[2018] UKFTT 311 (TC)

TC06541

Appeal number: TC/2017/09024

INCOME TAX - individual tax return - penalties for late filing - whether properly imposed - no - no evidence that a valid notice to file under section 8(1) TMA 1970 had been given to the taxpayer by an "officer of the Board" – purpose for which any purported notice to file was given was not to establish chargeability – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

PETER GROVES **Appellant**

- and -

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

TRIBUNAL: JUDGE NIGEL POPPLEWELL

The Tribunal determined the appeal on 7 April 2018 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 13 December 2017 (with enclosures) and HMRC's Statement of Case (with enclosures) prepared by the respondents on 30 January 2018 and various correspondence between the parties.

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DECISION

Background

1. This is an appeal against the following penalties, visited on the appellant under Schedule 55 Finance Act 2009 for the late filing of an individual tax return for the tax year 2014-2015.

(1) A late filing penalty of £100 ("**late filing penalty**").

(2) Daily penalties of £900 (the "**daily penalties**").

(3) A 6 month late filing penalty of £300 ("**6 month penalty**").

2. The respondents (or "HMRC") have said in their Statement of Case that they will not be putting a case for the daily penalties and thus they accept that that aspect of the appeal should be allowed. This appeal, therefore, is against the late filing penalty and the 6 month penalty.

3. However, in their Statement of Case, HMRC (under the Facts section) tell me that they issued a notice of penalty assessment on or around 12 July 2016 in the amount of £300 by way of a 12 month penalty. However, they do not say that the appellant is appealing against this 12 month filing penalty. They simply (once the case for the daily penalties has been withdrawn) tell me that the taxpayer is appealing against the late filing penalty and the 6 month penalty. Extracts from HMRC's computerised records deal only with the late filing penalty, the daily penalties and the 6 month penalty. The review letter dated 20 September 2017 deals with only these three penalties. The grounds of appeal shed no light.

4. So it is not at all clear to me that HMRC did in fact give notice of a penalty assessment for a 12 month penalty to Mr Groves. But if they did then:

(1) I am content that Mr Groves appeal should include an appeal against any such 12 month penalty; and

(2) My decision in this case relating to the late filing penalty and the 6 month penalty applies equally to any 12 month penalty so assessed on Mr Groves.

Evidence and findings of fact

5. From the papers before me I find the following relevant facts:

(1) The appellant was in employment during the 2014-2015 tax year, but HMRC considered that he had underpaid PAYE income tax of £166.80.

(2) On 26 October 2015 HMRC sent the appellant a P800 tax calculation for the year showing an underpayment of tax of £166.80.

(3) On 25 January 2016 a voluntary payment letter was sent to the appellant asking him to pay the amount or come to an arrangement to pay and, if he didn't, collection would be made via the self-assessment system.

(4) On 18 April 2016 a second voluntary payment letter was sent to the appellant informing him that because he hadn't made a voluntary payment or come to an arrangement to pay, the underpayment would be collected via the self-assessment system.

(5) On 11 July 2016 (the appellant not having responded to either of the voluntary payment letters) his record was automatically put into the self-assessment system to collect the underpaid amount.

(6) The purported notice to file for the year was issued to the appellant on 21 July 2016 to the address held on HMRC's records at the time. I deal in more detail with the evidence adduced by HMRC to support their contention that such a notice to file was served on Mr Groves at [22-26] below.

(7) The filing date for a valid notice to file, served on Mr Groves on 21 July 2016, would have been 28 October 2016 for both a non-electronic and electronic return.

(8) As the return was not received by the filing date, HMRC issued a notice of penalty assessment to the appellant on or around 18 February 2014 for the late filing penalty.

(9) As the return had still not been received 6 months after the penalty date, HMRC issued a notice of penalty assessment on or around 12 January 2016 for the 6 month penalty.

Legislation

6. A summary of the relevant legislation is set out below:

Obligation to file a return and penalties

(1) Under Section 8 of the Taxes Management Act 1970 ("TMA 1970"), a taxpayer, chargeable to income tax and capital gains tax for a year of assessment, who is required by an officer of the Board to submit a tax return, must submit that return to that officer by 31 October immediately following the year of assessment (if filed by paper) and 31 January immediately following the year of assessment (if filed on line).

