



**TC02081**

**Appeal number TC/2011/07605**

*Penalty; late payment; fairness; Jusilla v Finland. “Reasonable excuse”. Honest and genuine belief amounts to “reasonable excuse”. Honest belief – test – purely subjective. Even an objectively unreasonable or irrational belief, if honestly held, suffices for a reasonable excuse. Dicta to the contrary in Intelligent Management UK Ltd v HMRC [2011] UKFTT 704 (TC) not followed.*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**MRS HOLLY CHICHESTER**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE GERAINT JONES Q.C.  
DEREK SPELLER ESQ.**

**Sitting in public at 45 Bedford Square, London WC1 on 06 June 2012.**

**The Appellant in person.**

**Mr. Ratcliffe, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents.**

## DECISION

### Introduction.

- 5 1. For the fiscal year ended 5 April 2010 the appellant, Mrs Chichester, was  
required to file her tax return by 31 January 2011 (if filed electronically) and to pay  
the tax properly due. The payment that was due by 31 January 2011 was £228,013.23.  
That sum was not paid until 07 March 2011. In consequence, on 11 April 2011 the  
10 respondent issued a surcharge notice, based on a 5% surcharge, being a sum of  
£11,400.06.
2. The appellant asked for a review of that surcharge on the basis that she had a  
reasonable excuse for the late payment. The respondent upheld the surcharge after  
undertaking its review. The appellant has appealed to this Tribunal.
- 15 3. Mrs Chichester gave evidence on oath and said that the facts and matters set out  
in her letter dated 8 June 2011 were true and correct. She explained that in January  
2011 the Barclays Bank manager at the branch where both she and her company,  
Ptolomy Tortoise Limited, held their respective bank accounts, arranged during a  
telephone conversation with her, that a substantial sum of money sitting in the current  
20 account of the company, would be used to earn some modest interest instead of sitting  
in a current account which paid no interest whatsoever. Mrs Chichester's evidence  
was that it was always her intention that the cheque for the tax due by 31 January  
2011 would come from her company because she left her own money with the  
company as a director's loan. That, she explained, is how she tended to organise her  
25 affairs. So far as the respondent was concerned, it mattered not whether the cheque for  
the payment came from the taxpayer personally or from another source.
4. Mrs Chichester's evidence was that she did not understand that the funds that  
would earn interest would be placed into a separate account and/or that she would  
need to take any steps to ensure that such funds were available to meet cheques drawn  
on the company's current account. At first blush that might appear to be surprising but  
30 Mrs Chichester explained that the mechanics of how the funds would earn interest  
were not specifically discussed between her and the bank manager, Mr Newton, with  
whom she had a very good working relationship and who she had known for very  
many years. The discussion was informal.
5. The essential ingredient in Mrs Chichester's evidence was that she told us that she  
35 genuinely believed that whatever mechanism was used to allow some interest to be  
earned on the large sum of money in the current account, it was nonetheless  
immediately available to the company with the result that cheques should not be  
dishonoured unless for an amount in excess of the total funds lodged by the company  
at the bank.
- 40 6. We believed the evidence given by Mrs Chichester. We considered her to be a  
genuine and honest witness, notwithstanding her apparent imprecise analysis of the  
arrangement made for a substantial part of the company's funds to earn a modest  
amount of interest. We find as a fact that when Mrs Chichester sent the cheque to the

respondent, being a company cheque, to pay her tax liability, she honestly and genuinely believed that that cheque would be honoured; there being no reason in her mind why it should not be honoured.

5 7. The nature of Mrs Chichester's business, as she explained, is that she is absent from the United Kingdom for considerable periods of time and was so absent for much of February 2011. We mention that because the respondent has argued that because it left a voice message on Mrs Chichester's answer-phone (whether landline or mobile phone, we do not know) any reasonable excuse does not exist for the entirety of the default period. The respondent also says that it sent a letter on 23  
10 February 2011 asking for payment.

15 8. We accept Mrs Chichester's evidence that she was absent from the country and received no such message. Her evidence is that upon her return to the United Kingdom, she found the letter of 23 February 2011 and immediately telephoned the respondent and there and then paid the outstanding tax by using a debit card. That is not disputed by the respondent.

20 9. Indeed, it is right that we should say that the respondent did not challenge Mrs Chichester's factual evidence or call her veracity into question. Mr Ratcliffe had no material available to him that would have justified him cross-examining on the basis that the appellant was not being truthful and, entirely properly, he did not cross examine the appellant on that basis.

