TC01673

Appeal number: TC/2011/04692

Penalty; late filing; fairness; s98A(2)(a) TMA 1970. Conscionable conduct. Jusilla v Finland. Reasonable excuse. Honest and genuine belief amounts to "reasonable excuse". Burden of proof.

FIRST-TIER TRIBUNAL

TAX

GAVIN ALEXANDER PARTNERSHIP **Appellant**

- and -

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

TRIBUNAL: GERAINT JO0NES Q. C. (TRIBUNAL JUDGE)

The Tribunal determined the appeal on 09 November 2011 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 17 June 2011, HMRC's Statement of Case submitted on 08 September 2011 and the Appellant's Reply dated 30 September 2011.

DECISION

1. By its Notice of Appeal the Gavin Alexander Partnership appeals against a penalty of £400 imposed upon it by the respondent on the basis that, as an employer, it failed to file its P35 end of year return by 19 May 2010. The Penalty Notice was dated 27 September 2010, more than four months after the alleged date of default.

2. Section 98A(2)(a) Taxes Management Act 1970 provides that any person who fails to make a return in accordance with the relevant provisions *"shall be liable to a penalty or penalties of the relevant monthly amount for each month (or part of a month) during which the failure continues ....."*.

3. It is very clear from the Notice of Appeal that the alleged default is not admitted. In those circumstances it is for the respondent to prove the alleged default. In **Jussila v Finland (2009) STC 29**, in the context of default penalties and surcharges being levied against a taxpayer, the Court determined that Article 6 of the European Convention on Human Rights was applicable, because such penalties and surcharges, despite being regarded by the Finnish authorities as civil penalties, nonetheless amounted to criminal penalties despite them being levied without the involvement of a criminal court. At paragraph 31 of its judgment the court said that if the default or offence renders a person liable to a penalty which by its nature and degree of severity belongs in the general criminal sphere, article 6 ECHR is engaged. It went on to say that the relative lack of seriousness of the penalty would not divest an offence of it inherently criminal character. It specifically pointed out, at paragraph 36 in the judgment, that a tax surcharge or penalty does not fall outside article 6 ECHR.

4. This is a case involving penalties. The European Court has recognised that in certain circumstances a reversal of the burden of proof may be compatible with Article 6 ECHR, but did not go on to deal with the issue of whether a reversal of the burden of proof is compatible in a case involving penalties or surcharges. This is important because a penalty or surcharge can only be levied if there has been a relevant default. If it is for HMRC to prove that a penalty or surcharge is justified, then it follows that it must first prove the relevant default, which is the trigger for any such penalty or surcharge to be levied.

5. In my judgement there can be no good reason for there to be a reverse burden of proof in a surcharge or penalty case. A surcharge or penalty is normally levied where a specified default has taken place. The default might be the failure to file a document or category of documents or it may be a failure to pay a sum of money. In such circumstances there is no good reason why the normal position should not prevail, that is, that the person alleging the default should bear the onus of proving the allegation made. In such a case HMRC would have to prove facts within its own knowledge; not facts peculiarly within the knowledge of the taxpayer.

6. It is for HMRC to prove that a penalty is due. That involves HMRC proving, on the balance of probabilities, that the required end of year filing did not take place by 19 May 2010. In my judgment it has produced no, or insufficient, evidence to that

effect and, for that reason alone, this appeal must succeed. My reasons for that conclusion are set out below.

7. The appellant's case is that the necessary P35 was sent electronically to the respondent on 10 May 2010, by an agent acting on its behalf, Mrs Percival. The respondent's response to that assertion is best found in its letter of 12 April 2011 where it says *"I am sorry but records show your agent did not file successfully in the live mode after the test was completed. The test box must not have been un-ticked whenever the return was submitted. A user has to actually select the option to do a test. The e-mail received from the HMRC Gateway is an automated message which confirms that the return is in the correct format.* [That assertion is misleading]. *As the e-mail suggests, it is up to each employer to check to ensure that the live return has been done, rather than a test return."* The same letter included a document headed "Summary Search Results" which demonstrates that on 10 May 2010 the appellant's agent was on line attempting to file the return. Against that entry the word "Test" appears.

