



TC01635

Appeal number: TC/2011/05565

Default by HMRC. Reasonable excuse. Burden of proof.

FIRST-TIER TRIBUNAL

TAX

ALLAN ARMSTRONG

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 14 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 18 July 2011 and HMRC's Statement of Case submitted on 12 September 2011.

DECISION

1. The appellant, Mr Armstrong, has applied for permission to appeal out of time against a fixed penalty levied against him by the respondent. In its Statement of Case
5 the respondent has taken no objection to the Tribunal granting permission for a late appeal to be pursued. By reference to the overall merits of the appeal and the fact that the appeal is not inordinately out of time, I grant permission to appeal out of time.
2. By its letter of 29 March 2010 the respondent wrote to the appellant telling him that it believed that he should be completing a tax return "each year". The letter went
10 on to say, in its second paragraph : "*We will let you know which tax return we want you to complete. At this point we will also tell you the date by which the completed tax return must be received by us.*"
3. The respondent claims, in its review letter of 13 June 2011, that the appellant was then sent another communication on 4 June 2010. It said "*A notice to file letter was
15 issued to you on 4 June 2010. A notice to file letter replaces the issue of a tax return and it advises you of your obligations and that filing a return is necessary. On 16 December you were issued a reminder to file your tax return.*"
4. In the appellant's Notice of Appeal he says that he received the letter of 29 March 2010 and the letter of 16 December 2010. He says that he did not receive any
20 communication dated 4 June 2010.
5. The appellant's case is that he has a reasonable excuse for not undertaking the filing by 31 January 2011 because he had been expressly told by the respondent, by its letter of 29 March 2010, that he would be told which kind of tax return he was required to complete. His case is that he was never so informed. If that is correct, he
25 has a reasonable excuse for not making the filing because the respondent had expressly told him that it would provide him with specific information which, on the appellant's case, it failed to do. In those circumstances I am entirely satisfied that he was entitled to wait until he was provided with the promised information.
6. Thus, the sole issue in this case concerns whether the respondent did or did not
30 send the required and promised information to the appellant. On that issue there can be no doubt that the respondent bears the onus of proof. That is because this is a penalty case and the jurisprudence of the European Court of Human Rights in **Jussila v Finland (2009) STC 29** emphasises that article 6 ECHR applies. The consequence of that provision being applicable is that the respondent bears the onus of proving the default which, on the facts of this case, is admitted. Where the appellant then raises
35 the point that as a result of default on the part of the respondent it did not receive promised information, being stipulated by the respondent as a pre-requisite to him filing a return, the legal burden of showing that that is wrong rests upon the respondent. The appellant has discharged the evidential burden by raising that as an
40 issue in the appeal, but the respondent retains the legal burden of proving its case that a penalty is due and it can only do that if it adduces evidence to negate the appellant's case that he did not receive the communication of the 4 June 2010.

7. The respondent has not seen fit to exhibit a copy of any letter or communication of 4 June 2010 alleged to have been sent to the appellant, to a witness statement or otherwise. It simply makes the assertion in its review letter of 13 June 2011 that “A notice to file a letter was issued to you on 4 June 2010.” I know nothing about the basis upon which the author of that letter was able to make any such assertion. The appellant says that he received no such communication. There are two possibilities. The first is that the letter was not sent. The second is that it was sent, but went astray in the post. I suppose there is a third possibility, which is that the appellant is simply not being truthful.
8. From the tenor of the appellant's request for a review I am certainly not persuaded that he is somebody who would resort to dishonesty over this comparatively minor matter.
9. Accordingly, the respondent must prove, on the balance of probabilities, that it did send the claimed letter of 4 June 2010 to the appellant. In my judgement it has adduced no evidence or, at least, insufficient evidence, to make out that proposition.
10. In those circumstances I must consider whether the appellant has a reasonable excuse for his admitted default in circumstances where he was informed by the letter of 29 March 2010 that he would be informed what kind of tax return he was required to provide. If the respondent informs an appellant that it will inform him of what kind of Tax Return he is required to file but then fails to do so, it does not lie in the respondent's mouth then to complain that the required tax return is late. Or, to put it another way, it is my judgement that the appellant then has a reasonable excuse for not filing the allegedly due tax return in circumstances where he is still awaiting promised information from the respondent. The respondent may well say that it is the obligation of a taxpayer to file a tax return. That is true. Nonetheless, where misleading information is given or where a promise to provide information is given but not honoured, it undoubtedly gives rise in the mind of a taxpayer to the proposition that he can and should await the provision of the promised information prior to filing the tax return. In my judgement it would be grossly unfair for the respondent to promise to provide information prior to an appellant being required to file a tax return and then, having failed to provide that information, to claim that the appellant is in default and that it, the respondent, can justifiably levy a penalty. That would offend any notion of fairness and plain dealing.
11. 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.

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**TRIBUNAL JUDGE
RELEASE DATE: 7 DECEMBER 2011**

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