TC01732

Appeal number: TC/2011/05749

Default. P35. Burden of proof. Jusilla v Finland. Reliability of HMRC records.

FIRST-TIER TRIBUNAL

TAX

JEFFREY MARSHALL **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 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 17 June 2011 and HMRC's Statement of Case submitted on 21 September 2011.

DECISION

1. This is an appeal in which the appellant, Mr Marshall, asserts that his employer's end of year return, P35, for the fiscal year ended 5 April 2007, was filed on time, that is, by 19 May 2007. The respondent contends that it was not filed on time.

2. As there is an issue of fact as to whether the filing did or did not take place by 19 May 2007 and as the respondent seeks to impose a penalty upon the appellant, the respondent bears the onus of proving the alleged default.

3. In my judgment the true legal position now has to be considered bearing in mind the decision of the European Court in the **Jussila v Finland (2009) STC 29** where, 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, as 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.

4. This is a case involving 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, which is the trigger for any such penalty or surcharge to be levied.

5. 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.

6. In this appeal the respondent has not seen fit to adduce any or any persuasive evidence to demonstrate that the required filing did not take place on or before 19 May 2007, despite knowing that it is the appellant's case that there has been no default.

7. It is clear that the respondent simply seeks to rely upon its recording system and, inferentially, asserts that that system permits of no margin of error. That is not a proposition that I would consider it proper to adopt and rely upon.

8. I should point out that the appellant's agent, Mr Roome, contends in his letter of 26 May 2011, that his office filed the necessary end of year returns, as usual, for the appellant and several other clients. He also refers to the respondent having alleged that another of his clients had made a late filing. He goes on to say : *"Fortunately, our computer had the electronic confirmation of receipt but owing to a previous computer failure, I cannot go back to 2007 for the two above clients. Further, speaking to fellow accountants, it is clear that they have had similar problems."*

9. That is some evidence of the unreliability of the system upon which the respondent seeks to rely and which it asserts, inferentially, can never be wrong. In the light of such evidence, as set out above, the respondent bears the onus of proving the default. I find as a fact that there is insufficient evidence to prove the fact of default to the required standard, that is, on the balance of probabilities.

10. 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 in full.

TRIBUNAL JUDGE
RELEASE DATE: 9 January 2012

Amended pursuant to rule 37 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 on (06 March 2012).