TC02149

Appeal number: TC/2011/09182

Delivery by post. S7 Interpretation Act 1978. Delivery in due course of post – meaning of. Foresight Financial Services [TC/2011/04204] considered. Conscionable conduct. Penalties – P35.

FIRST-TIER TRIBUNAL
TAX CHAMBER

ROYAL INSTITUTE OF NAVIGATION **Appellant**

- and -

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

TRIBUNAL: JUDGE GERAINT JONES Q. C.
ANNE REDSTON

Sitting in public at 45 Bedford Square, London WC1 on 22 June 2012.

Mr. Stitt for the Appellant.

Miss Oromoloye, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents.

DECISION

1. The appellant, the Royal Institute of Navigation, should have filed its P35 for the fiscal year ended 5 April 2009, by 19 May 2009. It accepts that it did not do so but there is a dispute as to when the P35 was eventually filed. The competing contentions are that the appellant says it was filed on or about 3/4 August 2009 whereas the respondent claims that it was not filed until 8 February 2010. The respondent also contends that no P14s accompanied the P35 and so the filing (if it took place in August 2009) was invalid. It thus contends that valid filing did not take place until 24 January 2011.

2. The appellant was issued with penalty notices totalling £400 and appeals against that penalty on two distinct bases. Those bases are :

(1) that it did validly file its P35 (including the P14s) by posting it on 3 August 2009 so that it should have been received by the respondent, in due course of post, by 4 August 2009;

(2) that, in any event, there has been unfairness or unconscionable conduct on the part of the respondent and so the maximum recoverable penalty is limited to £100.

3. The Tribunal decided the first issue in the appellant's favour. However, we could not agree on the second issue. Judge Jones is the Presiding Member for the purposes of this Tribunal[1] and as such has the casting vote[2]. Paragraphs 25 to 30 set out Judge Jones' conclusions. As he exercised his casting vote, Judge Jones' conclusions are the decision of the Tribunal. Paragraphs 31 to 42 set out Mrs Redston's dissenting judgment.

Authorities and evidence

4. In support of its first argument the appellant relies on the decision of this Tribunal in *MEM Industrial Roofing* [2011] UKFTT 604(TC), and in support of its second argument it relies upon this Tribunal's decision in *Hok* [2011] UKFTT 433 (TC).

5. Each side has submitted various documents to the Tribunal. Mr Stitt is the Treasurer of the appellant and gave witness evidence as well as making submissions. The documents included the following:

(1) An email from the RIN's Chairman to its part-time book-keeper, dated 17 July saying "Thanks for PAYE details. I have transferred £4,798.65 to HMRC through internet banking and let them know. They remind us that we have not yet submitted a P35".

(2) A copy of the P35 signed by the Chairman as Director and dated 1 August 2009, together with a further copy sent to HMRC and date stamped by them as received on 8 February 2010.

(3) An extract from the Register of Use of the appellant's Pitney-Bowes franking machine for August 2009.

[1] Practice Statement on the Composition of Tribunals, 10 March 2009, paragraph 8.
[2] First-tier Tribunal and Upper Tribunal (Composition of Tribunal) Order 2008 (SI 2008/2835) , paragraph 8.

(4) A copy of the penalty notice issued by HMRC, dated 28 September 2009 and date stamped as received on 5 October 2009.

(5) HMRC's Charter.

(6) A copy of HMRC's "Joint Initiative on HMRC Service Delivery" together with a print out from their website headed "Employers will be told sooner about PAYE returns".

(7) An email from Mr Stitt to the book-keeper, dated 11 October 2009 asking "has the missing annual return been filed" and the book-keeper's reply of the same date, in which she says:

> "it was filed months ago, but it was filed late...the reason it wasn't filed is because I misunderstood what was required. I have processed payroll many times but have never been responsible for the annual returns, and at the time, upon reading the form, I thought it was to do with P11Ds. I explained this to the HMRC at the time and they told me that we would probably be fined anyway..."

The first issue: delivery

Submissions on behalf of the appellant

6. The appellant's case is that it completed its P35 on Saturday 1 August 2009, and it was signed by its director on that date. The P35 was sent to the respondent by posting it in the A5 envelope provided on 3 August 2009, being the following Monday.

7. The appellant's Register of Use of the Pitney-Powes franking machine ("the Register") shows that its finance section were charged for three letters in August, two were franked as sent first-class on 3 August 2009 and one was sent second class on 20 August. Mr Stitt gave evidence that one of the letters sent first class on 3 August was the P35. While the Register does not tell us to whom any stamped letter was addressed, it is however consistent with the appellant's evidence that the P35 was signed on Saturday 1 August and then sent out first class (which Mr Stitt said was unusual and a sign of urgency) on the first posting day thereafter.

