TC01725

Appeal number: TC/2011/05746

P35. End of year return. Reasonable excuse. Conscionable conduct. Oxfam explained.

FIRST-TIER TRIBUNAL

TAX

HILLTOP SYNDICATE SHOOT **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 21 November 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 22 July 2011 and HMRC's Statement of Case submitted on 22 September 2011.

DECISION

The Facts.

1. The Hilltop Syndicate Shoot is described as a small fun shooting club, which is non-profit-making. Nonetheless, it seems to have at least one employee, perhaps part-time, and so is under an obligation to file an employer's end of year return, P35, by 19 May in each year. It accepts that it did not file such a return by 19 May 2010.

2. The consequence was that by its Penalty Notice of the 27 September 2010 the respondent imposed a penalty of £400, being calculated as £100 per month for the four month period ending 19 September 2010. As the notice was sent so very late, inevitably, a further £100 penalty up to 19 October 2010 would accrue, even if the necessary filing had been made immediately upon receipt of the Penalty Notice. In fact the filing did not take place until 17 February 2011 and so a penalty of £900 has been demanded by HMRC.

3. On 15 November 2010 Mrs Gough wrote to the respondent on behalf of the Syndicate and explained that an individual who had undertaken to look after the PAYE & NI matters for the Syndicate had badly let them down and that she, Mrs Gough, had come across many unopened letters that required attention. One of those letters was the Penalty Notice dated 27 September 2010. In the penultimate paragraph of her letter she asked that the correct forms should be sent to her so that she could deal with the matter forthwith.

4. For a reason that has not been provided to me by the respondent, HMRC did not see fit to send a substantive reply to that letter (albeit that a brief acknowledgement was sent). That was not only discourteous; it was also prejudicial because the respondent has subsequently contended that the necessary filing could only take place online. If the courtesy of a reply had been afforded to Mrs Gough, I have little doubt that it would/should then have been pointed out to her that the necessary filing had to take place online.

5. Mrs Gough says that the next communication from the respondent was a letter dated 28 April 2011, which opens with the sentence *"You have not responded to our previous attempts to collect your debt."* On Mrs Gough's evidence, which I accept, that was simply wrong.

6. Mrs Gough swung into action and explained in her letter dated 12 May 2011 that she had made several telephone calls to the respondent to request a paper return form so that she could complete it forthwith. She makes the point that she had not then been informed that a paper return would not be acceptable. She says that she then waited but no paper return form materialised, and that on a subsequent occasion when she contacted the respondent by telephone, she was told that it was impossible to file the return on paper. She makes the point, very sensibly, that if she had been provided with that information, either in response to her letter of 15 November 2010 or during the earlier telephone calls that she made, she would have taken the appropriate action to set up an online filing facility.

7. Mrs Gough says in her letter of 22 July 2011, which is, in reality, the Grounds of Appeal for the appellant, that she never ignored correspondence and has done everything within her power to file the return once she discovered that it had not been duly filed. I accept the factual assertions in each of Mrs Gough's letters as setting out a truthful and accurate factual account.

8. The First Penalty Notice is dated 27 September 2010. The respondent has provided no explanation as to why it waited more than four months after the last date for filing, that is 19 May 2010, before sending out that Penalty Notice.

9. Furthermore, notwithstanding that the respondent has been in possession of the factual information provided by Mrs Gough, it has not taken issue with any of it. The respondent has not explained why, when Mrs Gough telephoned to ask for a paper return so that the necessary filing could take place, she was misled into believing that a paper return would be sent and that a paper filing could take place. If the respondent is to impose penalties upon people, on an automatic basis, it is of vital importance that the respondent provides accurate information to people when they make enquiries about their various obligations. Tax matters are complicated and not necessarily understood by many members of the public, especially those without professional assistance. In those circumstances it is especially important that HMRC provides accurate information to such people when they telephone to make appropriate enquiries. I find as a fact that that did not happen in the instant case and that Mrs Gough was misled into believing that (i) a paper return would be sent to her, and (ii) that the return could be filed on paper. The latter finding is put on the basis that whilst Mrs Gough may not have been expressly told that she could make a paper filing, such a representation is implicit in the promise to send her the appropriate form so that that could be done.

The Law.

10. 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.

11. 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 ....."*.

12. 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.

13. 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.

14. 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.

15. 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.

16. 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.

17. 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.

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

19. 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.

20. 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.

21. 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.

22. 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.

23. 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.

24. 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.

25. 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.

26. 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.

27. 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.

28. 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).

29. 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.

30. It is for HMRC to prove that a penalty is due. In this case that requirement is satisfied because the appellant admits its delay.

The Outcome.

31. When I apply those legal principles to the facts of this case I unhesitatingly arrive at the conclusion that there was inordinate delay in sending out the First Penalty Notice.

32. However, I then have to consider whether that delay has been causative of any part of the penalty accruing which, but for that delay on the part of the respondent, would not have accrued due. That takes me back to the letter of 12 May 2011 where Mrs Gough explains that the fact that there had been a failure to file the end of year return did not come to her attention until early November 2010, just before she wrote her letter of 15 November 2010. Thus, it is difficult to see how it could properly be said that the delay on the part of the respondent in sending out the First Penalty Notice has prejudice the appellant because, as I find, even if a First Penalty Notice had been sent out in good time, that is, within 14 – 21 days of 19 May 2010, it seems clear from Mrs Gough's letter that it would have remained unopened and unknown about until November 2010. There is no reasonable excuse for that situation because any excuse would be predicated on the basis that the organisation's internal administrative system was at fault. A party cannot rely upon its own internal failings as a reasonable excuse. If the position was otherwise, every completely disorganised business could successfully blame its own internal shortcomings for failures to comply with regulatory requirements.

33. The penalty in this case is £900. The end of year return was received by the respondent on 17 February 2011. I find as a fact that but for the fact that Mrs Gough was misled about the possibility of both receiving and sending in a paper return, the return would have been filed online at a much earlier date had she been given accurate information, that is, information to the effect that the filing could only take place online. There can be no criticism of Mrs Gough for waiting for a paper return form to

arrive given that she had been given to understand that one would be sent to her and she had not been informed that filing had to take place online.

34. I find as a fact that had Mrs Gough been given accurate and correct information either by way of an appropriate reply to her letter of 15 November 2010 or in her various telephone discussions with the respondent's staff, the necessary filing would have been affected online by not later than 15 December 2010. It follows that the penalty must be reduced to £700.

35. 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. Penalty reduced to £700.

TRIBUNAL JUDGE
RELEASE DATE: 5 January 2011