(2) Failure to file the return on time engages the penalty regime in Schedule 55 Finance Act 2009 ("Schedule 55") and references below to paragraphs are to paragraphs in that Schedule.

(3) Penalties are calculated on the following basis:

(a) failure to file on time (i.e. the late filing penalty) - £100 (paragraph 3).

(b) failure to file for three months (i.e. the daily penalty) - £10 per day for the next 90 days (paragraph 4).

(c) failure to file for 6 months (i.e. the 6 month penalty) - 5% of payment due, or £300 (whichever is the greater) (paragraph 5).

(4) In order to visit a penalty on a taxpayer pursuant to paragraph 4, HMRC must decide if such a penalty is due and notify the taxpayer, specifying the date from which the penalty is payable (paragraph 4).

(5) If HMRC considers a taxpayer is liable to a penalty, it must assess the penalty and notify it to the taxpayer (paragraph 18).

(6) A taxpayer can appeal against any decision of HMRC that a penalty is payable, and against any such decision as to the amount of the penalty (paragraph 20).

(7) On an appeal, this tribunal can either affirm HMRC's decision or substitute for it another decision that HMRC had the power to make (paragraph 22).

The Law

General

7. The burden of establishing that the appellant is prima facie liable to the penalties which must be assessed and notified in accordance with the law lies with HMRC. It is for them to prove each and every factual matter said to justify the imposition of the penalties on this particular taxpayer.

8. The standard of proof is the civil standard of proof namely the balance of probabilities or more likely than not.

Who must give the notice to file

9. The penalties in this case have been assessed and notified on and to the appellant under paragraph 18 of Schedule 55.

10. To come within the Schedule 55 penalty regime, a taxpayer must have failed to make or deliver a return, or to deliver any other document, specified in the "Table below" on or before the relevant filing date (paragraph 1(1) of Schedule 55).

11. The item in the "Table below" which is relevant in this case is item 1 which relates to income tax. The relevant return is a "Return <u>under</u> section 8(1)(a) of TMA 1970 (emphasis added).

12. Section 8(1)(a) TMA 1970 states as follows:

> "(1) For the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, and the amount payable by him by way of income tax for that year, he may be required by a <u>notice given to him by an officer of the Board –</u>
>
> (a) <u>to make and deliver to the officer,</u> a return containing such information as may reasonably be required in pursuance of the notice....." (emphasis added).

13. When considering the validity of a penalty assessment and notification I need to consider whether a notice to file under section 8(1)(a) TMA 1970 has been lawfully given to the appellant by an officer of the Board (see *Barry Lennon v HMRC* [2018] UKFTT 0220) at [21-40].

14. If no valid notice to file has been lawfully given then there can be no failure to make or deliver a return etc “under" section 8(1)(a) of TMA 1970 as is required by Schedule 55.

15. If no valid notice to file has been lawfully given, then any return submitted by a taxpayer is a voluntary return. It has been held in the cases of *Wood* (*DJ Wood v HMRC* [2018] UKFTT 0074) and *Patel* (*Shiva Patel and Ushma Patel v HMRC* [2018] UKFTT 0185) that where a voluntary return has been submitted but there has been no notice to file given to a taxpayer, there is no valid notice under section 8(1)(a). And so penalties (*Wood*) and the opening of an enquiry and its closure by a closure notice (*Patel*) were not valid.

16. If no return has been given under section 8(1)(a) TMA 1970 in accordance with its terms, the provisions of section 1 TMA 1970, and sections 5 and 9 of the Commissioners for Revenue and Customs Act 2005 cannot save the invalid notice.

17. The phrase “given to him by an officer of the Board" means what it says. I would expect any such notice to be signed by a named officer and evidence provided which shows that to be the case. The officer giving the notice needs to be identified in the notice because the return must be made and delivered to that officer. In other words there must be evidence that the named officer has signed the notice or it must be otherwise made clear that he is "giving" it.

18. Under paragraph 4 of Schedule 55, daily penalties for late filing can only be imposed on a taxpayer if "HMRC" have decided to impose the penalty and given notice to a taxpayer specifying the date from which the penalty is payabe.

19. In *Donaldson* (*Donaldson v HMRC* [2016] EWCA Civ 761) HMRC’s case was that there was no requirement for an officer of the Board to make that decision.

