TC01489

Appeal number: TC/2011/04024

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

FORESIGHT FINANCIAL SERVICES 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 20 September 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 28 May 2011 and HMRC's Statement of Case submitted on 4 July 2011.

DECISION

The Background.

1. The appellant, Foresight Financial Services Ltd, has appealed to this Tribunal against penalties totalling £600 imposed upon it by HMRC in respect of its late filing of the End of Year Return (P35) required to be filed by an employer, on or before the 19 May in any fiscal year. That requirement arises under regulation 73 of the Income Tax (PAYE) Regulations 2003 and paragraph 22 of Schedule 4 of the Social Security (Contributions) Regulations 2001.

2. The appellant puts its appeal on the basis that it had a "reasonable excuse" for its tardiness in filing the P35 for the year ended 5 April 2010 and, in effect, on the basis that there has been conspicuous unfairness on the part of HMRC in failing to send out the first Penalty Notice timeously.

The Law.

3. 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.

4. 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 ....."*.

5. 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.

6. 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.

7. 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.

8. 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.

9. 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.

10. 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.

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

12. 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.

13. 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.

14. 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.

15. 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.

16. 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.

17. 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.

18. 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.

19. 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.

20. 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.

21. 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).

22. 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.

23. It is for HMRC to prove that a penalty is due. In this case that requirement is satisfied because the appellant, by its letter of 29 November 2010, admits its delay and the author of the letter, the appellant's Director, Mr Owen, says *"I would be grateful if you would accept this letter as an appeal against these penalties as I was unaware that the form had not been filed and this was due to an oversight. The form was prepared on the 20 April 2010 and the forms P60 given to the relevant employees following the payment of the PAYE and NI for the quarter. However, I was unaware that the relevant forms had not been filed over the Internet until the first penalty notice was received in September 2010, which came as a complete shock as I believed the forms had been submitted."* He does not explain the basis upon which he held any such belief.

The Facts.

24. As set out above, the default until the 21 October 2010 is admitted.

25. The first Penalty Notice was issued by HMRC on 7 September 2010, just twelve days short of four months from the default date (19 May 2011). Even then, assuming that the First Penalty Notice was received within due course of post, within two days or so of posting, the P35 was not filed online until 21 October 2010. A Final Penalty Notice was issued on the 1 November 2010 in the sum of £200, the initial Penalty Notice having been in the sum of £400.

26. 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.

27. 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 may be otherwise in P35 default situations.

28. 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.

29. 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.

30. In this case the First Penalty Notice was issued on the 7 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.

31. Nonetheless the fact remains that there was conspicuous unfairness by HMRC in failing to send out a First Penalty Notice until almost 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 an entire period of three months and nineteen days 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.

32. 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.

33. 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.

34. In my judgement the only fair and just outcome to this appeal is 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 three months, should be disallowed so as to negate the effect of that identified conspicuous unfairness.

35. The appellant also contends that it has a reasonable excuse for its default. The letter from Mr Owen, referred to above, does not contend that he reasonably and honestly believed that the necessary end of year return had been filed on or before the 19 May 2010; instead, it says that the filing did not take place, as a result of an oversight. He does not expand upon the nature or extent of that oversight. For there to be a "reasonable excuse" there are only two preconditions. They are:

(1) that the appellant puts forward an excuse, and

(2) when viewed objectively, that excuse is properly to be characterised as reasonable.

36. The words "reasonable excuse" are not defined by the definition section of the Taxes Management Act 1970. They are words in ordinary and everyday use and must be given their natural and ordinary meaning absent Parliament specifying that they are to bear a statutorily ascribed meaning.

37. In my judgement the internal failing of the administrative procedures within the appellant company, which gave rise to the (unexplained) oversight, do not amount to

an excuse which, when viewed objectively, can properly be characterised as reasonable.

38. HMRC may contend that as the penalty regime is a statutory regime, this Tribunal has no jurisdiction to substitute a sum but only to uphold the penalty or set it aside (in whole or in part) in respect of any period for which a reasonable excuse is demonstrated. I recognise a further exception in law, which is that where HMRC, through its conspicuous unfairness and failure to operate the penalty regime in the manner that was and is intended by and in the contemplation of Parliament, the common law principles that I have identified above are sufficient to justify this Tribunal mitigating or setting aside part of the penalty, in appropriate factual circumstances.

39. Applying those principles this appeal is allowed in part and the penalty reduced to £300.

40. 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 in part.
The penalty is reduced to £300.

TRIBUNAL JUDGE
RELEASE DATE: 5 OCTOBER 2011