



**TC02137**

**Appeal number: TC/2012/00697**

*Penalty. Late filing. Onus of proof. Late filing denied. No evidence of late filing. Appeal allowed.*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**THE SOURCE PARTNERSHIP**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE GERAIN T JONES Q.C.**

**The Tribunal determined the appeal on 12 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 16 December 2011 and HMRC's Statement of Case submitted on 09 January 2012.**

## DECISION

1. The Source Partnership (“the appellant”) was sent a tax return that it had to file on paper by 31 October 2008 or electronically by 31 January 2009. The fact that it was sent a tax return and was required to submit it by the due filing date is not in dispute.
2. In mid-February 2009 the respondent issued a late filing penalty in respect of each of two partners, in the sum of £100 each. A similar second late filing penalty was issued in early August 2009. The respondent contends that the partnership tax return was not received until October 2009. That is a disputed fact. The appellant contends that its tax return was sent to the respondent within the due filing period and thus no penalties are due.
3. The correct legal position has be considered bearing in mind the amendments to section 50 of the Taxes Management Act 1970, the most recent having come into effect from 1 April 2009 but, more importantly, having in mind the decision of the European Court in Jussila v Finland [2009] STC 29 where, in the context of default penalties and surcharges being levied against the 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 involved criminal proceedings despite them being levied without the involvement of a criminal court. At paragraph 31 of its judgement the court said 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 its inherently criminal character. It specifically pointed out, at paragraph 36 in the judgement, that a tax surcharge or penalty does not fall outside article 6 ECHR.
4. This is a case where penalties have been levied. The issue arises as to who bears the onus of proving the facts said to give rise to liability to a penalty.
5. 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. Absent proper justification for a reversal of the burden of proof, it will be for him who alleges, to prove. That is, it will be for HMRC to prove the alleged default, which is the trigger for the penalties levied in this case.
6. In my judgement there can be no justification for any reversal of the burden of proof. In a penalty or surcharge case all facts and matters relevant to the alleged offence or transgression are within the knowledge of HMRC. If, for example, HMRC alleges that a taxpayer has failed to file a return or make a payment by a specified date, then it will be able to lead evidence that that did not take place. This is not a situation where HMRC is called upon to prove some factual matter peculiarly within

the knowledge of the taxpayer. It is simply a matter of producing appropriate evidence.

7. In this appeal it is perfectly apparent that the taxpayer, by its Chartered Accountant, denies that the tax return was sent in late. In its letter of 16 March 2011 Becketts, Chartered Accountants, assert that the tax return was sent to HMRC but that it appeared "that the original filed return was not processed and the further return was then sent after the filing date." In other words, the appellant's agent was saying that the fault lay at the respondent's end.

8. The approach taken by the respondent is that it is the taxpayer's responsibility to file a return. That is not disputed. However, once a taxpayer has committed his/her tax return to the tender mercies of the postal system he/she is entitled to proceed on the basis that it has been delivered in due course of post. The respondent's position, as set out in its letter of 2 June 2011, was to demand "evidence to show there was an original filed return that was not processed but was received before the filing date". Absent a return being sent by recorded or registered post, that was an unrealistic request. I acknowledge that "proof of posting" slips can be obtained from the Post Office, even for first and second class mail, but there is no duty upon an agent routinely to obtain such proof of posting slips nor is there any evidence that this is the universal practice amongst reasonably prudent agents. Indeed, it involves going to a Post Office rather than simply posting letters at a post box. In any event, the enquiry was misplaced because if the respondent intended to impose a penalty, as explained above, the onus of proving the default giving rise to the penalty, lies upon the respondent.

9. In this case the respondent has adduced no or no sufficient evidence to persuade me that the appellant, by its agent, failed to send the return within sufficient time to avoid the levied penalties. I appreciate that when the first and second late filing penalties were issued they might have been expected to trigger an indignant response. However, I do not consider it proper to infer, from the absence of any such indignant response(s), that it is more probable than not that the partnership return had not been filed timeously.

10. HMRC has failed to prove, on the balance of probabilities, the trigger for the demanded penalties.

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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**Decision.**

Appeal allowed in full.

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

**RELEASE DATE: 19 July 2012**

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