20. The provisions of paragraph 4 which identify “HMRC” are to be contrasted with those of section 100 TMA 1970 which permit an "officer of the Board” to make a penalty determination. This is a decision by a real “flesh and blood” officer, and not by HMRC as a collective body. Nor is it a computerised decision.

21. The provisions of section 8 TMA 1970 are more akin to section 100 TMA 1970 than to paragraph 4 of Schedule 55. In my view a particular officer must be identified in the notice as the person giving the notice to file under section 8 TMA 1970.

Discussion

22. In this case HMRC have provided the following evidence that a valid notice to file was issued to the appellant on 21 July 2016.

(1) an extract from HMRC's computer records entitled "Return Summary" which purports to indicate that a notice to file for the tax year 2014/2015 was issued on 21 July 2016.

(2) an extract from HMRC's computer records indicating that a notice to file was sent to the appellant at his address at 53 Leysters Close; and

(3) a generic copy of a notice to file comprising a letter (pro forma) dated 6 April 2015 but with no addressee or signature (or indeed signature block).

23. From these documents which HMRC I believe are suggesting are matters of primary fact, I am implicitly (HMRC have not explicitly asked me to do so in their Statement of Case) being asked to infer that (or make a secondary finding of fact that) a section 8(1)(a) notice was given to this particular appellant by an officer of the Board. In order to make that inference, it is my view that I must decide whether it was more likely than not that such a notice was so given. For the following reasons, I cannot draw that inference.

(1) As mentioned above, there is no signature block on the pro forma letter. It is therefore not at all clear whether this pro forma letter would have been signed by a particular officer or whether it would have been signed by HMRC (or indeed whether it would have been signed at all).

(2) There is nothing in the Statement of Case which suggests that a notice to file was given by an officer. It simply says that a notice to file was issued. It doesn't say by whom. There is nothing asking me to find that, as a fact, it was given by an officer of the Board.

(3) Similarly, there is nothing in the computer printouts which indicates whether an officer, and if so which officer, gave a notice to file to the appellant. Nor any indication of how, if an officer had given such a notice, that is then reflected in the return summary.

(4) The wording in the pro forma letter is in the third person. In other words, the first sentence starts "we are sending you this letter…", and later on "you must make sure that we receive your tax return by" and "if we don't receive your tax return by the deadline....". Although such a letter (which is on HMRC letterhead (obviously)) could be signed by an officer of the Board on behalf of HMRC, there is nothing to suggest that this is the case.

24. There are two other letters in the bundle of papers. The first is a letter dated 20 September 2017 from HMRC Pay As You Earn and Self-Assessment to the appellant. It relates to his appeal and is written in a blend of first and third person. It has a signature block indicating that it was written by Assistance Officer Brightman. The copy is not signed.

25. The second letter is also addressed to the appellant. It is dated 20 November 2017 and is from HMRC Late Penalties & Reasonable Excuse Team. It is written in the first person. The copy that I have has no signature block. I have no idea of the identity of the officer who has sent it.

26. Neither of these letters shed any light on whether a notice to file was given by a named officer to this particular appellant.

27. I am being asked to speculate by HMRC that a notice to file was given to this appellant by an officer of the Board. I am not prepared to so speculate. I cannot draw an inference that this was the case from the evidence that has been presented to me.

28. Under these circumstances therefore, I find that no valid notice to file under section 8(1)(a) TMA 1970 was given to the appellant by an officer of the Board.

29. The appellant has not failed to deliver a return under section 8(1)(a) TMA 1970. And so Schedule 55 is not engaged. The penalties were invalidly assessed and notified to the appellant and accordingly it is my decision that the appellant's appeal is allowed.

The purposes for which notice to file is given

30. If I had found that a valid notice to file had been given by an officer of the Board, I would have still have allowed this appeal on the basis that such notice was invalid since it was not given for the purposes set out in section 8 TMA 1970.

31. I reviewed the law relevant to this issue in some detail in the case of *Lennon* (*Barry Lennon v HMRC* [2018] UKFTT 0220). That review is set out in the appendix to this decision.

Discussion

32. The appellant's circumstances are very similar to those of Mr Lennon. In *Lennon*, HMRC had identified an underpayment of PAYE income tax and put Mr Lennon into the self-assessment regime to recover it. They have done the same with this appellant.

33. As in *Lennon*, HMRC know the amount of this appellant's underpayment (£166.80) as evidenced by the P800 calculation and the voluntary payment letters mentioned at [5(2)-(4)] above.