8. The agent to whom I have referred was Mrs Percival. She had written to the respondent on the 25 February 2011 pointing out that this was the very first time that she had undertaken online submissions and she says that when she filed online she received an e-mail confirmation receipt headed "Successful Receipt of Online Submission". A copy of that receipt has been made available to me. It is correct to say that it says in the body of the receipt "*If this was a test transmission, remember you still need to send your actual Employer Annual Return using the live transmission in order for it to be processed."*

9. It is extraordinary that the respondent chooses to send such a misleading or ambiguous receipt. On the one hand, it starts with the words, typed in bold:*"**Successful Receipt of Online Submission** for reference ....."* only in the second paragraph, does it add the rider about a test submission. The respondent now argues that its "Receipt" is not in fact a receipt.

10. In circumstances where the respondent caused an electronic Receipt, as detailed above, to be sent to the appellant, the respondent fails to satisfy me, on the balance of probabilities, that no successful submission was made prior to the 19 May 2010.

11. Even if I had been satisfied that the P35 had not been filed by the 19 May 2010, this appeal would still succeed.

12. The second basis upon which this appeal must succeed is that I accept the inherent contention of Mrs Percival that she honestly believed that the necessary P35 filing had taken place on 10 May 2010.

13. Where a person honestly believes that she has done a certain act but, in fact, has not done so, that may amount to a reasonable excuse for not thereafter doing that certain act (by a certain time), at least until such time as the person ceases to hold that honest belief. In R v Unah The Times 2/8/11 the Court of Appeal (Criminal Division) Elias LJ, Wyn Williams J & Sir David Clarke decided, albeit in a rather

different context, that a genuine or honestly held belief can amount to a reasonable excuse not doing something that a person is required to do. That, in my judgment, is no more than common sense.

14. For there to be a "reasonable excuse" an appellant has to demonstrate two things. The first is that there is an excuse. If there is an excuse the Tribunal then has to be satisfied that, when viewed objectively, the excuse can properly be characterised as reasonable.

15. I am in no doubt that Mrs Percival genuinely and honestly believed that she had made a successful submission. When it was claimed that she had not done so, she immediately made a further submission which the respondent accepts it received. I accept and find that Mrs Percival honestly believed that the P35 had been filed timeously. In my judgement that amounts to a reasonable excuse for the entire period of alleged default.

16. Even if I had not determined that this appeal must succeed on the foregoing two bases, the penalty would have been reduced to £100. That is because HMRC has put forward no explanation whatsoever for its failure to send out a First Penalty Notice within a reasonable time of the default being known about on the 20 May 2010.

17. I am entitled to take judicial notice (based upon experience of sitting in a specialist Tribunal) of the fact that where a taxpayer defaults in sending in a VAT return on time, or defaults in paying the amount of VAT due on time, a Default Notice or Surcharge Notice (whichever is appropriate) is usually sent out within 14 – 21 days. I can and do take judicial notice of that fact. In a VAT default case the penalty (if applicable) does not increase with the passage of time, by contrast to the penalty regime for failing to file an end of year return by the 19 May. Thus in a VAT case HMRC has no interest in delaying sending out the Penalty Notice (where applicable), as the penalty does not increase as time goes by. It may be, and usually is otherwise in P35 default situations.

18. In contrast, the experience of this Tribunal is that in respect of penalties for the late filing of end of year returns, HMRC delays sending out the First Penalty Notice for 4 months or thereabouts. It gives no explanation for, and has provided no justification for, such tardiness. I have no doubt that Penalty Notices are computer-generated and that HMRC could, if it so wished, set its computer system to generate a Penalty Notice soon after 19 May in each year just as easily as it now sets its computer system to generate such Penalty Notices almost four months post default. In VAT default cases HMRC receives no greater monetary sum if it delays demanding the penalty and so it chooses to send them out promptly. The converse is true in a case involving the late filing of end of year returns, where the penalty increases month on month.

19. The question would thus arise in the mind of any fair-minded objective observer as to whether this is something done deliberately by HMRC so as to increase the penalty monies received in respect of P35 cases, given that additional penalties accrue

whilst the default continues. In many cases the continuing default may represent no more than the sin of oversight or forgetfulness which, had a timeous First Penalty Notice been issued, would, in many cases, be remedied forthwith.

