TC01538

Appeal number: TC/2011/04290

Burden/onus of proof. End of year returns (late filing of). Jusilla v Finland.

FIRST-TIER TRIBUNAL

TAX

GREEN ISLAND PROMOTIONS 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 2 June 2011 and HMRC's Statement of Case submitted on 12 August 2011.

DECISION

1. The appellant company appeals against penalties totalling £2000 in respect of alleged late filing of end of year returns (P35 & P14) which an employer has to file by 19 May in each year. The Statement of Case filed by HMRC (which is in the nature of a pleading, rather than evidence) alleges that for the tax year ended 5 April 2009 the appellant failed to file its end of year returns until 6 May 2011. In respect of the tax year ended 5 April 2010 it makes the same allegation.

2. In respect of the tax year ended 5 April 2009 HMRC alleges that a first interim penalty notice in the sum of £400 was issued on the 28 September 2009; a second penalty notice totalling £400 was issued on 25 January 2010; and a subsequent penalty notice totalling £400 was issued on the 24 May 2010.

3. In respect of the year ended 5 April 2010 HMRC alleges that a first penalty notice totalling £400 was issued on the 27 September 2010 and a subsequent penalty notice totalling £400 was issued on 24 January 2011.

4. HMRC has given no explanation as to why it delays so very long in sending out a first penalty notice where there has been an alleged default in filing employer's end of year returns.

5. The appellant's Grounds of Appeal are to be found in its documents dated 24 March 2011 appended to its Notice of Appeal. The appellant says that when it received the first penalty notice in January 2010 it, by its bookkeeper Mrs Griffiths, was most surprised. She says that she sent a prompt reply to HMRC, but, surprisingly, has not exhibited a copy thereof. She says that as no reply was received to her letter she proceeded on the basis that all was well. Her letter proceeds on the basis that nothing further was received from HMRC until a letter dated 17 February 2011 was received, alleging that the appellant had not responded to previous notices or correspondence. That is something that Mrs Griffiths disputes. She says that a further communication was received from HMRC on 11 March 2011 and that it was not until 14 March 2011 that HMRC confirmed that it had received the appellant's letter (presumably the letter of 11 February 2011).

6. It seems that HMRC treated the appellant's letter or letters as an appeal because it undertook a review and then sent its letter of 15 March 2011, by which it said that each penalty was upheld. Misleadingly that letter went on to say that the appellant might avoid the penalty if it had a reasonable excuse and that to establish a reasonable excuse it had to show that there was "*an exceptional event beyond your control"* which had prevented the return being sent on time. The assertion that for there to be a reasonable excuse, there must be exceptional circumstances is, as a matter of law, wrong. The words "reasonable" and "excuse" are ordinary English words in everyday use. As the relevant legislation does not provide a statutory definition for either of those words or for the phrase "reasonable excuse" there can be no justification for giving them anything other than their ordinary everyday meaning. For a reasonable excuse to be made out there are only two requirements. The first is that the appellant must put forward an excuse and then, if it does so, it must be decided whether, when

viewed objectively, that excuse is reasonable in the context of the delay that has triggered the penalty. Each case will turn on its own facts, but every case involves applying the same test or approach; as explained above.

7. It must be observed that this is not a case where the appellant admits that any late filing took place. On the contrary, it is clear that Mrs Griffiths is saying that she did send the end of year returns for the year ended 5 April 2009, hence her surprise upon receiving a penalty notice in January 2011. She makes no reference to the alleged penalty notice sent in September 2009. If HMRC wishes to rely upon the fact that any such penalty notice was sent, it must prove that alleged fact.

8. The letter from Mrs Griffiths proceeds on the basis that the appellant did not then hear from HMRC until January 2011. The Statement of Case proceeds on the basis that HMRC had sent a first penalty notice on the 27 September 2010. If it did so, it is for HMRC to prove that it did so.

9. The Statement of Case and the several documents appended thereto are not, without more, evidence in judicial proceedings. The exhibited documents do not speak for themselves. They require to be contextualised with evidence speaking to their provenance, content and relevance. Indeed, where codes appear on them, those codes need to be explained. I cannot guess what they mean.

10. This is not some legalistic objection. In my judgment the legal position 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 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.

13. Accordingly, it must be for HMRC to prove the alleged defaults. It has chosen not to adduce any evidence. It has been open to HMRC to seek to prove its case, either by adducing witness statements from witnesses who can speak to the relevant matters (either from their own knowledge or from perusing and producing records kept by HMRC) and/or by seeking appropriate admissions from the appellant (either before or after serving witness statements).

14. The Grounds of Appeal put too many facts in issue which remain in substantial doubt. HMRC asserts in its Statement of Case that various penalty notices were sent to the appellant. No copy of any such Penalty Notice has been adduced. HMRC has produced a copy of what looks like something from a computer screen which records dates upon which it is noted that certain documents may have been produced, but even then this is in code (which is unexplained). In these proceedings there is no evidence to the effect that any such notices were generated or dispatched. That is an important point in a case where the appellant contends (inferentially if not expressly) that at least some of them were not received. I cannot and will not proceed on the basis or assumption that that which is said to be recorded as having happened, necessarily happened, in circumstances where the appellant contends otherwise.