34. So, as in *Lennon,* HMRC knew the amount of underpaid PAYE income tax. And so they knew the amount for which the appellant was chargeable to income tax. They did not need to serve the purported notice to file to "establish" that amount. They had already established it.

35. And so the purported notice to file is invalid in any event since it was not given for the purpose(s) set out in section 8 TMA 1970.

36. Since it was invalid, there was no obligation on the appellant to file a self-assessment tax return for 2014-2015, and so Schedule 55 was never engaged. And so the appellant cannot be liable for the penalties.

Reasonable excuse etc

37. In light of the foregoing there is no need for me to consider reasonable excuse, special circumstances or proportionality.

Decision

38. In light of what I have said above, I allow this appeal.

Appeal rights

39. 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 a Company a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

NIGEL POPPLEWELL
TRIBUNAL JUDGE

RELEASE DATE: 15 JUNE 2018

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APPENDIX

Extract from Lennon

Should the appellant have been "put into self-assessment"

1. The appellant raises as one of his grounds of appeal that he should not have been put into self-assessment. HMRC do not address this ground, head-on, in their Statement of Case. But is a very pertinent point.

2. As set out in [6] above it is for HMRC to show that the penalties have been properly assessed on the appellant, and are payable by him.

3. This requires them to have served a valid notice to file on the appellant pursuant to section 8(1) TMA 1970.

4. Paragraph 1(1) of Schedule 55 states that:

> "a penalty is payable by a person ("P") where P fails to make or deliver a return, or to deliver any other document, specified in the Table below on or before the filing date".

5. The Table referred to is in paragraph 1(5). It specifies an income tax return as being a return under section 8(1)(a) of the TMA 1970.

6. Under section 8(1):

> "For the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, and the amount payable by him by way of income tax for that year, he may be required by a notice given to him by an officer of the Board –
>
> a) to make and deliver to the officer, a return containing such information as may reasonably be required in pursuance of the notice.....".

7. So in order to engage Schedule 55, HMRC must comply with section 8(1)(a) which in penalty appeals means that they must establish that a valid section 8(1)(a) notice to file has been notified to the appellant.

8. The position if they fail to serve such a valid notice is reasonably clear. Even if a taxpayer has failed to make a return on time, Schedule 55 is not engaged. The taxpayer has not failed to deliver a return since he had not been properly notified that he had to.

9. But the position is less clear if HMRC can establish that they have issued and served a notice to file, but it was not "for the purpose of establishing the amounts in

which a person is chargeable to income tax and capital gains tax for a year of assessment…..”.

10. In such circumstances, is the notice valid? Does this tribunal have jurisdiction to look behind the notice and consider its validity? And what is the consequence (if we can consider that validity) if the notice turns out to be invalid?

11. These are not easy questions to answer, but they have been considered and dealt with head on by Judge Thomas in *Goldsmith (David Goldsmith v HMRC* [2018] UKFTT 00005), which contains a masterful and scholarly analysis of these issues.

12. I have read *Goldsmith* a number of times and find myself in complete agreement with the reasoning and conclusions that Judge Thomas has laid out in that case. It is not binding on me, but I adopt those principles for the purposes of this decision.

13. The salient principles are these:

> (1) The PAYE system was designed to take employees out of the usual return and assessment system which, when it was introduced, applied to the self-employed and others.
>
> (2) The PAYE system involves the use of a code number which identifies the amount of tax free pay to which an employee is entitled, and enables the employer to deduct the correct amount of tax, on a cumulative basis, from an employee's wages.
>
> (3) Complete agreement between the tax deducted under PAYE and the correct tax liability for an employee was not always possible. From 1945 to the computerisation of PAYE (in the 1980's), in each tax year from about June onwards, a physical reconciliation was carried out by Inland Revenue staff.
>
> (4) This reconciliation could result in one of four outcomes.
>
> (a) no action because the liability and tax suffered reconciled exactly or within laid down margins;
>
> (b) a repayment because the tax deducted under PAYE exceeded the liability;
>
> (c) an underpayment of tax which under the PAYE system could be coded out i.e. reducing the code number that would otherwise apply in the year of the reconciliation or the next year;
>
> (d) an assessment under section 29 TMA 1970 where the underpayment might be too large to code out or coding out was not possible for other reasons.
>
> (5) When self-assessment was introduced with effect from 1996-1997, little changed. The PAYE system continued to operate for those outside the new self-assessment regime, but HMRC’s PAYE computer systems started to carry out reconciliations automatically.

