circumstances in this case. It is right that a multiplicity of penalties can constitute special circumstances in some cases, as illustrated by *Welland*. However, the difference in the present case is that, unlike Mr

Welland, Priory was already aware of the need to file the returns and so the educative nature of the penalties was not present. Whilst it is correct that the timing of the penalties meant that the miscommunication between Priory and its accountants was not highlighted, there is no evidence as to why Priory did not discover the failure earlier or as to why it happened twice.

54. Further, we do not accept Mr Dawson’s central premise that there were in effect eight penalties for the same mistake. First, the mistake in respect of the 2013/14 tax year occurred again in respect of the 2014/15 tax year. Even if this emanated from an original misunderstanding prior to the 2013/14 returns falling due, the failure to correct that misunderstanding prior to the 2014/15 returns falling due was a further omission by Priory or Priory’s accountants (or both). Secondly, Priory was under a separate obligation to file a return in respect of each of the Properties. As such, Priory is not being penalised more than once for the same mistake; each penalty relates to a mistake in respect of each return, albeit caused by the same misunderstanding. We are reinforced in this view by the fact that the logical extension of Priory’s argument would be that the greater the magnitude and duration of the defaults, the more deserving of reduction the circumstances would become; we do not accept that such an outcome would be appropriate.

55. It is also clear from *Barry Edwards v HMRC* [2019] UKUT 131 (TCC) (“*Barry Edwards*”) that the fact that no tax was due is not a relevant circumstance to be taken into account when considering special circumstances. The Upper Tribunal stated as follows at [86] and [87]:

“[86] In view of what we have said about the legitimate aim of the penalty scheme, a penalty imposed in accordance with the relevant provisions of Schedule 55 FA 2009 cannot be regarded as disproportionate in circumstances where no tax is ultimately found to be due. It follows that such a circumstance cannot constitute a special circumstance for the purposes of paragraph 16 of Schedule 55 FA with the consequence that it is not a relevant circumstance that HMRC must take into account when considering whether special circumstances justify a reduction in a penalty.

[87] Therefore, in this particular case, HMRC’s decision as regards special circumstances was not flawed. As Mr Edwards’s contention that it was disproportionate to impose penalties concerned in circumstances where no tax was due does not amount to a special circumstance, HMRC did not fail to take into account a relevant matter in making its decision. Since that was the only basis on which Mr Edwards contended that there were special circumstances justifying a reduction in the penalty, the proportionality issue must be determined in this case in favour of HMRC.”

56. Further, the fact that the regime was subsequently changed is of no consequence. We agree with and adopt the following non-binding comments in *Chartridge Developments Ltd v HMRC* [2016] UKFTT 766 (TC) (Judge Robin Vos) at [134] to [139]:

‘[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.

[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 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.”

57. We do not accept that the absence of a notice to file can constitute special circumstances in the present case. The nature of the ATED regime is that HMRC does not know about the liability to tax until a return is filed. As such, a notice to file would not have been possible.

58. In any event, we find that Priory’s circumstances are not sufficiently special to constitute special circumstances. This is because the default was effectively as a result of negligence by either Priory or its advisors (or both); such a situation is not an unusual occurrence. Similarly, there is no suggestion that it is unusual for a company to own more than one property subject to the ATED regime.

## **PROPORTIONALITY**

### **Submissions**

#### ***HMRC***

59. Miss McLaughlin rightly accepted that Article 1 of Protocol 1 of the European Convention on Human Rights is engaged, with the effect that penalties must be rational and proportionate. In *Bank Mellat v HM Treasury* [2013] UKSC 39 (“*Bank Mellat*”) at [20], Lord Sumption set out four criteria when considering rationality and proportionality:

“[20] The requirements of rationality and proportionality, as applied to decisions engaging the human rights of applicants, inevitably overlap. The classic formulation of the test is to be found in the advice of the Privy Council, delivered by Lord Clyde, in *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 at 80. But this decision, although it was a milestone in the development of the law, is now more important for the way in which it has been adapted and applied in the subsequent case-law, notably *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 (in particular the speech of Lord Steyn), *R v Shayler* [2003] 1 AC 247 at paras 57-59 (Lord Hope of Craighead), *Huang v Secretary of State for the Home Department* [2007] 2 AC 167 at para 19 (Lord Bingham of Cornhill) and *R (Quila) v Secretary of State for the Home Department* [2012] 1 AC 621 at para 45. Their effect can be sufficiently summarised for present purposes by saying that the question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the

consequences, a fair balance has been struck between the rights of the individual and the interests of the community. These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them. Before us, the only issue about them concerned (iii), since it was suggested that a measure would be disproportionate if any more limited measure was capable of achieving the objective. For my part, I agree with the view expressed in this case by Maurice Kay LJ that this debate is sterile in the normal case where the effectiveness of the measure and the degree of interference are not absolute values but questions of degree, inversely related to each other. The question is whether a less intrusive measure could have been used without unacceptably compromising the objective. Lord Reed, whose judgment I have had the advantage of seeing in draft, takes a different view on the application of the test, but there is nothing in his formulation of the concept of proportionality (see his paras 68-76) which I would disagree with.”