8. Mr Stitt told the Tribunal that the procedure was that the post room put the franked letters into a pouch and they were collected from the appellant's office by the Post Office on a daily basis.

9. In support of the proposition that the P35 was accompanied by the appropriate P14s, the appellant relies upon the Declaration signed by the Chairman at the bottom of the P35, where the box has been ticked declaring that forms P14 are enclosed.

Submissions on behalf of HMRC

10. HMRC's Statement of Case said that:

> "The legislation does not define 'delivery'. HMRC takes this to mean that a paper return must be physically handed over to Revenue staff or placed in the office letter box. A return sent by post is thus not delivered until it reaches the office."

11. On the question of the P14s, Miss Oromoloye argued (by reference to the e-mail dated 11 October 2009) that because the appellant's book-keeper commented that she had originally misunderstood what was required concerning filing forms P35, we

should infer that no forms P14 accompanied the P35 which the appellant says was posted on 3 August 2009. She also said that when the appellant sent a copy of the P35 to HMRC, which was received by them on 8 February 2011, this P35 did not have the P14s attached.

Decision on the first issue

12. The appellant has satisfied us on the evidence set out above that it did post the P35 on 3 August 2009. That being so, it is for the respondent to prove, if it is able so to do, that same were not posted and/or received in due course of post. That is because section 115(2) Taxes Management Act 1979 provides for delivery by post. By reference to section 7 Interpretation Act 1978:

> "Where an Act authorises or requires any document to be served by post .... then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, prepaying and posting a letter containing the document and, unless the contrary is proved, to have been affected at the time at which the letter would be delivered in the ordinary course of post."

13. Thus, in circumstances where we accept on the evidence that the P35 has been properly addressed, prepaid and posted, the onus shifts to the respondent to demonstrate, on the balance of probabilities, that the documents were not served or filed by being delivered in the ordinary course of post. The expression "*ordinary course of post*" means delivery on the next business day (including Saturdays) where first-class post is used and two business days later where second-class post is used.

14. The respondent has adduced no evidence that goes anywhere near to rebutting the evidence and presumption arising from section 7 Interpretation Act 1978 that the P35 was placed into the post and was received in the ordinary course of post.

15. We considered the parties' submissions on whether the P35 was accompanied by the P14s. We do not consider the inference which Miss Oromoloye asks the Tribunal to draw from the email of 11 October 2009 to be a legitimate or proper inference to draw given that the e-mail plainly relates to the state of mind or understanding of the book-keeper at the time when she originally received the P35. The e-mail does not speak to, nor does it purport to speak to, her state of knowledge or state of mind at any later date. We fear that if we were to proceed as suggested on behalf of the respondent, we would be basing our decision upon speculation rather than legitimate inference. We accept the appellant's submission that ticking of the box on the P35 is supportive evidence for the inclusion of those documents with the P35.

16. Accordingly, we find that any penalty must be limited to £300, being £100 for the two complete months from 20 May 2009 to 19 July 2009, and the part-month from 20 July 2009 until the P35 was deemed delivered under section 7 of the Interpretation Act, on 4 August 2009, regardless of whether the appellant does or does not succeed on the second basis for its appeal.

The second issue: fairness/unconscionable conduct.

17. Having decided that issue, we moved on to consider the second issue.

18. The appellant does not dispute that it filed its P35 late and that some penalty is due. As we have set out above, it was not filed until about 4 August 2009. It is also

not in dispute that the appellant did not receive any form of penalty notice until the Notice of Penalty Determination was issued on 28 September 2009, more than four months after the filing deadline of 19 May 2009.

19. However, the appellant accepts that on 17 July 2009 its Chairman telephoned the respondent concerning PAYE matters and, during the course of that telephone conversation, quite fortuitously he was informed that the respondent had not yet received the P35 for the fiscal year ended 5 April 2009. As we have indicated above, the necessary filing took place about two weeks thereafter. The Tribunal asked Mr Stitt why there was a delay of two weeks, and he said he had "no idea".

20. Mr Stitt asked the Tribunal to apply and follow the decision of this Tribunal in *Hok.* That case is under appeal to the Upper Tribunal, in particular on the issue of whether the First-tier Tribunal has the jurisdiction to consider HMRC's procedural fairness.

