TC06929

Appeal number: TC/2018/06120

Income tax – self assessment – late filing – proof of requirements of s8 Taxes Management Act 1970. Burden of Proof in Penalty cases. Inherent unreliability of HMRC's Return Summary documents.

FIRST-TIER TRIBUNAL
TAX CHAMBER

Mr. GEORGE PANTELLI **Appellant**

- and -

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

TRIBUNAL: JUDGE GERAINT JONES QC.

The Tribunal determined the appeal on 10 January 2019 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 (with enclosures) and HMRC's Statement of Case (with enclosures).

DECISION

1. HMRC alleges in its Amended Statement of Case that it sent late filing penalty notices to the appellant Mr Pantelli, in respect of the fiscal years ended 5 April 2015 and 5 April 2016 because, it is alleged, he had not filed his self-assessment tax return for those years. I have not been provided with a copy of any such penalty notice. Thus I have no evidence about what was contained in them or either of them. Although HMRC has produced a document headed "View Statement" in respect of the appellants personal tax affairs which contains entries such as "Late Filing Penalty for 14/15" which appears alongside the date "25 March 2016", it gives no clue whatsoever as to whether any Penalty Notices were generated, let alone dispatched. In those circumstances I decline to treat this as an appeal made out of time but even if it should be out of time I would grant an extension of time given my firm view that it is a wholly meritorious appeal on the basis of the evidence adduced to me.

2. It is plain from the appellant's response to the Amended Statement of Case that he firmly takes issue with the proposition that he received any Notices to File further to section 8 Taxes Management Act 1970. Accordingly, this being a penalty case it is for the respondents to prove that such a notice was given in respect of each fiscal year.

3. As these two appeals (in respect of separate tax years) are in respect of penalties, the jurisprudence of the European Court of Human Rights in Jussila v Finland [2006] ECHR 996 makes it clear that article 6 of the European Convention on Human Rights (right to a fair trial) applies to the instant appellate process.

4. The right to a fair trial plainly requires that the hearing is before an independent Court of Tribunal which acts procedurally fairly which, in the context of this appeal, includes the following:

> (1) Noting that because this appeal involves penalties, the respondents bear the onus of proving the several facts and matters said to justify the imposition of penalties.
>
> (2) The Tribunal making its findings of fact based upon admissible evidence; not based upon unsubstantiated assertions made by the respondents' presenting officer or advocate.

5. Thus the present situation is that in the absence of an admission by the appellant of a fact which the respondents must prove to justify the imposition of a penalty, it is for HMRC to prove that factual prerequisite. HMRC is on notice that this is a live issue because the appellant has denied that any such notices were received by him.

6. The burden of proof in a penalty case rests upon the respondents who must prove each and every factual and matter said to justify the imposition of the penalty; albeit to the civil standard of proof.

7. In this Tribunal witness evidence can be and normally should be adduced to prove relevant facts. Documents (if admitted or proved) are also admissible. Such documents will often contain evidence, but often from a source of unknown or unspecified

provenance. In those circumstances, that is not, strictly speaking, hearsay evidence. It is admitted under the "business records" provision where the courts proceed on the basis that where information is input into a business record or business computer system by somebody acting in the course of his/her employment, for a business record making purpose, it is inherently likely that such information will be reliable (or that there was no proper reason to falsify it) such that it can properly be admitted into evidence. Hearsay evidence is admissible, albeit that it will be a matter of judgement for the Tribunal to decide what weight and reliance can be placed upon it.

8. Whatever form the admissible evidence takes, adequate evidence is a necessity; not a luxury.

9. With those rather basic and, I venture to think, self-evident principles in mind, I turn to the circumstances of this case. Section 8(1) Taxes Management Act 1970 provides as follows:

> Return of income.
>
> 8(1) Any person may be required by a notice given to him by an inspector or other officer of the Board to deliver to the officer within the time limited by the notice a return of his income, computed in accordance with the Income Tax Acts and specifying each separate source of income and the amount from each source.

10. It is to be observed that before a person is obliged to file a self-assessment tax return, a notice to file such a return must have been sent to that person in accordance with the service requirements set out in section 115 of the same Act. Accordingly, we must examine what evidence has been adduced by the respondents to demonstrate that this pre-condition to filing existed in respect of both or either of the relevant tax years. If the respondents cannot prove that the notices to file were served in respect of the respective tax years, the penalties imposed fall at the first hurdle.

11. HMRC has chosen not to adduce any witness evidence.

12. In respect of serving a Notice to File HMRC for the fiscal year ended 5 April 2015, HMRC has simply produced a document, presumably printed from some computer held record, headed "Return Summary" which bears the appellant's name, tax reference number and national insurance number. There is then a column which contains the words "Return Issued Date" alongside which appears "06/04/15". HMRC contends that I can be satisfied that a Notice to File was sent to the appellant's correct address because it would have been sent to the address for the appellant which the respondents hold on file by way of another computer record.

13. The "Return Summary" falls well short of being sufficient evidence to prove, even to the civil standard, that a Notice to File was actually sent to the appellant. That is because:

(1) Where the document shows a "Return Issue Date" of "6/04/16" I can be reasonably certain that that is a fiction, because those with experience in this Tribunal well know that, absent special circumstances, that is the date which

appears alongside every person's Return Summary alongside the words "Return Issued Date". It is equally well known that the reality is that HMRC sends out Notices to File on a staggered basis because, logistically, it simply could not hand over to the Royal Mail the huge volume of letters which it would need to send if every taxpayer was sent a Notice to File on the same day of each year. Nonetheless, that would have to be the factual situation for that record to be true. The record is therefore inherently improbable and unreliable. It may well be that HMRC sends out some Notices to File on 6 April in each year, but there is, literally, no reliable evidence to show that that happened in the case of this appellant on 6 April 2015 and/or 6 April 2016 Or indeed on any other data. Accordingly, the Return Summary probably contains false information and it would require cogent evidence from HMRC for me to find as a fact that a Notice to File was sent to this appellant on 6 April 2015 and then again on 6 April 2016.

(2) Even if HMRC could show that a Notice to File was intended to be sent to this appellant on each of those dates, there is no evidence to show that any such Notices to File were actually sent. That is because even if the date shown in the Return Summary, whether inserted by a person or a computer, is accurate, it falls far short of evidencing and proving actual dispatch of any particular document. That is important in a case where an appellant says, in terms, that he did not receive any such Notices to File.

(3) I acknowledge that in large organisations, where many processes may be automated, a single individual may not be able to give witness evidence that he/she physically placed a notice to file into an envelope (on a specific date), correctly addressed it to a given appellant's address held on file and then sealed it in a postage pre-paid envelope before committing it to the tender care of the Royal Mail. That is why Courts and Tribunals admit evidence of system which, if sufficiently detailed and cogent, may well be sufficient to discharge the burden of proving that such a notice was sent in the ordinary course of the way in which a particular business or organisation operates its systems for the dispatch of such material. There is no such evidence.

14. Accordingly in circumstances where HMRC has failed to prove a prerequisite to issuing the penalties in dispute in this appeal, the appeal must be allowed in full in respect of each of the fiscal years ended 5 April 2015 and 5 April 2016.

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.

GERAINT JONES Q.C.
TRIBUNAL JUDGE
RELEASE DATE: 10 JANUARY 2019