



TC02084

Appeal number: TC/2011/09645

Penalties and surcharges. Onus of proof.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MRS JILL COX

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE GERAINT JONES Q. C.

The Tribunal determined the appeal on 06 June 2012 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 01 November 2011 and HMRC's Statement of Case submitted on 16 January 2012.

DECISION

1. By her Notice of Appeal, the appellant, Mrs Jill Cox, has appealed against a surcharge of £1256.48 levied against her by the respondent against an allegation that she was late in paying tax due and so became liable to a surcharge and also a late filing penalty of £100.
2. The appellant's Notice of Appeal is not easy to follow because where she was asked to set out her Grounds of Appeal, she simply said "please see attached letter". The attached letter is undated, but must be taken to be dated the same as the Notice of Appeal, being 01 November 2011. In that letter the appellant refers to inadvertent delay in paying tax due and refers to the fact that her husband is 74 years of age and she is 68 years of age, living on their pensions. The appellant then goes on to say that at the time when the tax return was due she did not have enough information to complete the Capital Gains Tax section and so they were sent in late albeit accompanied by a cheque. She then says that the documents were returned to her because she had "accidentally not properly signed the documents".
3. The letter then deals with the medical conditions of the appellant and her husband. In the final paragraph the appellant says that the failure to pay tax on time arose from "circumstances completely beyond our control" making it impossible to do so, on time.
4. There is then a second attached letter dated 20 August 2011 and in the second paragraph thereof the appellant asserts that she filed a tax return "on time". She then goes on to say that she has been receiving medical treatment in respect of a painful infected disk in her lower spine. She then refers to not fully signing the tax return and having it returned to her. I do not quite understand how a document can be said to be "not fully signed". Either it is signed, or it is not. In box 8 of the Notice of Appeal the appellant simply says that all the tax was paid, but then adds that postal delays made it impossible to do so within the due time.
5. 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*". A penalty was exacted as well as a surcharge.
6. It is for the respondent to prove the alleged default, unless it is admitted. In **Jussila v Finland (2009) STC 29**, 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, because 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.

5 7. This is a case involving surcharges and 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, 10 which is the trigger for any such penalty or surcharge to be levied.

15 8. 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.

20 9. It is for HMRC to prove that a penalty/surcharge is due. That involves HMRC proving, on the balance of probabilities, that the required end of year filing and/or payment did not take place by the due date.

25 10. My task in this appeal has been made difficult because of the lack of evidence filed by each side. I have assertions provided by the appellant in the letters to which I have referred, which are lacking in detail and particularity. I have the Statement of Case from the respondent, which conspicuously fails to deal with some of the detail that the appellant has set out in her letters.

30 11. For example, the appellant asserts in the third paragraph of her first letter that the tax return was sent in late, but does not say how late. That is material to the issue of whether or not a penalty is due. She also asserts that it was accompanied by a cheque, without specifying the amount of that cheque. The respondent does not even attempt to fill in the detail. In the Statement of Case it is asserted, absent any evidence on the issue, that the appellant's tax return was dated 8 January 2011, but it is said that it bears a received date stamp of 28 March 11. The Statement of Case asserts that the cheque, to which the appellant referred, was received on 28 March 2011. The 35 Statement of Case then goes on to say that "*The appellant has provided no evidence of a return submitted and then returned to her with a cheque prior to the payment date of the 31 January 2011 or the surcharge trigger date of the 28 February 2011.*" That may be so, but she does not bear the onus of proving the alleged default. The appellant has admitted no more than that the return was sent in late but she does not 40 say, or admit, the extent of any such lateness. That is a crucial issue when it comes to the matter of penalties and surcharges.

12. This appeal is by way of judicial proceedings and although proceeding in a Tribunal, where rules of evidence are less formal than they are in some Courts, it is still incumbent upon the party who bears the onus of proof, to lead evidence to establish factual matters relevant to its case. HMRC has chosen to adduce no evidence. Instead, it has simply submitted a Statement of Case which contains various factual assertions which may or may not have been capable of being proved by evidence.

13. I decide this appeal on the basis that the onus of proving the alleged default or defaults is on the respondent. I further decide this appeal on the basis that the respondent has adduced no evidence to prove the default or defaults upon which it relies. It could have adduced evidence but it has chosen not to do so. This is more than a technical matter because, as the European Court has made plain in *Jusilla* a penalty or surcharge case falls to be considered within article 6 ECHR and so it is only right, bearing in mind the need for a fair trial, that the party who bears the onus of proving highly material facts must lead credible evidence to prove those facts. HMRC has not done so and it is not for me to speculate whether it could have done so, so as to make good the factual assertions (which are no more than that) contained in the Statement of Case.

14. It follows that this appeal is allowed on that discrete basis.

15. 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. Surcharge and penalty/penalties set aside.

**GERAINT JONES QC
TRIBUNAL JUDGE**

RELEASE DATE: 18 June 2012