



TC02010

Appeal number: TC/2011/05680

Penalty. Date of Return. Waiver. Reasonable excuse. Date from which penalties can run.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

KATHLEEN LOMAS

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY'S
REVENUE & CUSTOMS**

Respondents

TRIBUNAL: JUDGE GERAINT JONES Q. C.

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 21 July 2011 and HMRC's Statement of Case submitted on 13 September 2011.

DECISION

1. In this appeal the Tribunal has already promulgated a Summary Decision. As it was entitled to do, the respondent has asked for full written reasons. The initial decision was put as follows: *The Tribunal decided that the appeal is allowed. The respondent imposed a penalty of £100 on the appellant for alleged late filing of a tax return for the fiscal year ended 5 April 2010. A document attached to the respondent's Case Statement headed "Return Summary", applicable to the appellant, records: "Return Captured Date: 27/01/11." That document demonstrates that the tax return was received in due time. If it is the respondent's case that that return was on paper, rather than filed electronically, the fact that it captured the return and accepted it demonstrates that it waived the requirement for online filing and accepted the paper return. Thus it was not late. The appellant having paid the penalty of £100 already, same must be returned to her, with interest."*

2. This is a case involving penalties. Accordingly, it is for HMRC to prove that there has been the relevant default in the absence of same being admitted. 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.

3. 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.

4. 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*".

5. In this case, the respondent alleges that the appellant failed to file a paper tax return for the fiscal year ended 5 April 2010 by the due date. It does not put its case on any other basis.

6. The appellant has set out the facts that she relies upon in her Notice of Appeal. In the Case Statement submitted by the respondent, no issue appears to be taken with the reliability or accuracy of the factual account put forward by the appellant. I accept her account as factually accurate. The appellant is a lady who, it is accepted, has no blemish on her tax return or tax payment record over the last 40 years. There is no reason whatsoever to doubt her veracity.

7. The appellant's case is that she received a letter on 10 January 2011 informing her of the need to complete a self assessment tax return. She says, and I accept, that on that very morning she telephoned the respondent and was promised that a paper return would be sent out to her. I pause to observe that HMRC has given no explanation as to why one of its

personnel should have offered to send out a paper tax return when, on its case, the deadline for using a paper return had expired and, thereafter, only online filing would be acceptable. Similarly, it has given no explanation for why a member of its staff desisted from informing the appellant that it was too late for her to file a paper tax return and, instead, must now file online. The respondent complains that the appellant did not have her own house in order but gives no explanation for not having its own house in order in terms of the information and/or advice given by it to the appellant.

8. The paper return was then received by the appellant, who sent it to the respondent, duly completed, on 17 January 2011. The appellant was out of the country from 18 January 2011 until mid-March 2011. It is not in dispute that once the appellant received the paper tax return, she submitted it promptly. It is not in dispute that it was received by HMRC in due course of post and, as I find, well before 31 January 2011. The returned information resulted in a sum payable of £270.84 which the appellant paid by bank transfer on 18 March 2011, the day after she had returned to the country.

9. I accept the appellant's account that she had not, prior to 10 January 2011, received a paper tax return or notification to file a return.

10. A document attached to the respondent's Case Statement is headed "Return Summary" and contains within it the statement "Return Captured Date : 27/01/11". It is plain from the fact that the respondent sent out a tax demand or assessment, in the modest sum of £270.84, that it had received and acted upon the paper tax return. That raises the issue as to whether it thereby waived the requirement for the appellant to submit an electronic tax return and/or waived the expiry date for valid filing of a paper return. The respondent points to section 8(1D) Taxes Management Act 1970 which states that a paper return must be filed by 31 October 2010 or online filing must be by 31 January 2011. That statute does not provide that the respondent might not waive the requirement for a paper return to be submitted by 31 October 2010. It is silent on the issue.

11. The penalty regime is in section 93(2) TMA 1970. In practice it contains a "wait and see" provision. If a person does not file a paper tax return by 31 October in a given tax year, that does not trigger a penalty. That is because HMRC can only levy a penalty if a tax return is not filed on time. Thus HMRC has to wait and see whether an online filing takes place by 31 January of the following year. If it does, there can be no question of any penalty whatsoever. If it does not, then HMRC does not levy a penalty on the basis that a paper filing is late; it levies it on the basis that the overall filing obligation has not been fulfilled by 31 January of the relevant year, with penalties beginning thereafter.

