TC01285

Appeal number: TC/2011/01383

Penalty ; Late filing; Onus of Proof. Jusilla v Finland. Article 6 ECHR.

FIRST-TIER TRIBUNAL

TAX

HICHARMS (UK) LIMITED **Appellant**

- and -

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

TRIBUNAL: GERAINT JONES Q.C. (TRIBUNAL JUDGE)
MR MARK BUFFERY (MEMBER).

The Tribunal determined the appeal on 22 June 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 16 February 2011 and HMRC's Statement of Case submitted on 16 March 2011.

DECISION

Introduction.

1. HMRC alleges that the appellant, Hicharms (UK) Limited, failed to file its employer's end of year returns by the 19 May 2010. It unnecessarily waited for four months before sending the appellant a penalty notice demanding £400 by way of a late filing penalty, assessed at £100 per month.

2. Subsequently, on the 20 October 2010, an Amended Penalty Determination was sent to the appellant reducing the penalty to £266.

3. On the 30 October 2010 the appellant indicated to HMRC that it wished to appeal against that penalty. The appeal was put on the basis that the necessary filing had in fact taken place at 2217 hours on the 03 May 2010. The letter, in which the appeal was notified, even quoted the "correlation ID" number. As the appellant had used commercial software to make the filing it was able to attach to that letter a copy of a computer screen showing the status of the employer annual return submission as "complete". The correlation ID also appeared on that document.

4. HMRC replied on 19 January 2011 saying that it did not agree that the appellant had a reasonable excuse for not sending its return on time. That demonstrates that HMRC simply did not understand, or deal with, the basis upon which the appellant was putting its appeal. The appeal was not put on the basis that the appellant had a reasonable excuse for late filing; the appeal was put on the basis that there had not been late filing but, rather, timeous filing and so no penalty could be levied.

5. Accordingly, the appellant has appealed to this Tribunal.

The Law.

6. Before we turn to the facts of this appeal and to our conclusions in respect of it, it is appropriate that we set out the law as we now perceive it to be. In G. Deacon & Sons v Commissioners of Inland Revenue 33TC 66 Mr Justice Donovan dismissed a request for a case to be stated in respect of conclusions drawn by General Commissioners, holding that from the primary facts adduced in evidence, they were entitled to draw the inferences that they drew against the then appellant, Mr Deacon.

7. In Johnson v Scott (1987) STC 476 Mr Justice Walton expressly considered where the onus of proof lay in a case where an appellant was challenging amended assessments that had been upheld by the Commissioners. He observed that counsel for the Crown had correctly accepted that where, as in that case, neglect on the part of the taxpayer had to be established, the onus of establishing such neglect lay with the Crown. He went on to hold that if a finding of neglect is made, and justified on the evidence, that enabled the Crown to make assessments for the purpose of making good any tax lost as a result of such neglect. He went on to observe that if that stage

was reached, then the onus would pass to the taxpayer to adduce evidence to show that the assessment is too large.

8. His Lordship desisted from indicating whether the onus that then shifted to the taxpayer was a legal burden or an evidential burden, but usually a reference to a party then having a burden to adduce evidence, refers to an evidential rather than a legal burden. It is also relevant to observe that in that case the learned judge was considering section 50(6) of the Taxes Management Act 1970 in its original, unamended, form. The learned judge also emphasised that where the Crown's case was based upon inferences drawn from primary facts, such inferences had to be "fair" inferences. One would not have expected otherwise. The Court of Appeal upheld that judgment. It was a case in which the taxpayer failed, by adducing acceptable or probative evidence, to discharge the evidential burden upon him of showing that the inferences drawn by the Crown were not fair or appropriate.

9. I set out the foregoing because it is often, incorrectly, stated that once an assessment is raised or a surcharge demanded, the burden of proving that it is incorrect rests upon the taxpayer. That may be an approximation of the de facto position in respect of an assessment (but not a surcharge or penalty) but it fails to analyse the true legal position.

10. In our judgment the true legal position now has to be considered bearing in mind the amendments to section 50 of the Taxes Management Act 1970, the most recent having come into effect from the 1st April 2009, but more importantly 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, 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.

11. 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.

12. In our 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.

13. 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 the 19 May 2010. It has produced no evidence to that effect and, for that reason alone, this appeal must succeed.

The Facts

14. Quite regardless of whether HMRC's computer system does or does not accept that the appellant submitted its end of year documents, we find as a fact that the appellant did just that. We refer to Mr Lamb's undated letter which was received by the Tribunal on 18 April 2011. We accept his evidence that his computer system demonstrates that there had been a successful submission of his end of year filing at 22:17 hours on the 03 May 2010.

15. We do not consider it proper to proceed on the basis that HMRC's computer system is flawless, especially in circumstances where HMRC has made public announcements concerning computer system problems experienced by it, often involving large numbers of people.

16. HMRC knows the case being put forward by the appellant but has desisted from adducing any evidence to support the proposition that the end of year filing did not take place by the 19 May 2010. It bears the onus of proof on that issue and it has woefully failed to discharge it.

17. Even if the appellant had not successfully filed its end of year returns, we find is a fact that the appellant genuinely and honestly believed that it had done so. In those circumstances it would have a reasonable excuse for not doing so up until such time as it was notified that it is genuine and honest belief was, in fact, incorrect, provided that it then acted timeously to make the filing.

18. 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.

The penalty of £266 is cancelled.

TRIBUNAL JUDGE
RELEASE DATE: 30 JUNE 2011