TC01634

Appeal number: TC/2011/05588

Penalty; late filing; fairness; s98A(2)(a) TMA 1970. Common law fairness. Conscionable conduct. Jusilla v Finland. "Reasonable excuse". Default by HMRC. Burden of proof.

FIRST-TIER TRIBUNAL

TAX

CORBALLON LIMITED **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 14 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 July 2011 and HMRC's Statement of Case submitted on 31August 2011.

DECISION

1. On the 27 September 2010 the respondent, HMRC, sent the appellant, Corballon Limited a Penalty Notice on the basis that the appellant had been late filing its P35 end of year return as an employer. An employer is required to file an end of year return by the 19 May in each year.

2. There has been no explanation from the respondent as to why it delayed for such an inordinate period of time in sending out the First Penalty Notice.

3. Although after receipt of the First Penalty Notice the appellant successfully filed an end of year return on 25 October 2010, the respondent sent an additional penalty notice demanding an additional penalty of £200. This appeal therefore concerns a total penalty of £600.

4. The default is said to be for the fiscal year ended 05 April 2010 so that the end of year return should have been received by 19 May 2010.

5. The respondent admits that on 24 March 2010 the appellant attempted to register through the Government Gateway so that it could undertake online filing of its end of year return. The respondent also accepts that an enrolment notification was sent to the appellant on the 27 March 2010 which stated that an activation code would be sent within seven days. The letter of 22 June 2011 from the respondent, to the appellant, says *"The e-mail sent in by you does confirm that you activation code had not been issued because either HMRC did not have an up to date address or your tax record had ceased. It advised you to call your Tax Office and gave details on how to contact the correct office."* I can only make limited sense of that assertion in the context of the appellant's letter of 19 April 2011, where it was said *"Your Online Services helpline was unclear as to the address is required."*

6. The letter from the respondent dated 22 June 2011 goes on to assert that the appellant did not receive its activation code and that a new one was not requested. It also says that correspondence sent by the respondent was returned by the Royal Mail on 7 May 2009 and again on 28 June 2010. The respondent also seems to accept that certainly by not later than 5 August 2010 all necessary information was available to it from the appellant, including a correct address, and still no activation code was sent to the appellant. In numbered paragraph 2 of the Appeal it is said by the appellant that it contacted the respondent's helpdesk in May 2010 and was promised that a further activation code would be posted to it. It seems astonishing that the Royal Mail should have returned a letter on 7 May 2009 (as stated in the respondent's letter of the 22 June 2011) given that when the new activation code was requested, there would have been no benefit in the appellant giving anything other than an appropriate and correct address. There is no evidence from the respondent concerning the address or addresses to which it sent any correspondence or the activation code(s) for the appellant. In its letter of 22 April 2010 the respondent sets out various addresses that it has had for the appellant, but does not state to what address any particular item of correspondence or any particular activation code was sent.

7. In numbered paragraph 1 of the appellant's Grounds ofAppeal it is said that contact was made with the respondent in April 2010 when "*we provided an alternative address and were advised that an activation code would be posted to us at the address supplied."* Thus, whether the activation code was sent to the address supplied at that time or to some other address, I simply do not know because the respondent has not seen fit to put in any evidence relating to what address or addresses it sent any particular communication.

8. The appellant does not deny that the end of your return was not made by 19 May 2010. In reality the appellant is saying that it has a reasonable excuse for that failure, given that the respondent failed to provide it with an activation code so as to allow it to file its end of year return online, that being the only method then permitted.

9. There can be no doubt that this is a penalty case. The jurisprudence of the European Court in **Jussila v Finland (2009) STC 29** emphasises that article 6 ECHR applies. The consequence of that provision being applicable is that the respondent bears the onus of proving the default which, on the facts of this case, is admitted. Where the appellant then raises the point that as a result of defaults on the part of the respondent it did not receive the online activation code necessary to undertake online filing, the legal burden of showing that that is wrong rests upon the respondent. The appellant has discharged the evidential burden by raising that as an issue in the appeal, but the respondent retains the legal burden of proving its case that a penalty is due and it can only do that if it adduces evidence to negate the appellant's case that it did not receive an activation code through the default of the respondent, rather than by reason of its own default.

10. In my judgement the material adduced by the respondent does not satisfy that burden of proof. I am left in considerable doubt as to why the appellant did not receive its activation code. I am certainly not persuaded, even on the balance of probabilities, that the reason for the appellant not receiving its activation code arose from any default on its part. It may have done; it may not have done. The simple point is that the respondent has failed to discharge the onus of proof of showing that it had done all that was necessary to provide the appellant with the activation code necessary for online filing. If the respondent imposes a requirement for online filing then it bears a heavy onus to ensure that the appropriate tools to undertake that online filing, insofar as they must be provided by the respondent, are in fact provided.

11. It follows that this appeal must be allowed.

12. Even if this appeal had not been allowed for the foregoing reason I would still have reduced the penalty to £200. That is because the first Penalty Notice was issued by HMRC on 27 September 2010, more than four months from the default date (19 May 2010). The P35 was successfully filed on 25 October 2010. A Final Penalty Notice was issued on a date that I have been unable to ascertain, in the sum of £200, the initial Penalty Notice having been in the sum of £400.

13. 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.

14. 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 is otherwise in P35 default situations.

15. 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.

16. 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.

17. In this case the First Penalty Notice was issued on 27 September 2010 but the appellant still did not file its end of year return until the 21 October 2010. Thus it took it a further six weeks to make the filing even after it had received a belated *de facto* reminder.

18. Nonetheless the fact remains that there was conspicuous unfairness by HMRC in failing to send out a First Penalty Notice until more than 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 to it, it could and, as I find, would have avoided some (but not all) of the additional penalties 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.

19. 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.

20. A fair minded objective observer would readily identify conspicuous unfairness 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.

21. In my judgement, but for the appeal being allowed in full on basis set out above, the only fair and just outcome to this appeal would have been that as a result of the conspicuous unfairness referred to above, which meant that the appellant had no prompt *de facto* reminder that its 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 four months, should be disallowed so as to negate the effect of that identified conspicuous unfairness.

22. 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.

TRIBUNAL JUDGE
RELEASE DATE: 7 DECEMBER 2011