20. In this case the First Penalty Notice was issued on the 27 September 2010.

21. In my judgement it was conspicuously unfair of HMRC to fail to send out a First Penalty Notice until almost four months post default. That is a serious but inevitable charge to be laid at the door of HMRC in this kind of penalty case. The appellant was not given a timeous *de facto* reminder of its default during a period exceeding four months during which, had an appropriately timed First Penalty Notice been sent, the appellant could, and as I find, would have avoided all but the first monthly penalty of £100 accruing. There can be no doubt that it was the duty of HMRC to act promptly in sending out the First Penalty Notice. I find as a fact that it did not do so. I find as a fact that the duty upon HMRC to act promptly requires it to send out a First Penalty Notice not more than 14 days after the 19 May in each year.

22. In my judgement the conduct of HMRC in desisting from sending out a timeous First Penalty Notice gives rise to conspicuous unfairness which would be recognised as such by any fair-minded objective observer. Such an objective observer would recognise such conspicuous unfairness being caused by HMRC choosing not to notify the appellant that it had incurred any penalty until well into September 2010. In my judgement, it was/is not the intention of Parliament, or within its contemplation based upon *s98A Taxes Management Act 1970* (and its other provisions), that HMRC would or should desist from acting timeously in issuing a first (or other) Penalty Notice.

23. The respondent may say that it is under no obligation to send out any reminder notices in respect of end of year returns. That is undoubtedly correct. However, that is to confuse and misunderstand its obligations. The obligation cast upon the respondent, by Parliament, is to charge and collect in penalties that fall due. A proper discharge of that duty requires, in my judgement, that when a penalty falls due on 20 May of any year, if an end of year return has not been filed, the respondent should then seek to collect in that penalty without undue delay. If, without undue delay, the respondent sent a Penalty Notice, regardless of the fact that it is under no obligation to serve a reminder notice, the First Penalty Notice would act as a *de facto* reminder. Thus, if the respondent discharged its duty, as Parliament intended it to do, the respondent would not be issuing a reminder but would be issuing a different kind of document which, in fact, would have the same effect as the service of a reminder notice. In my judgement, there can be no justification or reasonable excuse for the respondent failing to send such a First Penalty Notice within 14 – 21 days of the penalty being incurred (as of the 20 May in any year). Its failure to do so means that it is not undertaking its responsibilities as provided by Parliament.

24. A fair minded objective observer would readily identify conspicuous unfairness in the failure to send a timeous First Penalty Notice from the following :

(1) HMRC's failure to comply with the obvious intention of Parliament that where a penalty is incurred, that penalty should be promptly notified to and collected from the transgressor.

(2) The complete lack of any explanation for, or justification of, HMRC's dilatoriness in failing to send out a First Penalty Notice for four months or thereabouts.

(3) The fact that HMRC notifies and collects penalties or surcharges for failing to file a VAT return or failing to make a VAT payment, with expected promptness. By contrast, it shows no such inclination to act with promptitude in cases involving a penalty for failing to file end of year returns, which just happen to incur increasing penalty sums as time goes by.

(4) By failing to act promptly in notifying and collecting penalties due for a failure to file an end of year return on time, HMRC is thereby failing to give effect to the intention of Parliament that it should so act.

(5) It is an overwhelming inference that if HMRC can set its computer system to notify VAT penalties promptly, its computer system could also be persuaded to notify late filing penalties in respect of end of year returns, with equal promptness.

25. In my judgement the only fair and just outcome to this appeal, if this was the only basis on which it fell to be allowed, would be that as a result of the conspicuous unfairness referred to above, which meant that the appellant had no prompt *de facto* reminder that the (alleged) default needed to be remedied, the penalty relating to the period of conspicuous unfairness, which I find on the facts of this case to be the entire period save for the first month, should be disallowed so as to negate the effect of that identified conspicuous unfairness.

26. 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.

Decision.

The appeal is allowed in full.
No penalty is due and payable.

TRIBUNAL JUDGE
RELEASE DATE: 19 December 2011