21. Miss Oromoloye said that HMRC did not accept that the Tribunal had this jurisdiction but given that the issue is about to be heard by the Upper Tribunal neither she nor Mr Stitt put forward authorities in support of their contentions. Instead, they went on to consider the position assuming that the Tribunal does have that jurisdiction.

22. Mr Stitt said that the penalty should be reduced to £100 on the basis that anything more was unfair; Miss Oromoloye asked the Tribunal to distinguish this case from *Hok.* She said that in *Hok* the appellant was only informed by HMRC in September that it had incurred a penalty; here the appellant had been informally told in July. She also said that HMRC was not required by parliament to give reminders about filing failures; in contrast, there is a statutory obligation placed on the appellant to send in its returns on time.

23. Mr Stitt invited the Tribunal to consider the HMRC Charter, submitting that HMRC had failed to help and support the appellant to get things right, and had failed to act professionally. Miss Oromolye said there had been, on the evidence, no breach of the Charter.

24. Mr Stitt also referred the Tribunal to HMRC's "Joint Initiative on HMRC Service Delivery" and the website printout headed "Employers will be told sooner about PAYE returns". He said that this change of practice was as close as one would get to an admission by HMRC that the practice which was in place for the 2008-09 P35s had been unfair/unconscionable. Miss Oromolye disagreed, saying that these documents were not relevant to the Tribunal's decision.

Judge Jones's analysis and conclusions

25. My starting point is *Hok* and also the case of *Foresight Financial Services* [2011] UKFTT 647 (TC). I refer specifically to paragraphs 3 - 22 in the Decision in the *Foresight Financial Services* case and incorporate them herein by reference. I do not consider it necessary to set them out *in extenso.*

26. Events have moved on since the decisions to which I have just referred. Mr Stitt pointed out to us that in the documents published by HMRC "Joint Initiative on HMRC Service Delivery", it is stated that in December 2011 HMRC stated that by 31

March 2012 it was committed to working together with taxpayers to find ways of avoiding employers incurring and building up end of year P35 filing penalties without being aware of them.

27. Even more encouragingly Mr Stitt pointed out that if we now go to **www.hmrc.gov.uk/news/p35-pens.htm** we find that HMRC now says: *"From 28 April 2012, when they believe a 2011-2012 P35 remains outstanding, they will issue an "Employer Annual Return Reminder" and from 31 May 2012, introduce a "P35 Interim Penalty Letter" which will be issued over a five-day period, so that it reaches employers within a month of the filing deadline."*

28. As Mr Stitt put it, that is as close as one will come to an admission from HMRC that its previous practice, as identified in *Hok*, was at least inappropriate and, quite probably, unfair or unconscionable. I agree. Mr Stitt also pointed out that the change of stance is to be seen as compatible with the HMRC Charter with which HMRC should comply pursuant to section 16A Commissioners for Customs and Excise Act 2005, albeit that that statutory provision talks in terms of HMRC aspiring to reach certain objectives rather than being under a statutory duty so to do.

29. Consistently with the decisions referred to above, I find that there was unfairness and unconscionable conduct in this case because HMRC failed to issue a first penalty notice timeously in accordance with its statutory duty to do so, pursuant to Parliament placing upon it a duty to issue penalty notices if the relevant filing obligations were not met. In my judgment a reasonable time within which a first penalty notice should be issued is not more than 28 days after 19 May in any fiscal year. As previously pointed out HMRC has no difficulty in issuing default notices or demands within 14 days when VAT filings or payments are not made by a due date and it is inconceivable that its computers could not be persuaded to issue Penalty Notices very much earlier than four months post default, that is, within 28 days of any default occurring.

30. It follows that so far as this appeal is concerned, if the appellant had been provided with a first penalty notice not more than 28 days after the default, it would have received a *de facto* reminder (HMRC being under no statutory duty to provide an actual reminder) to file its P35. Even when it received the fortuitous informal reminder, during a telephone conversation in July 2009, the appellant thereafter took about two weeks to undertake the necessary filing. It is reasonable to proceed on the basis that had the appellant received a *de facto* reminder some 28 days or thereabouts post default, it would nonetheless have incurred a second £100 penalty for the second month (or part thereof), in addition to the penalty for the first month, with the result that the penalty in this case should be reduced to £200.