(6) These automatic reconciliations led to the computer producing a tax calculation on Form P800 which explained to a taxpayer how any over or underpayment would be dealt with.

(7) Where coding out an underpayment is not possible, HMRC's first approach in P800 cases is to seek a voluntary payment. But they still have the option of doing what they did before the arrival of the self-assessment system and making an assessment under section 29 TMA 1970. I consider this in more detail later in this decision.

(8) The purpose for which a notice to file under section 8 TMA 1970 (i.e. for establishing the amounts in which a taxpayer is chargeable to income tax or CGT) is given to a taxpayer is important and must be given some meaning.

(9) If HMRC already know the amounts in which a taxpayer is chargeable to income tax and CGT for a year of assessment (for example because they have issued voluntary payment letters to the taxpayer and/or a P800 showing an underdeduction and asking the taxpayer to pay the balance), is it really the case that HMRC's purpose in serving the notice to file is to establish that amount?

(10) Although the Tribunal, in a penalty appeal, must determine the "matter in question" (which means the matter to which an appeal relates - see section 49 I(1)(a) TMA 1970) this is wide enough to include an examination of the validity of a penalty notice. Indeed, this is what *Donaldson* was all about.

(11) The cases of *Birkett & others v HMRC* [2017] UKUT (0089) and *PML Accounting Limited v HMRC* [2017] EWHC 733 can be distinguished from the cases of *B&S Displays Limited and others v Special Commissioners of Income Tax & Cir* 52 TC 318 (1978) and *Kempton v Special Commissioners of Income Tax & Cir* 66 TC 249 (1992) ("*Kempton*") (and the cases cited therein).

(12) Importantly, in Kempton the Special Commissioner, Judge Patrick Medd QC, was faced with a challenge to the validity of a notice under section 20 TMA 1970. In his decision Judge Medd sets out the rival contentions:

> "It was accepted by Mr. Koenigsberger that the notice, under s 20(1) Taxes Management Act 1970, had been issued to Mrs. Kempton as alleged in the summons, and that Mrs. Kempton had not complied with the notice within the period specified in the notice.
>
> Mr. Koenigsberger indicated, however, that it was his contention that the notice issued by the Inspector was invalid and that, therefore, Mrs. Kempton had a good defence and was not liable to a penalty. In answer to this submission, Mr. Baron asserted that it was not open to Mrs. Kempton to take this point in these penalty proceedings and that the point could only be raised in an application for judicial review."

(13) Judge Medd held:

> "It is clear from the Coombs case [*R v Inland Revenue Commissioners, Exp T C Coombs &* Co [1991] 2 AC 283] that the Inspector's decision to issue a notice under s 20(3) can be challenged by way of judicial review, and I have no doubt that the same must apply if the notice is issued under s 20(1). The question is, therefore, whether, in addition to being able to challenge the Inspector's decision by way of judicial review, the taxpayer is entitled alternatively to challenge it by way of a defence to penalty proceedings.
>
> The answer to this question was not given by the House of Lords in the Coombs case but Bingham L.J., in the Court of Appeal in the case of *Regina v. Inland Revenue Commissioners ex parte Taylor (No. 2)* 1990 STC 379 which was a case where a notice was issued to a solicitor under s 20(2) (which gives similar powers to the Board of Inland Revenue as are given to an inspector by s 20(1)), said, at page 384j
>
> > 'Strictly, however, the taxpayers' remedy is, in the event of non compliance followed by penalty proceedings, to resist the penalty proceedings and then attack the giving of the notice.'
>
> A similar view was expressed by Brightman L.J. in *Essex and Others v. Commissioners of Inland Revenue and Grugan* 53 TC 720, which was an action for a declaration that certain notices were invalid, when he said, at page 743:
>
> > 'I should mention at this stage that ss 98 and 100 of the Taxes Management Act 1970 impose penalties on a person who fails to comply with the requirements of a notice served under s 490 of the other Act. It would therefore have been open to the Plaintiffs to challenge the validity of the notices in any proceedings which might have been brought under ss 98 and 100 of the Taxes Management Act instead of claiming a declaratory judgment, as had been done in the present action.'
>
> Those two dicta in the Court of Appeal which were both directed to the situation where notices of a similar nature to the one with which I am concerned were served are, of course, strong persuasive authority for the proposition that a person on whom a notice under s 20(1) is served may raise the question of the validity of the notice as a defence in penalty proceedings brought against him for failure to comply with the notice. However, the question seems to me to have been answered even more authoritatively by the reasoning in the decision of the House of Lords in the case of Wandsworth London Borough Council v. Winder [1984] 3 All ER 976. …

