TC01684

Appeal number: TC/2011/05598

Penalty; late filing; fairness; s98A(2)(a) TMA 1970. Reasonable excuse. Honest and genuine belief amounts to "reasonable excuse". Conspicuous unfairness. Conscionable conduct.

FIRST-TIER TRIBUNAL

TAX

BRIAN PURVEUR **Appellant**

- and -

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

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

The Tribunal determined the appeal on 9 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 18 March 2011, HMRC's Statement of Case submitted on 23 August 2011.

DECISION

1. By his Notice of Appeal Mr Purveur appeals against a penalty of £500 imposed upon him by the respondents on the basis that, as an employer, he failed to file a P35 end of year return by 19 May 2010. The Penalty Notice was dated 27 September 2010, more than four months after the 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 admitted in the sense that the appellant accepts that he may have made an error when seeking to make his first ever filing on line and on the basis that he did not make that attempt until 25 May 2010.

4. The appellant's case is that he honestly believed that he had successfully undertaken the necessary filing, on line, on 25 May 2010. I accept that implicit assertion. It is consistent with the appellant's conduct when he was informed that the necessary filing had not in fact taken place.

5. Where a person honestly believes that he 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 for not doing something that a person is required to do. That, in my judgment, is no more than common sense.

6. 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.

7. I am in no doubt that Mr Purveur genuinely and honestly believed that he had made a successful submission on 25 May 2010. When it was claimed that he had not done so, he immediately made a further submission which the respondent accepts it received. I accept and find that Mr Purveur honestly believed that the P35 had been filed on the 25 May 2010. In my judgement that amounts to a reasonable excuse for the entire period of alleged default beyond that date, but not for the period 19 – 25 May 2010.

8. Accordingly the penalty must be reduced to £100.

9. Even if I had not determined that this appeal must succeed on the foregoing basis, the penalty would have been reduced to £100 in any event. 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.

10. 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.

11. 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.

12. 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.

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

14. 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 in accordance with its duty to enforce the penalty regime laid down by Parliament. 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.

15. 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 he 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.

16. 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 duty as laid down by Parliament.

17. 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.

18. The applicable principle of conspicuous unfairness is best understood by reference to the speech of Ld. Mustill in R (on the application of Q) v Secretary of State for the Home Department (1994) 1 AC 531 at 560. Examples of the principle being applied are found in Thakur (Bangaladesh) (2011) UKUT 151 and Patel (India) (2011) UKUT 211.

19. 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.

20. 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.

TRIBUNAL JUDGE
RELEASE DATE: 20 December 2011