#### The Grounds of the Appeal.

25 10. The appellant's appeal is put on the basis that as she honestly and genuinely believed that the tax had been paid by the due date, that amounts to a reasonable excuse for the default in payment, at least until such time as she was put on notice that the honest and genuine belief was, in fact, incorrect.

#### The Law.

30 11. In our judgment the true legal position now has to be considered having in mind the decision of the European Court in the **Jussila v Finland (2009) STC 29** where, 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, as such penalties and surcharges (by whatever name), 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  
35 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.

40 12. This is a case involving a surcharge. It is undoubtedly in the nature of a penalty, despite being called "a surcharge". That it is penal in nature is beyond doubt given

that it is additional to interest calculated at an appropriate interest rate on the sum that remained outstanding. If an additional payment looks like, feels like and smells like a penalty, then it is a penalty regardless of the terminology used to disguise its true nature and character.

5 13. It is the well-established jurisprudence of this Tribunal that an honest belief in a state of affairs can (and usually will) amount to a reasonable excuse for a given failure, at least until such time as the person holding that belief becomes aware that it is an incorrect belief. That person will also thereafter have a reasonable time within which to rectify the applicable default once becoming aware that the previously held  
10 honest belief was in fact incorrectly held – see HMD Response International v HMRC [2011] UKFTT 472 (TC) and Purveur v HMRC [2011] UKFTT 850 (TC). In this case we are entirely satisfied that the reasonable excuse existed throughout the period of default.

14. In its decision in Intelligent Management UK Ltd v HMRC [2011] UKFTT 704 (TC) this Tribunal recognised that an honest belief in a given state of affairs could  
15 amount to a reasonable excuse for not thereafter doing a particular act, but at paragraph 22 of its decision went on to say “*If honest and genuine belief that the filing had taken place within the deadline can be a reasonable excuse, the Tribunal considers that there must be some reasonable basis for the honest and genuine belief.*  
20 *The Tribunal does not consider that an irrational or unreasonable belief, even if honest and genuine, would suffice.*”

15. Whether a person holds an honest and genuine belief is a question of fact. It is an enquiry into the subjective state of mind of a given individual. There is no objective element to the enquiry; it is entirely subjective. That is the effect of the decision of the  
25 Court of Appeal in R v Unah The Times 2/8/11 the Court of Appeal (Criminal Division) where 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.

16. If the claimant’s (honest) belief is, when viewed objectively, irrational or  
30 apparently unreasonable, that is a factor that might weigh in the forensic exercise of deciding whether the person claiming to hold the stated (honest) belief did in fact hold the claimed (honest) belief. It is not a separate test to be applied in deciding whether an honest belief amounts to a reasonable excuse. If it was, it would inject an impermissible element of objectivity into an enquiry which is solely subjective, in the  
35 sense that it turns solely upon the state of mind or subjective belief of the relevant person. Accordingly, it is wrong in law to proceed on the basis that an honestly held belief would not amount to a reasonable excuse if, from an objective standpoint, it was considered that that belief was irrational or unreasonable. The objective analysis goes solely to the issue of credibility. If a Tribunal finds that a person, as a matter of  
40 fact, held a particular honest and genuine belief, that may amount to a reasonable excuse (on appropriate facts) regardless of whether that belief would be characterised as irrational or unreasonable when viewed objectively.

17. In this appeal, as we have set out above, we consider the appellant to be a lady whose evidence should be accepted. We find as a fact that the fact that she honestly and genuinely believed that the cheque that was undoubtedly sent in good time, would be honoured, amounts to a reasonable excuse for late payment. We take into account the fact that once the appellant became aware that the cheque had not been honoured, she took immediate steps to effect payment, quite literally within 24 hours of her return to this country.

18. Even if the appellant's failure to enquire as to the mechanics by which monies from an interest-bearing account (or arrangement) would be transferred to the current account so that the current account would have sufficient funds within it to allow the cheque to be cleared, we do not consider that that has any relevance. That is because even if such failure to make precise enquiries could feed an argument that the appellant's belief was thereby unreasonable (or possibly irrational), that, as a matter of law, would be irrelevant, given our finding that, as a matter of fact, that honest belief was held.

19. 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. The surcharge amount is set aside.

**GERAINT JONES QC  
TRIBUNAL JUDGE**

**RELEASE DATE: 18 June 2012**