TC01286

Appeal number: TC/2011/01447

Penalty; late filing; fairness; s98A(2)(a) TMA 1970. Common law fairness. Conscionable conduct.

FIRST-TIER TRIBUNAL

TAX

HOK 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 19 February 2011 and HMRC's Statement of Case submitted on 15 March 2011.

DECISION

Introduction.

1. On the 27 September 2010 HMRC sent the appellant, Hok Limited, a penalty notice in the sum of £400 on the basis that the appellant had failed to file its employer's end of year annual returns (P35 & P14) by the 19 May 2010. The penalty was calculated as £100 per month for four months. On the 21 October 2010 a further penalty notice in the sum of £100 was issued given that the necessary filing had taken place on the 15 October 2010 once the appellant had been alerted to its default.

2. In this appeal the appellant does not assert that it did file on time. Instead, the appellant says that it thought it did not need to file the appropriate returns because its only employee had ceased employment part way through the year. It acknowledges that it was wrong in that belief and the appellant also acknowledges that HMRC was entitled to levy a penalty. The appellant's complaint is that had HMRC timeously notified it of its default, it would have been remedied it a far earlier time, thus avoiding ongoing penalties.

3. The appellant requested a review which resulted in a letter of 4 February 2011 being sent by HMRC to the appellant in which the overall level of penalty, some £500, was upheld.

4. The appellant has appealed to this Tribunal. The Notice of Appeal proceeds on the basis that the level of penalty is manifestly excessive especially as HMRC had already received the necessary information when the appellant's last employee had ceased employment part way through the fiscal year ended the 5 April 2010.

5. The statement of case submitted by HMRC proceeds on the basis that the penalty has been correctly levied pursuant to section 98A(2)(a) Taxes Management Act 1970.

The Law.

6. 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 ....."*.

7. So far as the State and its several organs are concerned (HMRC being one such organ), there is a common law duty of fairness. In R v S.S.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 S.S. 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.

8. Thus, the issue arises whether that common law principle has any application where a statutory provision renders a person "liable" to a specified penalty. It must be

noted that the statute does not provide that the penalty or any part of it must be levied. It does no more than to indicate that a person is "liable" to the penalty which means not that the specified penalty must apply, but may apply and may be demanded. If we take a criminal analogy it is that, for a specified offence, a statute might provide that a convicted person is liable to a fine not exceeding £500. In our judgement the words "not exceeding" make little, if any, difference. They are not words which import discretion but simply make it clear that the fine cannot or must not exceed £500. The discretion of a court to impose a fine below the specified maximum does not arise by reason of the words "not exceeding" but by the use of the expression that a person is "liable" to a fine, but capped at £500.

9. Thus, in our judgement, the appellant is entitled to rely upon the common law duty of a public body to act fairly not just in its decision-making process but also in administering its statutory powers. We are in no doubt that such a body does not act fairly where it deliberately desists from sending a penalty notice, for four months or more, knowing that the effect will be to impose a minimum penalty of £500 upon somebody whose sin may be no more than oversight or forgetfulness.

The Facts and our Findings.

10. In its Statement of Case HMRC sets out that it runs a *"structured programme to enable penalties to be issued regularly throughout the year, rather than waiting for the late return to be submitted and then issue a final penalty. These penalties, although aimed at encouraging compliance and having the effect of reminding are not designed to be reminders for the outstanding return."*

11. Thus, HMRC deliberately waits until four months have gone by and does not issue the first interim penalty notice until, as in this case, September of the year of default. By that time a penalty of £400, being four times £100 per month, is said to be due. In fact, if the penalty notice operates as a reminder and the taxpayer undertakes the necessary filing forthwith, a further one month penalty arises because the *de facto* reminder is received only after it is too late to avoid a further £100 penalty. Thus, the effect of HMRC desisting from sending out a penalty liability notice very soon after 19 May of the relevant year, and choosing deliberately to delay that penalty notice until four months has gone by, is to result in the taxpayer facing a minimum penalty of £500. We appreciate that HMRC takes the stance that it is the responsibility of the taxpayer to make the necessary filing and that it is its stance that it has no obligation to issue any reminder. However, we have no doubt that any right thinking member of society would consider that to be unfair and falling very far below the standard of fair dealing and conscionable conduct to be expected of an organ of the State.

12. There can be no logical reason whatsoever for HMRC to delay sending out a penalty notice for four months so that, in effect, a minimum penalty of £500 will be levied unless the taxpayer has unilaterally realised that it has failed to undertake the necessary filing.

13. HMRC is an organ of the State. It is no function of the State to use the penalty system as a cash generating scheme. The penalty system has a legitimate aim, which is to ensure that appropriate filings take place in good time and to discourage default. Given that that is the legitimate aim, it is inexplicable why HMRC deliberately delays sending out a penalty notice for four months, with the effect that a penalty for five months becomes payable, that is, £500. In our judgement it would be a very simple matter for HMRC to set its computer settings so that a default or penalty notice was sent out immediately after the 19 May in any year, instead of some four months later. That might generate less penalty cash for the State, but it would be fair and conscionable as between the taxpayer and the State (acting by HMRC).

14. HMRC makes the point that it is not under an obligation to remind a taxpayer of its obligation to file documents. It is true that it is under no obligation to do so, but that does not mean that good practice and conscionable conduct does not require it either (i) to send a reminder immediately after 19 May in each year when it knows that a default has taken place or (ii) immediately after 19 May each year to issue a £100 penalty notice which would have the effect of acting as a reminder before further monthly penalties are incurred.

15. It has long been part of the common law of this country that organs of the State must act fairly and in good conscience with its citizens. In our judgement there is nothing fair or reasonable in setting a computer system so that it does not generate a penalty notice until four months have gone by from the date of default, thereby ensuring that a penalty of not less than £500 will be due. We are in no doubt that the computer system could easily be set to generate a single £100 penalty notice immediately after the 19 May in each year. That is the course that a fair organ of the State, acting in good conscience towards the citizens of the State, would adopt.

16. As, in our judgement, HMRC has neither acted fairly nor in good conscience, in the manner described above, we do not consider that any penalty is recoverable over and above the £100 penalty for the first month unless HMRC proves (the onus being upon it) that even if such a penalty notice, which would have acted as a reminder, had been issued, the default would nonetheless have continued. It has proved no such thing.

17. 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 sum is reduced to £100.

TRIBUNAL JUDGE
RELEASE DATE: 30 JUNE 2011