[2019] UKFTT 475 (TC)

Penalty – s8 Taxes Management Act 1970 – proof of service a prerequisite to a penalty – "Return Summary" inadequate/unreliable evidence.

FIRST-TIER TRIBUNAL
TAX CHAMBER

TC07278

Appeal number: TC/2018/08237

BETWEEN

JONATHAN HULBERT **Appellant**

-and-

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

TRIBUNAL: JUDGE GERAINT JONES QC.

The Tribunal determined the appeal on 11 July 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 dated 20 December 201 and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 27 February 2019.

DECISION

1. HMRC alleges in its Statement of Case that it sent late filing penalty notices to the appellant, Mr Hulbert, in respect of the fiscal year ended 5 April 2017 because, it is alleged, he had not filed his self-assessment tax return on time. I have not been provided with a copy of any of the penalty notices. Thus I have no evidence about what was contained in them or any of them. Although HMRC has produced a document headed "Return Summary" in respect of the appellant's personal tax affairs, which contains an entry "Return Issued Date" which appears alongside the date "06/04/2017", it gives no clue whatsoever as to whether any Penalty Notices were generated.

2. It is plain that the appellant has not said anything whatsoever about whether he received any Notice 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 the fiscal year ended 05 April 2017. Service of such a statutory notice is the trigger for the requirement to file.

3. As this appeal is 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:

    a. 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.

    b. 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. At paragraph 17 of their Statement of Case the respondents state and "The onus of proof is for the respondents to show that the penalties have been correctly calculated. The burden shifts to the appellant to demonstrate that a reasonable excuse exists for the defaults." That might be correct in so far as it goes, but it fails to acknowledge that it is for the respondents to demonstrate not only that a penalty has been "correctly calculated" but that the appellant is actually liable to pay a penalty.

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, I must examine what evidence has been adduced by the respondents to demonstrate that this pre-condition to filing existed in respect of the relevant tax year. If the respondents cannot prove that a notice to file was served in respect of the tax year, 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 for the fiscal year ended 5 April 2017, 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 "06/04/17". Inferentially 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:

    a. Where the document shows a "Return Issue Date" of "6/04/17" 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 2017 or indeed on any other date. 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 2017.

b. Even if HMRC could show that a Notice to File was intended to be sent to this appellant on "06/04/17", there is no evidence to show that any such Notice 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 the respondents bear the onus of proving each and every fact necessary for liability to a penalty to arise.

c. 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 the fiscal year ended 5 April 2017.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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 QC.
TRIBUNAL JUDGE

RELEASE DATE: 24 JULY 2019