…

I, therefore, hold that it is open to Mrs. Kempton to challenge the validity of the Inspector's decision to serve a notice on her under s 20(1) by way of defence in these proceedings for a penalty."

(14) As can be seen from the foregoing extract, it is open to an appellant to challenge the validity of HMRC's decision to serve a notice on him/her under section 20(1) TMA 1970. The same principle applies to a notice purportedly served pursuant to section 8(1)(a) TMA 1970.

(15) The reconciliation process referred to at [13(4)-(8)] above, followed in many cases by a P800, is a finalisation of a non self-assessment taxpayer's tax liability.

(16) If that reconciliation evidences an underpayment which cannot be coded out, HMRC's powers enable them to issue an assessment under section 29 TMA 1970. But it is not open to them to choose an alternative mechanism, namely to issue a notice to file under section 8 TMA 1970.

14. In *Kempton*, as can be seen from the extract above, Judge Medd said that the question as to whether a person on whom a section 20 TMA 1970 notice is served can raise its validity as a defence in penalty proceedings "…. has been answered even more authoritively by the reasoning in the decision of the House of Lords in the case of Wandsworth London Borough Council v Winder [1984] 3 ER 976……" ("*Wandsworth*").

15. Why did he say this? Why is *Wandsworth* such an important authority in this area?

16. In *Wandsworth* Mr Winder occupied a flat let by Wandsworth Borough Council ("Wandsworth BC") on a secure weekly tenancy. Wandsworth BC resolved to increase his rent to an amount which he considered to be excessive and which he refused to pay. Wandsworth BC sued him for possession and rent arrears. Mr Winder defended that claim contending that the rent increases were ultra vires and void. This defence was initially struck out on the basis that the resolution to increase the rents by Wandsworth BC could only be challenged by judicial review under RSC order 53, and it could not be used as a defence in his proceedings. Mr Winder said that he should be allowed to defend the claim for possession and for rent arrears on the basis that the resolution was ultra vires.

17. The House of Lords finally decided the matter in favour of Mr Winder. In his judgment, Lord Fraser made the following comments:

"The respondent [i.e. Mr Winder] seeks to show in the course of his defence in these proceedings that the appellants' [Wandsworth BC] decisions to increase the rent were such as no reasonable man could consider justifiable. But your Lordships are not concerned in this appeal

> to decide whether that contention is right or wrong. The only issue at this stage is whether the respondent [i.e. Mr Winder] is entitled to put forward the contention as a defence in the present proceedings. The appellants [i.e. Wandsworth BC] say that he is not because the only procedure by which their decision could have been challenged was by judicial review...."

18. Lord Fraser then reviewed the House of Lords Authorities of *O'Reilly v Mackman* [1983] 2 A.C. 237 ("*O'Reilly*") and *Cocks v Thanet District Council* [1983] 2 A.C. 286 ("*Cocks*").

19. Lord Fraser distinguished *O'Reilly* on the basis that in *O'Reilly* the plaintiffs had initiated the proceedings (whereas in *Wandsworth*, Mr Winder was defending proceedings); and secondly that in *O'Reilly*, the plaintiffs had not suffered any infringements of their rights under private law, whereas Mr Winder complained that Wandsworth BC had infringed his contractual rights in private law.

20. The essential difference between the case of *Cocks* and the position of Mr Winder was that in *Cocks* the impugned decision of the local authority did not deprive the plaintiff of pre-existing private law eight. It prevented him from establishing a new private law right. Furthermore, as in *O'Reilly*, the party complaining of the decision was the plaintiff.

21. Lord Fraser then considered the principle underlying the decisions in *O'Reilly* and *Cocks*. One of which was that there is a "need, in the interests of good administration and third parties who may be indirectly affected by the decision, for speedy certainty as to whether it has the effect of a decision that is valid in public law".

