



TC01637

Appeal number: TC/2011/05595

Penalty; late filing; fairness; s98A(2)(a) TMA 1970. Conscionable conduct.

FIRST-TIER TRIBUNAL

TAX

TALKABOUT PUBLISHING

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 16 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 16 July 2011 and HMRC's Statement of Case submitted on 23 August 2011.

DECISION

1. By its Notice of Appeal Talkabout Publishing appeals against a penalty of £500 imposed upon it by the respondent on the basis that, as an employer, it failed to file its P35 end of year return by 19 May 2010. The Penalty Notice was dated September 2010, more than four months after the date of default.
2. 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*”.
3. It is very clear from the Notice of Appeal that the alleged default is admitted in the sense that the appellant accepts that a P35 was not submitted by 19 May 2010 but says that it believed that it did not need to make such a filing because there was no outstanding liability in respect of the fiscal year ended 05 April 2010. That was an error of law on the appellant’s part. A letter from JPO Accountancy Ltd dated 23 March 2011, submitted on behalf of the appellant, says that the appellant's office in Chester had been subject to a catastrophic fire and the whole building, including all the business records, destroyed. Precisely when that happened is not disclosed. That is relevant because this is a case where the appellant seeks leave to appeal out of time. The respondent has not addressed that issue in its Statement of Case.
4. I have looked at the period of time during which there was delay, the reason put forward for it and the overall merit of the appeal and I conclude that leave to appeal out of time should be granted.
5. This appeal must succeed and the penalty is reduced to £100. That is because 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 as it ought to have done if it was to comply with its duty to collect in such a penalty in accordance with the obligations placed upon it by Parliament.
6. 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, and usually is otherwise in P35 default situations.
7. 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 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 the penalty notices 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.

8. 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.

9. I find as a fact that the default would have been remedied forthwith had a timeous First Penalty Notice been issued within an appropriate timescale, that is some 14-21 days after the 19 May 2010. The appellant's post notification conduct dictates such a finding.

10. In this case the First Penalty Notice was issued in September 2010 four months post default.

11. In my judgement it was conspicuously unfair of HMRC to fail to send out a First Penalty Notice until 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 a period exceeding four months during which, had an appropriately timed First Penalty Notice been sent, the appellant could, and as I find, would have avoided all but the first monthly penalty of £100 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 14 -21 days after the 19 May in each year.

12. 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.

13. The respondent may say that it is under no obligation to send out any reminder notices in respect of end of year returns. That is undoubtedly correct. However, that is to confuse and misunderstand its obligations. The obligation cast upon the respondent, by Parliament, is to charge and collect in penalties that fall due. A proper discharge of

that duty requires, in my judgement, that when a penalty falls due on 20 May of any year, if an end of year return has not been filed, the respondent should then seek to collect in that penalty without undue delay. If, without undue delay, the respondent sent a Penalty Notice, regardless of the fact that it is under no obligation to serve a reminder notice, the First Penalty Notice would act as a *de facto* reminder. Thus, if the respondent discharged its duty, as Parliament intended it to do, the respondent would not be issuing a reminder but would be issuing a different kind of document which, in fact, would have the same effect as the service of a reminder notice. In my judgement, there can be no justification or reasonable excuse for the respondent failing to send such a First Penalty Notice within 14 – 21 days of the penalty being incurred (as of the 20 May in any year). Its failure to do so means that it is not undertaking its responsibilities as provided by Parliament.

14. A fair minded objective observer would readily identify conspicuous unfairness in the failure to send a timeous First Penalty Notice from the following :

15 (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.

20 (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.

25 (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.

30 (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.

35 15. 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 the 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 the entire period save for the first month, should be disallowed so as to negate the effect of that identified conspicuous unfairness.

40 16. 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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Decision.

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The appeal is allowed in part and the penalty is reduced to £100.

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TRIBUNAL JUDGE
RELEASE DATE: 7 DECEMBER 2011

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