TC01726

Appeal number: TC/2011/05681

Penalty; late filing; fairness; s98A(2)(a) TMA 1970. Common law fairness. Conscionable conduct. Conspicuous unfairness. Oxfam (per Mr. Justice Sales) explained.

FIRST-TIER TRIBUNAL

TAX

PETER STUMP **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 21 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, HMRC's Statement of Case submitted on 11 October 2011 and the appellant's Reply dated 4 November 2011.

DECISION

The Facts.

1. The appellant, Mr Stump, used to be the landlord of a public house known as The Boar's Head. He no longer runs that business. However, whilst ran that business he had employees and accordingly had to file employer's end of year returns, forms P35, by 19 May in each year. As with many small employers he had to undertake that task online, rather than on paper, in recent years.

2. On 27 September 2010 the respondent sent a First Penalty Notice to the appellant, in the sum of £400. It sent the notice at such a time that even if the appellant acted upon it forthwith, a further £100 penalty would become due (according to the respondent) because the filing would have taken place after 19 September 2010.

3. The appellant has appealed and the basis of his case is set out in the Notice of Appeal and the appellant's Reply of 4 November 2011.

4. The Notice of Appeal says that the appellant "*believe[d] that the return had been filed on time through the QTAC, the reason for this is that the 2009/2010 year end return was the first one which had to be done online."* The point is made by the appellant that he had no reason not to file the relevant end of year returns on time and believed that he had done so. The Notice of Appeal has plainly been drafted by the appellant's wife (no doubt doubting her husband's ability to put forward his appeal to its best advantage) and she says, in response to the respondent's implied assertion that the excuse is untruthful, "*why, given the circumstances at the time, would we knowingly not file a return, and knowingly incur charges that could have the ability to cause us bankruptcy*." The latter comment was made in circumstances where the appellant's parlous financial circumstances had previously been explained.

5. However, after the First Penalty Notice had been received by the appellant, the necessary filing still did not take place until 23 January 2011, almost a further four months later. The explanation put forward for that appears in the Notice of Appeal where it is said that after receipt of the First Penalty Notice the appellant made telephone calls to the respondent indicating that he thought the filing had taken place online but that, if it had not, it would be sorted out. The point is made that further penalty notices were then issued notwithstanding that the respondent's staff had assured the appellant that "*everything would be sorted out once the return was in*". It is suggested that this hardly indicated that there was any urgency.

The Law.

6. This is a case involving penalties. The fact of default has been admitted by the appellant and thus it need not be proved in this appeal by HMRC adducing reliable evidence thereof.

7. So far as end of year returns are concerned, 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 ....."*.

8. So far as the State and its several organs are concerned (HMRC being one such organ), there is a common law duty of fairness or, to put it in another way, a duty not to act in a manner that is conspicuously unfair towards any citizen/person. In *R v Secretary of State for the Home Department [2003] EWCA Civ 364* at paragraph 69, the Court of Appeal expounded the principle as related to the decision making process under scrutiny in that appeal. In *Secretary of State for the Home Department v Thakur [2011] UKUT 151* the Upper Tribunal, in paragraph 12 of its Decision, also recognised that principle, again in the context of a decision making process.

9. HMRC may well take the position that given the wording of *section 98A(2)(a) Taxes Management Act 1970,* there can be no answer to its demand for penalties regardless of the period of time that has elapsed prior to it sending out a First Penalty Notice. It may argue that this Tribunal must proceed on the basis that its jurisdiction is solely statutory and so it can do no more than strictly apply the relevant revenue statutes. It may argue that in this Tribunal there is no place for the application of any common law principles, however sound they might be.

10. Thus one of the first issues for consideration is whether sound common law principles must be left outside the door of the Tribunal room, never to cross its threshold.

11. A convenient starting point is the decision of the House of Lords in *CEC v J H Corbitt (Numismatists) Ltd [1980] STC 231* where the House of Lords had to determine whether, in relation to an appeal against an assessment which depended upon a prior exercise of a discretion by the Commissioners, the Tribunal had power under the then equivalent of *section 83 Value Added Tax Act 1994 (section 40 Finance Act 1972)* to review the exercise of the discretion. The House of Lords held that the form in which the discretion was given precluded any such review and that if the Act had been intended to give the Tribunal a supervisory jurisdiction, clear statutory words would have been expected.

12. In *CEC v National Westminster Bank plc [2003] STC 1072* HMRC had relied upon a defence of unjust enrichment against an appellant's claim for repayment of VAT, but had not invoked that defence against a similar claim by one of the appellant's commercial rivals. The taxpayer bank complained of unfair treatment and Mr Justice Jacob had to determine whether the Tribunal had a supervisory jurisdiction in respect of the conduct of HMRC. Following the earlier decision of Mr Justice Moses in *Marks and Spencer plc v CEC [1999] STC 205* he decided that the Tribunal had no jurisdiction to supervise the conduct of HMRC and/or so to quash its decision.