22. He went on to say that judicial review proceedings may provide that speedy certainty but there are other ways of obtaining speedy decisions and:

> "In any event, the arguments for protecting public authorities against unmeritorious or dilatory challenges to their decisions have to be set against the arguments for preserving the ordinary rights of private citizens to defend themselves against unfounded claims".

23. Lord Fraser then went on to say as follows:

> "It would in my opinion be a very strange use of language to describe the respondent's [i.e. Mr Winder] behaviour in relation to this litigation as an abuse or misuse by him of the process of the court. He did not select the procedure to be adopted. He is merely seeking to defend proceedings brought against him by the appellants [Wandsworth BC]. In so doing he is seeking only to exercise the ordinary right of any individual to defend an action against him on the ground that he is not liable for the whole sum claimed by the plaintiff. Moreover he puts forward his defence as a matter of right, whereas in an application for judicial review, success would require an exercise of the court's discretion in his favour. Apart from the provisions of Order 53 and section 31 of the Supreme Court Act

1981, he would certainly be entitled to defend the action on the ground that the plaintiff's [i.e. Wandsworth BC] claim arises from a resolution which (on his view) is invalid..... I find it impossible to accept that the right to challenge the decision of a local authority in course of defending an action for non-payment can have been swept away by Order 53, which was directed to introducing a procedural reform…..

Nor, in my opinion, did section 31 of the Supreme Court Act 1981 which refers only to "an application" for judicial review have the effect of limiting the rights of a defendant sub silentio. I would adopt the words of Viscount Simonds in *Pyx Granite Co. Ltd v. Ministry of Housing and Local Government* [1960] A.C. 260, 286 as follows:

> "It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words".

The argument of the appellants [i.e. Wandsworth BC] in the present case would be directly in conflict with that observation.

If the public interest requires that persons should not be entitled to defend actions brought against them by public authorities, where the defence rests on a challenge to a decision by the public authority, then it is for Parliament to change the law."

24. It is also worth mentioning here the observations of Lord Justice Parker in the Court of Appeal.

> "It is not suggested that the defendant [i.e. Mr Winder] has not an arguable case that the rents were unreasonable. He was in my view well entitled to sit back and leave it to the authority to sue him if they thought fit. He was under no obligation to initiate proceedings against them. However wide the general rule is, I cannot regard it as an abuse of process to raise his challenge in this case by way of defence. He has of course in that defence attacked not only the rent itself but the decision-making process and it is plain that, had he desired himself to initiate such a challenge, his proper course would have been to do so under Order 53, but this makes no difference. I would allow this appeal and set aside the order of the judge, with the result that the defence and counterclaim would be restored and the action would proceed."

25. And by Lord Justice Goff in the Court of Appeal:

> "I fully appreciate that public authorities may be exposed to great inconvenience if they are unable to invoke the principle of *O'Reilly v Mackman* [1983] 2 A.C. 237 in a case such as the present. But such inconvenience may arise in many cases where a citizen successfully challenges action by public authority affecting his private law rights under a decision by the public authority which proves to have been made ultra

> vires. The successful challenge by the citizen may be a source of great embarrassment for the public authority, as it contemplates all the earlier occasions upon which it has given effect to the ultra vires decision and the possibly immense cost to ratepayers of putting the matter right. Sometimes indeed, as experience has shown, it may even be necessary to legislate in order to extricate the public authority from its difficulties. But it does not in my judgment follow that there is an abuse of process by the citizen in invoking the assistance of the ordinary courts, by action or by defence, in order to enforce, or to claim the protection of, his private law rights. If it is thought that any limit should be placed upon citizens proceeding in this way, in the interests of good administration, then this is, in my judgment, a matter for Parliament."

26. As can be seen from the foregoing, the Court of Appeal and the House of Lords both recognised that it is not an abuse of process to challenge the validity of a notice by way of a defence to a claim from a public body. The defendant is simply asserting that he is not liable for such a claim. In *Wandsworth* the claim was for rent arrears.

27. Judge Medd had no difficulty in asserting that the reasoning in *Wandsworth* applies to notices served under section 20 TMA 1970 which related to a power (now repealed) which permitted HMRC to call for documents to be delivered to it.