15. The facts said to give rise to the various penalties must be proved (on the balance of probabilities) by admissible and reliable evidence. That has not happened in this case.

16. For the above reason alone the appeal must be allowed in full.

17. However, even if the appeal had not been allowed for the foregoing reason it would have succeeded in respect of the tax year ended 5 April 2009 on the basis that Mrs Griffiths says that she genuinely believed that the necessary filing had taken place on time. If, as she says, no letter (or penalty notice) was received until January 2010, she would not have been on notice until that time, that her belief was incorrect. A genuine or honest belief that something has been done, can and does amount to a reasonable excuse for not thereafter doing the same thing, at least until such time as the person holding that belief knows that the belief is incorrect. However, that would not explain why there was no submission until May 2011. It follows that if this appeal turned solely on this point I would have upheld the penalty for the year ended 5 April 2009, but in the limited sum of £400.

18. In respect of the year ended 5 April 2010 Mrs Griffiths says that she sent the return, in good time, by way of an online filing. HMRC has not proved that that is

incorrect. Even if it was incorrect, I accept that Mrs Griffiths honestly and genuinely believed that she had done so. An honest and genuine belief amounts to a reasonable excuse at least until such time as the person holding that belief is given to understand that the belief is incorrect. The Court of Appeal has recognised that principle in R v Unah : The Times 2/8/11 (Elias LJ, Wyn Williams J & Sir David Clarke).

19. This is also a case where, even on its own case, HMRC has delayed for an inordinate period of time in sending out first penalty notices alleging that a penalty is due by reason of a failure to file by the 19 May in the appropriate year. This Tribunal has made it clear that there can be no justification for such inordinate delay. Given that HMRC is under a statutory duty to levy and collect an appropriate penalty upon a default taking place, it cannot have been the intention of Parliament that HMRC would delay for so long in fulfilling its duties. A penalty notice acts as a *de facto* reminder to a person in default that he is in default and that the default needs to be remedied. I appreciate that HMRC is under no duty to send a reminder, but that is not the point. The reality is that a penalty notice, whether or not intended to act as a reminder, has the effect of so doing. It is well known to this specialist Tribunal that HMRC does not delay in sending out default or surcharge notices where VAT returns are not filed or VAT is not paid. In those circumstances the surcharge sum does not increase with the passage of time, in contrast with penalties for the late filing of end of year returns which increase month on month.

20. In this appeal I need say nothing further about that issue because this appeal must succeed for the reasons which I summarise below.

21. The first reason is that in a case where the fact of default is disputed, HMRC has failed to adduce any or any sufficient evidence to satisfy me that it is more probable than not that each alleged default has taken place. The fact, as alleged, that HMRC sent out penalty notices (itself disputed in part) does not prove that the defaults took place. If correct, it would establish no more than that such notices were sent out. They may have been correctly sent out; they may have been sent out incorrectly.

22. As indicated above, an honest and/or genuine belief in the fact that something has been done, can and does amount to a reasonable excuse for not doing it thereafter at least until such time as the person holding that belief comes to know that the belief is incorrect. I find as a fact that Mrs Griffiths, so far as the year ended 5 April 2009 is concerned believed that a paper or manual filing had taken place. Further I find that HMRC has not proved that no such filing took place. As Mrs Griffiths accepts that a letter or penalty notice was received in January 2010, that reasonable excuse would have come to an end at that juncture. On the basis of the information set out in the Statement of Case, no penalty has been demanded in respect of any period subsequent to May 2010. It follows that on this alternative basis the appeal in respect of that first year must succeed in full as no part of the demanded penalty refers to any period subsequent to January 2010.

23. In respect of the year ended 5 April 2010 Mrs Griffiths says that the appropriate filing took place online and she says that no information indicating to her that it had

not taken place, was received until January 2011. Again, based upon its Statement of Case, HMRC has not demanded any penalty in respect of any period subsequent to January 2011. It follows that the appeal in respect of that year also succeeds on this alternative basis.

24. I do not consider that I am able to make any further findings of fact in a case where the evidence provided to me is scant and unsatisfactory, notwithstanding that it must have been clear to each party to the appeal that significant factual issues are in dispute. It is thus surprising that neither party has seen fit to adduce evidence by way of witness statements dealing with those facts that are plainly in issue. Given that this is a case where HMRC bears the onus of proof on the issue of default and the facts said to prove each and every default, it follows that its failure to adduce evidence leads to the conclusion that it has failed to prove its (alleged) case.

25. 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.

The appeal is allowed in full.

TRIBUNAL JUDGE
RELEASE DATE: 2 NOVEMBER 2011