13. It is currently suggested that the decision of Mr Justice Sales in *Oxfam v HMRC [2010] STC 686* leads to a different result because, in that case, the learned judge decided that the First Tier Tribunal did have jurisdiction to deal with the taxpayer's

case which was (in part) put on the basis that it had a legitimate expectation that a given approach to its tax affairs would be applied by HMRC. It is important to appreciate exactly what the learned judge did deal with and rule upon in that case – as to which, see below.

14. It may be said that some decisions of this Tribunal have followed the *Oxfam* decision and others have declined to follow it.

15. In my judgement the *Oxfam* decision cannot be properly understood whilst there is a misunderstanding of the differing principles involved. There has, so far, been a failure to advert to the fundamental difference between :

(1) the First Tier Tribunal exercising a supervisory jurisdiction by way of judicial review, and

(2) the First Tier Tribunal applying sound principles of common law; which has nothing to do with exercising a supervisory jurisdiction by way of judicial review.

16. When I have regard to *section 15 of the Tribunals Courts and Enforcement Act 2007* it is notable that the Upper Tribunal has been given a Judicial Review power because that section specifically provides that it may grant relief of the kind that ordinarily comes within Judicial Review powers. No such power is given to the First Tier Tribunal. Nor, in my judgement, has the First Tier Tribunal ever claimed to exercise or purported to exercise such powers; any more than Mr Justice Sales said that it has any such powers.

17. What, in my judgement, Mr Justice Sales decided in the *Oxfam* case was that sound principles of the common law are not to be left languishing outside the Tribunal room door when an appeal is heard in the First Tier Tribunal. He decided that they are a welcome participant at the appeal proceedings and, in appropriate circumstances, must be applied. There is plainly a stark distinction between the Tribunal, on the one hand, applying sound common law principles, which amounts to the application of substantive common law to the appeal proceedings and, on the other hand, seeking to exercise a supervisory power by way of Judicial Review. Once that distinction is drawn and kept in mind, it seems to me that the authorities are readily understood and reconciled.

18. If support for that proposition is needed it is to be found in the line of cases *Wandsworth London Borough Council v Winder [1985] 1 AC 461,* followed in *Clark v University of Lincolnshire and Humberside [2000] 3 All ER 752* as applied and explained in *Rhondda Cynon Taff Borough Council v Watkins [2003] 1 WLR 1864.* In the latter decision the Court of Appeal decided that in private law proceedings relating to the possession of land, the defendant was not and could not be precluded from relying upon what the claimant characterised as a public law defence, absent a clear provision appearing in a statute, court rules or authority to preclude him from so doing. There was no such clear statutory provision, no court rules precluding such reliance and no authority precluding such reliance. Indeed, the earlier authorities

supported the ability of the defendant to rely upon something that amounted to a public law defence in private law proceedings for the possession of land.

19. That line of authority indicates, in my judgement, the application of sound common law principles by way of a defence to a claim, notwithstanding that the pleaded defence would independently found the basis for relief in Judicial Review proceedings.

20. Moreover, if we look at paragraphs 61 – 71 of the judgment of Mr. Justice Sales in *Oxfam v HMRC [2009] EWHC 3078 (Ch)* it seems clear to me, and is implicit in what he said, that he was recognising that common law principles are to be taken into account by the Tribunal. He was not saying, and nowhere did he say, that the First Tier Tribunal could exercise a judicial review function. One could not reasonably think that such a learned judge would have failed to have had in mind the clear distinction between applying common law principles (on the one hand) and exercising judicial review powers (on the other hand). The fact that he did not advert to the *Winder* line of authorities (see above) does not detract from that point.

21. The statutory penalty regime under the 1970 Act was not and is not intended by Parliament to be a revenue raising device. The obvious intention of Parliament was to implement a penalty regime so as to encourage compliance and, in cases where compliance does not take place, to levy a proportionate penalty. It cannot have been within the contemplation of Parliament that where HMRC was/is given the power to levy a penalty of £100 (on a small employer) if there has been a default of one month in filing a P35, that HMRC should desist from timeously sending out a Penalty Notice. That must be so, given HMRC's duty to collect the penalty once it has accrued due. It cannot have been the intention of Parliament, or within its contemplation, that HMRC would desist from sending out a Penalty Notice for many months (with the effect that unless the defaulter suddenly awoke to its default and remedied it, further monthly penalties would inevitably accrue). Such a failure on the part of HMRC (by engaging in wholly unnecessary delay) would be and is a failure to implement the penalty regime stipulated by Parliament, as Parliament intended it to be implemented. It is unthinkable that Parliament would intend a manifestly unjust situation to arise as a result of HMRC being dilatory in sending out a First (or subsequent) Penalty Notice.