28. But it seems to me that the principles in *Wandsworth* and the reasoning behind them are even more relevant to penalty appeals. *Wandsworth* was a money case. It involved rent arrears which Wandsworth BC alleged were due and payable by Mr Winder. Penalty cases are money cases too. HMRC asserts that a taxpayer is liable to a financial penalty for failing to do something. If Mr Winder had failed in his defence, Wandsworth BC could have enforced the rent arrears as a civil debt. If the appellant in this case fails to successfully challenge the penalty assessments, the penalties can be enforced as a civil debt. Indeed the assessments have already created that debt, enforcement of which is postponed pending the outcome of this appeal.

29. And so it is my view that the question of whether a taxpayer on whom a penalty assessment has been served, can raise the validity of that assessment (and any notice on which that assessment is based) as a defence in penalty proceedings has been answered equally authoritively by the reasoning of the House of Lords in the case of *Wandsworth*. The answer is that he can.

Section 29 TMA 1970

30. Under section 29 TMA 1970 as it applied before the introduction of self-assessment, an Inspector could make an assessment under section 29(1)(c) in respect of income arising in a tax year to the best his judgment by reference to actual income or estimated income (whether from any particular source or generally) or partly by reference to one and partly by reference to the other.

31. Under section 29(1)(A) TMA 1970 as it stood then, where such an assessment is made, any necessary adjustment shall be made after the end of the year of assessment

(whether by way of assessment, repayment of tax or otherwise) to secure that tax is charged in respect of income actually arising in the year.

32. It is true that the version of section 29 TMA 1970 which applies following introduction of self-assessment is more restrictive than that which applied before it. As Lord Justice Moses said at paragraph 24 of his judgment in *Tower McCashback LLP v HMRC* [2010] EWCA Civ 32.

> "…. the new s 29 …. confers a far more restrictive power than that contained in the previous s 29. The power to make an assessment if an Inspector discovers that tax which ought to have been assessed has not been assessed or an assessment to tax is insufficient or relief is excessive is now subject to the limitations contained in s 29(2) and (3).....".

33. However, in the context of this appeal, the restrictions in section 29(2) and (3) do not apply. This is because they only apply where the taxpayer has made and delivered a return under section 8 TMA 1970. And of course in this appeal the taxpayer has not. Indeed it is the appellant's case that he should not be put into the self-assessment system and thus required to submit a return under section 8 TMA 1970.

34. It seems to me, therefore, that the breadth of section 29 TMA 1970 which applied before the introduction of self-assessment is broadly the same after the introduction of self-asessment where the taxpayer has not made and delivered a section 8 return.

35. In such circumstances where an officer of the Board discovers that any income which ought to be assessed to income tax has not been assessed on a taxpayer, then the officer can make an assessment of the amount or the further amount, which ought to be charged to make good the loss of tax.

36. Since there has, therefore, been little change to the breadth of section 29, in circumstances where a taxpayer has not filed a self-assessment tax return, before and after the introduction of self-assessment, it seems to me that the power to ensure that the correct amount of tax has been paid by a taxpayer who has underpaid tax due to an underdeduction of PAYE, is still via the section 29 assessing mechanism; and not by putting that taxpayer into the self-assessment regime by serving a notice on him to file a return under section 8 TMA 1970.

Discussion

37. I have found as a fact that HMRC knew the amount of income tax which the appellant owed as a result of PAYE underdeductions by his employers. It was £321.12.

38. HMRC sent the appellant a tax calculation on Form P800 and followed this up with two voluntary payment letters.

39. So it is clear that they did not send the appellant a notice to file a tax return for the purpose of establishing the amount on which he was chargeable to income tax. HMRC must have known that amount in order to calculate the tax due of £321.12.

40. As I have said above the appellant can challenge the imposition of the penalty by asserting that the notice to file is invalid. In my view this is the case. A valid section 8 notice can only be given for the purposes set out in that section. In the case of this appellant, the notices to file were not given for that purpose. Since no valid section 8 notice was given to the appellant, there was no obligation on him to file a self-assessment tax return for 2014 - 2015, so Schedule 55 is not engaged.

41. I have therefore decided to allow the appeal on this ground.

42. The route which HMRC should have taken was to issue an assessment under section 29 TMA 1970 when it had become apparent that the underpayment could not have been coded out.

43. HMRC's statements in their voluntary payment letters that in such circumstances they might consider putting a taxpayer into the Self-Assessment Tax System in order to collect the underpayment may need to be reconsidered.