TC01537

Appeal number: TC/2011/104397

CIS late filing. Reasonable excuse. Burden of proof.

FIRST-TIER TRIBUNAL

TAX

T D G CARPENTRY AND JOINERY 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 7 October 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 8 June 2011 and HMRC's Statement of Case submitted on 15 July 2011.

DECISION

1. By its Notice of Appeal dated 8 June 2011 the appellant company appeals against penalties totalling £2600 in respect of alleged late filing of monthly CIS documents with HMRC. The appellant also seeks permission to appeal out of time, which HMRC says it does not oppose. Permission is granted.

2. It is essential that I understand precisely what is and is not admitted by the appellant because that bears heavily upon what needs to be proved by HMRC, upon whom the onus of proof lies if late filing in respect of any month for which any penalty has been levied, has not been admitted.

3. In my judgment the 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.

4. 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.

5. In my 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.

6. The Notice of Appeal is uninformative and difficult to follow. The appellant was asked to give its reasons for the appeal and said *"All dates are wrong and do not tally*

up." Under the heading Grounds of Appeal the writer said that he found it difficult to fill out forms and said that the appellant's tax was always up to date. He referred to going through a very difficult time financially and suffering from depression. It was again asserted that *"All dates on the letters do not tally up and furthermore half of the penalties have been paid. The letters state things that I have never received."*

7. I do not construe anything in the Notice of Appeal or anything else submitted by the appellant as constituting an admission of late filing in respect of any specified period. In the appellant's letter of 23 March 2011 there is a sentence that reads *"I have now sent all the relevant paperwork off and will keep it up to date."* There is no indication in respect of what period or periods that paperwork referred to.

8. HMRC has filed a Statement of Case. A Statement of Case is not evidence; it is in the nature of a pleading. It is true that under the heading "Facts" HMRC sets out various periods between July 2009 – March 2011 in respect whereof it alleges that late filing took place.

9. If HMRC wishes to prove its case, in judicial proceedings, it is up to it to adduce evidence in respect of its allegations and all and any facts that it needs to prove. It might seek to do that by putting in one or more witness statements from a person or persons who can speak to the relevant facts from their own knowledge or from knowledge gained by them personally perusing the relevant record keeping system or systems. If appropriate, the appellant then has a witness who can be cross examined.

10. The appellant's position seems to be that it may have been in default for some periods, but it makes no admissions concerning which periods. The appellant also makes it clear that it contests various dates, says that they are wrong and that they do not "tally up". In those circumstances HMRC was firmly on notice of the need to adduce evidence to prove the alleged defaults. It could do that by producing appropriate evidence or by seeking an admission from the appellant as to any period or periods in respect whereof the appellant admits that there was a default and in respect whereof no penalty has already been paid.

11. The state of the material made available to me, which does not include any evidence from HMRC (as opposed to a Statement of Case), does not allow me to conclude that in respect of any specific month, HMRC has proved the alleged default. As I have indicated above, this is not some mere legalistic formality. The European Court has made it clear that penalties are in the nature of criminal proceedings and thus the full rigour of article 6 ECHR applies.

12. HMRC has it within its power, if it sees fit, to adduce proper evidence and/or to seek admissions from an appellant (whether before or after the service of witness statements). Absent such evidence it is inevitable that this appeal is allowed as HMRC has not discharged the onus of proof upon it.

13. 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 £2,600 is set aside in full.

TRIBUNAL JUDGE
RELEASE DATE: 2 NOVEMBER 2011