22. HMRC may argue (as it did in its Review decision in this case) that it is not under a statutory obligation to issue any reminder to an employer to file a P35. That is correct. Nonetheless, as and when a First (or subsequent) Penalty Notice is sent it inevitably has the effect of being a *de facto* reminder. That is something that HMRC will inevitably realise; as any such realisation is dictated by common sense.

23. HMRC may pose the question : How can it be conspicuously unfair for it to desist from issuing a First Penalty Notice for four months or thereabouts in circumstances where it is under no statutory obligation to issue any form of reminder. The answer is straightforward. The answer is that it is plain from the statute that it was/is the intention of Parliament that HMRC will timeously enforce the penalty regime and thus it is an inevitable finding that it was/is the intention of Parliament and

within its contemplation that HMRC will act timeously in so doing. HMRC has not argued, nor could it sensibly argue, that once it issues a First Penalty Notice, that notice does not act as a *de facto* reminder, especially to those whose only sin might be forgetfulness or oversight.

24. As explained above the general proposition that the common law has no part to play in any proceedings before a statutory Tribunal is, in my judgement, wrong. This Tribunal applies common law principles in just about every case that it hears and determines. For example, there is a common law duty to conduct proceedings in a fair and open manner applying, amongst others, the principle *audi alterem partem.* There is a common law duty upon a judge to recuse himself if it would be inappropriate for him to sit on a particular case because it might give rise to a perception of partiality. The fact that those are procedural matters is not, in my judgement, a basis for differentiating between applications of the common law in respect of those procedural issues and the application of the common law's other well established important substantive principles such as the duty of a public body to act fairly or, perhaps I should say, its duty not to act in a manner that is conspicuously unfair. That is a duty that arises at common law. Similarly, it should be remembered that the Tribunal applies statutory provisions other than those found in revenue specific statutes. For example, the Tribunal has to apply *section 2 European Communities Act 1972*, which requires Courts and Tribunals to give effect to rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties (as defined).

25. Further, in deciding appeals it is often necessary to decide whether, for example, a contract exists, which necessarily turns upon an application of common law principles.

26. I am entirely satisfied that the delay in sending the First Penalty Notice until 27 September 2011 indicates that there was inordinate and inexcusable delay on the part of the respondent which, self evidently, inures to the prejudice of the appellant.

27. I accept the explanation put forward in the Notice of Appeal to the effect that the appellant believed that he had submitted the P35 on time. An honest belief that something has been done can amount to a reasonable excuse for not then doing that particular thing, at least until the person who believes that he has done a particular thing comes to know that he has not in fact done that particular thing.

28. On the appellant's case he knew that the online filing had not succeeded when he received the First Penalty Notice at the end of September 2010. It was then appropriate for him to have a reasonable time in which to undertake the necessary filing. Additionally, but for the inordinate and inexcusable delay on the part of the respondent in sending out the First Penalty Notice, the appellant would have been on notice of the failed attempt to file online by early/mid June 2011. He could then have put matters right.

29. The facts of this case indicate that the filing did not take place until 23 January 2011. In my judgement, there is no real explanation for the further period of delay

between 27 September 2010 – 23 January 2011, save that the appellant was making telephone enquiries with HMRC. There seems to be no reason why he could not simply have then filed online given that he knew that it was been contended that he had failed to do so.

30. I therefore have to consider what is to be the fair and just outcome. I proceed on the basis that the appellant should have received a First Penalty Notice by not later than 10 June 2010. He would already have incurred a penalty of £100 (subject to "reasonable excuse"), but would then have had the opportunity to make a successful online filing. In that situation the penalty would probably have been limited to £100. However, by his inaction the appellant raises the spectre that he may not have acted quite so promptly given that he did not make a successful filing until 23 January 2011. Nonetheless, he lost the opportunity to remedy the situation at a much earlier date. It must remain speculative as to whether the appellant would have behaved in the same way, had he received a timeous First Penalty Notice, rather than a much delayed penalty notice.

31. This is not an easy issue to resolve when dealing with an appeal dealt with solely on paper. My approach is that the appellant had a reasonable excuse for his failure to file, by reason of his belief that he had successfully done so. I find that that belief existed until the appellant received the First Penalty Notice at the end of September 2010. Thereafter, he should have had a reasonable time within which to make the necessary filing after knowing that he had not previously done so. In my judgement, a reasonable time would then be two weeks.

32. It follows that on the foregoing findings the filing ought to have taken place by mid October 2010. It did not in fact take place until 23 January 2011. Accordingly, I reduce the penalty to £331.

33. 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.

Appeal allowed to the extent that the penalty is reduced to £331.

TRIBUNAL JUDGE
RELEASE DATE: 5 January 2012