Ms Redston's analysis and conclusions

31. In answer to the question "what does fairness require in the present case" Lord Mustill in *R v Home Secretary ex p Doody* [1994] 1 AC 531 at 560 set out guidelines which have been widely accepted and followed. He said:

> "What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive

> that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects...[3]"

32. At page 561 of the same decision the following principle, accepted by both parties in that case, was endorsed by Lord Mustill:

> "It is not enough … to persuade the court that some procedure other than the one adopted by the decision-maker would be better or more fair. Rather, they must show that the procedure is actually unfair. The court must constantly bear in mind that it is to the decision-maker, not the court, that Parliament has entrusted not only the making of the decision, but also the choice as to how the decision is made."

33. I am thus required to consider whether HMRC have exercised their power in a manner which is fair "in all the circumstances". I note in particular that the principles of fairness "are not to be applied by rote" but instead depend on "the context of the decision and this is to be taken into account in all its aspects."

34. The most significant factor here is that the appellant in this case was advised by HMRC on 17 July 2009 that it had not filed its P35. It is thus, as Ms Oromoloye submitted, different from *Hok*, where the taxpayer was not informed until after 19 September 2009 (by way of the penalty notice) that there had been a default. In *Hok*, the minimum penalty charged was £500, as the taxpayer would have been in default for four months and one part month even if the failure had been rectified immediately after notification of the penalty.

35. Another relevant factor is that there is, as Ms Oromoloye says, no statutory obligation on HMRC to give reminders. The statutory obligation is on the taxpayer to complete its P35s by the due date.

36. I take into account the two week delay between HMRC informing the company of its compliance failure and the return being completed, a delay which Mr Stitt was unable to explain.

37. I have also considered whether the book-keeper's actions before 19 July are relevant. She received the P35 form, but thinking "it was to do with P11Ds" did not complete it until after the conversation between the Chairman and HMRC in July. At that point she called HMRC and obtained advice. Mr Stitt sought to persuade the Tribunal that this was an irrelevant factor: had HMRC provided the information to the appellant sooner, the book-keeper's failure to take proper advice when she received the P35 would have been discovered more quickly and the penalty would have been lower.

[3] The remaining guidelines deal with the statutory discretion and the right to be heard, and so are not relevant to the question under consideration.

38. I am, however, required by *ex parte Doody* to take into account "the context of the decision...in all its aspects", and one aspect is the behaviour of those acting for and on behalf of the appellant. Nevertheless, there is some force in Mr Stitt's submission, and for completeness I state that my decision would be the same without taking the book-keeper's failure before 19 July into account.

39. Mr Stitt said that HMRC's alleged non-compliance with the Charter was relevant to the question of fairness. Like Miss Oromolye, on the facts of this case I could not discern any failure by HMRC to live up to their Charter. They had provided help and support, in advising the Chairman of the late return and in assisting the book-keeper to understand the appellants' statutory obligations. There was no evidence of any lack of professionalism. Even if there had been a breach of the Charter, I do not consider that this is necessarily an aspect which should be considered in deciding whether HMRC had acted unfairly.

40. Mr Stitt also sought to rely on HMRC's subsequent change of practice, from the previous system of informing taxpayers for the first time in the September that they had failed to file their P35, to the current system of informing them within a month. In considering this point, I bear in mind the words of Lord Mustill, cited above, that it is not enough for me to find that an alternative (such as a penalty notice issued within a month of the deadline) might have been fairer. In my judgment, the fact that under the new approach taxpayers are alerted to their defaults within a few days of the deadline does not mean that HMRC acted unfairly when it told the appellant of its default two months after the filing date.

41. For the appellant to succeed, I must find that HMRC have acted unfairly in all the circumstances. Taking into account the factors set out above, and in particular the fact that the onus was on the appellant to complete the forms by the due date, and that HMRC informed it of the default only two months after that date (even though there was no statutory obligation so to do), I find that there was no unfairness.

42. As a result, I agree with Miss Oromoloye that the correct penalty is £300.

The Tribunal's decision on the second issue

43. The decision of the Tribunal on the second issue, as explained at the beginning of this decision notice, is that of Judge Jones, who exercised his casting vote. It is set out below.

44. Mr Stitt asked that the Tribunal's decision should make provision for the eventuality that the appeal in *Hok* might succeed. The Tribunal cannot, however, make a conditional decision.

45. Nevertheless, if *Hok* and *Foresight Financial Services* are decided in HMRC's favour, the parties can of course avoid the expense of an appeal against this decision by the appellant agreeing to pay the sum which would be due had HMRC succeeded on the second issue in this case. But that is a matter for them.

46. 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.

The penalty is reduced to £200.

GERAINT JONES Q. C.
TRIBUNAL JUDGE

RELEASE DATE: 24 July 2012