12. Ordinarily, a private person who has a right, or a public body that can require a person to perform a duty, may waive that right or requirement in the exercise of his or its discretion. In the case of a public body, normal public law principles will apply. In that circumstance a public body may waive a requirement only if it is reasonable, in the public law sense, for it to do so.

13. Waiver may take place by express words or by conduct. When the respondent received the paper tax return from the appellant it was open to it to return it and explain to the appellant that it could and would not accept a paper return, but, instead, the appellant must file online. The respondent did not know that the appellant was out of the country and that any letter sent to her, after it had received the paper return, might not be seen by her until after 31 January 2011.

14. I have to ask myself the question whether, by its conduct in capturing, receiving and acting upon the paper tax return sent in by the appellant in mid-January 2011, the respondent thereby waived the requirement for a paper tax return to be filed by 31 October 2010 and/or for online filing to take place by 31 January 2011. The fact that HMRC did not return the paper tax return and insist that the appellant must file online leads me inexorably to the conclusion that it did, by its conduct, waive the requirement for the paper return to be filed by 31 October 2010 and/or for the appellant to file online by 31 January. If any different construction is to be placed upon the events that occurred, there would be obvious prejudice to the appellant. The obvious prejudice is that as she was not promptly informed that HMRC was not accepting her paper return as a tax return filed within time (so as to avoid any penalties), she lost the opportunity to file online within time and thus avoid any penalty. It is not for HMRC to act in such an unconscionable manner. I find as a fact that HMRC accepted the paper tax return filed in mid-January 2011 as a validly filed return for the tax year, thus giving rise to no penalty implications. If HMRC did not want that construction put upon its conduct it should, as a matter of good conscience and proper administration (it being a public body that should abide by the highest standards of good administration and fairness), have promptly informed the appellant that its acceptance and acting upon her filed paper return should not be construed by her as an indication that she had fulfilled her filing obligations and that she should, nonetheless, file online by 31 January 2011 if she wished to avoid a penalty. It did not do so.

15. I do not know what, if any, arrangements the appellant had in place for receiving her mail whilst away on holiday or for being notified of its contents. The appellant plainly and honestly believed, as I find, that she had fulfilled her tax return filing obligations by mid January 2011.

16. There can be no doubt that, as a matter of law, if a person honestly believes that she has done that which she is required to do, that may amount to a reasonable excuse for not then doing the required act, at least until such time as she becomes aware that the honestly held belief is, in fact, wrong. I find as a fact that the appellant honestly believed that she had fulfilled her filing obligations and that that is why she did not file online by 31 January 2011. There is no evidence to suggest that she could not have done so had she perceived there to be a need to do so. Given the appellant's good tax record, I can further find (by inference) that had she been aware of the need to file online by 31 January 2011, she would have done so. The appellant had the option to file online by 31 January 2011 had she known of the need to do so. Although the respondent has put its case on this basis, it is artificial to regard the presently appealed penalty as relating to the late filing of a paper tax return. The reality of this situation is that it was open to the appellant to file online by 31 January 2011 but that because she quite reasonably believed that her paper tax return was accepted as a validly filed tax return, she desisted from so doing. Accordingly I find that the appellant had a reasonable excuse for her only possible failing that could give rise to a penalty, that is, her failure validly to file a return, that is by filing online which, even now, HMRC does not contend should happen.

17. HMRC argues that the appellant failed to submit her paper tax return by the due date and that penalties are imposed to promote the efficient operation of the tax system, with the responsibility to submit being placed squarely on the shoulders of the taxpayer. That proposition might be acceptable in circumstances where, by its conduct (see above), HMRC has not misled the taxpayer or lulled her into believing that she has fulfilled the obligations. To ignore the latter aspect of this case would be manifestly unjust.

18. In fact, as I find, the appellant has never been told by the respondent that it expected her to file online. That is because, as explained above, it accepted the paper tax return as a validly filed tax return. It has not asserted that any penalty is due because there has been a failure to file online. Such a proposition would be as unjust as it would be absurd. That option was open to the appellant and, as I find, she would have adopted it but for being misled by HMRC personnel.

19. I accept the appellant's evidence that she did not receive a paper tax return in or about April 2010. A taxpayer can only file a paper tax return if one is sent to her. Whilst I accept that it might be open to her to request such a form, this is a case where HMRC has not proved that it sent a paper tax return to the appellant in April 2010 and/or that same was received by her.

20. 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 appellant having paid the penalty of £100 already, same must be returned to her, with interest.

**GERAINT JONES Q.C.
TRIBUNAL JUDGE**

RELEASE DATE: 17 April 2012