60. These criteria were applied to penalties for the late submission of a Land and Buildings Transaction tax return in *Anderson v Revenue Scotland* (although, as a First-Tier Tribunal decision it is not binding upon us). Miss McLaughlin submitted that this was a comparable situation to the ATED regime.

61. Miss McLaughlin relied upon *HMRC v Total Technology* [2012] UKUT 418 (TCC) and *HMRC v Trinity Mirror* [2015] UKUT 0421 (TCC) to mark the distinction between a scheme of penalties being disproportionate on the one hand and the operation of the scheme in respect of an individual being disproportionate.

62. Miss McLaughlin relied upon *Barry Edwards* for the proposition that the overall Schedule 55 scheme is proportionate and also for the principle that a late filing penalty is not rendered disproportionate by no tax in fact being due. She also submitted that the multiplicity of penalties cannot be disproportionate because they were not for the same mistake.

### **Priory**

63. Mr Dawson relied upon *Walker* and submitted that when considering proportionality the Tribunal must look at the gravity of the infringement and the penalties applied must be necessary for the object of filing returns on time. He noted that in *Walker* emphasis was placed upon the fact that there was no tax liability in two of the three years and only a nominal liability for the third year. It followed that in the present case the penalties were disproportionate because there was no liability to tax at all.

64. Further, Mr Dawson submitted that the penalties were disproportionate because they all related to the same mistakes and failures.

### **Discussion**

65. We reject the argument that the penalties were disproportionate for the following reasons.

66. First, in *Barry Edwards* the Upper Tribunal (Nugee J and Judge Timothy Herrington) found that the Schedule 55 regime is a proportionate scheme. In particular, the Upper Tribunal stated as follows at [84]: and [85]

“[84] However, we were referred to HMRC’s guidance on the Schedule 55 FA 2009 penalty regime, as it relates to late filing penalties. It is clear from that guidance that the aim behind the Schedule 55 penalty regime is to penalise taxpayers who fail to comply with their obligations once a notice to file is issued and to incentivise them to comply with future notifications that they must file a tax return (and pay any tax due) on time. In our view, a penalty regime which seeks to incentivise taxpayers to comply with a requirement to file a return is a legitimate aim, regardless of whether it is subsequently



determined that any tax is due. The purpose of the requirement to complete a tax return is so that HMRC is in a position to ascertain whether tax is due from a particular taxpayer. If the taxpayer does not comply with the requirement to file a return, then HMRC is clearly not going to be in a position to ascertain easily whether tax is in fact due. A taxpayer who does not think he should be within the self-assessment regime when he receives a notice to file because as a matter of course he will have no further tax to pay should enter into a dialogue with HMRC with a view to being removed from the requirement to file rather than take no action in response to the notice. That is precisely what ultimately happened in this case.

[85] In our view, there is a reasonable relationship of proportionality between this legitimate aim and the penalty regime which seeks to realise it. The levels of penalty are fixed by Parliament and have an upper limit. In our view the regime establishes a fair balance between the public interest in ensuring that taxpayers file their returns on time and the financial burden that a taxpayer who does not comply with the statutory requirement will have to bear.”

67. *Barry Edwards* is of course binding on us and so there is no need (or room) for us to apply Lord Sumption’s four criteria in *Bank Mellat* to the overall scheme of the Schedule 55 penalties.

68. Secondly, on an individual level, the fact that no tax was due from Priory does not render the penalties disproportionate. Again, we are bound by *Barry Edwards* at [86] and [87] as cited above.

69. We note that *Walker* reaches a different view. However, *Walker* is a First-tier Tribunal decision, is not binding, and does not refer to *Barry Edwards*. We therefore follow *Barry Edwards*.

70. Thirdly, for the reasons set out above, we do not accept that there was only one mistake or failure. Priory’s obligation was to file a return for each of the Properties for each of the tax years. As such, the penalties relate to different obligations and are not multiple penalties for the same default.

#### **DISPOSITION**

71. It follows from the matters set out above that we dismiss the appeal.

#### **RIGHT TO APPLY FOR PERMISSION TO APPEAL**

72. 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.

**RICHARD CHAPMAN QC  
TRIBUNAL JUDGE**

**RELEASE DATE: 09 AUGUST 2021**