[2018] UKFTT 115 (TC)

TC06372

Appeal number: TC/2017/07256

Income tax – self assessment – late filing – proof of requirements of s8 Taxes Management Act 1970 – Burden of Proof in Penalty cases – When inferences are permissible. **Regina v Alan Peter Ronald Hedgcock, David Charles James Dyer, Robert Mayers:** Court of Appeal Criminal Division [2007] EWCA Crim 3486 applied.

FIRST-TIER TRIBUNAL
TAX CHAMBER

MRS SABIN QURESHI **Appellant**

- and -

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

TRIBUNAL: JUDGE GERAINT JONES Q. C.
MR. CHRISTOPHER JENKINS.

Sitting in public at Taylor House, London, on 27 February 2018.

The Appellant in person

Miss Olivia Donovan, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. The appellant, Mrs Qureshi, appeals against penalties imposed upon her by The Commissioners for Her Majesty's Revenue and Customs ("the respondents") in respect of alleged late filing of self-assessment tax returns for the fiscal years ended 5 April 2014 and 5 April 2015.

2. In two separate letters sent by the appellant to the respondents, respectively dated 29 January 2017 and 10 July 2017, the appellant stated that she had not received any notices requiring her to file any self-assessment tax returns. The respondents were on express notice that that was her position.

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. In the context of it being pointed out to Miss Donovan (for the respondents) that it was incumbent upon the respondents to prove that a notice to file, as required by section 8 Taxes Management Act 1970, had been sent to the appellant, she sought to deflect the need to adduce proper evidence to prove that requirement by informing us that on such evidential matters "*HMRC has an understanding with the Courts and Tribunals."* She did not further particularise what she claimed the nature or extent of any such alleged understanding might be.

6. We wish to make it clear beyond doubt that the respondents, as a litigant, hold no privileged position. If the Courts and/or Tribunals had any "understanding" with HMRC concerning what evidence it does or does not need to adduce, that would be a betrayal of the duty of those sitting in our Courts or Tribunals to act wholly independently and to adjudicate upon each case without fear or favour, while applying the relevant law and accepted rules of procedure and evidence to the proceedings in hand.

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

8. 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 hearsay evidence, but often from a source of unknown or unspecified provenance. 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.

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

10. With those rather basic and, we venture to think, self-evident principles in mind, we turn to the facts and circumstances of this case where the appellant has twice denied, in writing, that she received any notices to file self-assessment returns. 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.

11. 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.

12. Miss Donovan referred us to pages 14 and 15 in the respondents' bundle of documents and told us that because a document headed "Return Summary" contains an entry "Return Issued Date" and alongside it appears "12/6/14", we can conclude that a notice to file *"must have been*" sent on that date. She then went further and informed us that a "Return Summary" page would only come into existence if the respondents had sent out a notice to file. Miss Donovan also informed us that any notice to file "*would have been"* sent to such address for the appellant as the respondents then held on file.

13. It was at this juncture, when we queried Miss Donovan's use of the past conditional tense, that she informed us that the respondents had "*an understanding with the Courts and Tribunals"* with that "understanding" being, inferentially, that the respondents enjoy some kind of special privilege when the need for adequate evidence is being considered. We roundly reject any such notion and give Miss Donovan's assertion no credence whatsoever. It is frankly incredible that the respondents would seek to have or expect to have any kind of privileged position in litigation before the

Courts or Tribunal is in this country or, even if it did so, that the courts and/or Tribunals would countenance or tolerate any such arrangement, understanding or any attempt to procure same.

14. We 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 prepaid 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.

15. We also point out what should be obvious to all concerned, which is that assertions from a presenting officer or advocate that this or that "would have" or "should have" happened carries no evidential weight whatsoever. An advocate's assertions and/or submissions are not evidence, even if purportedly based upon knowledge of how any given system should operate.

16. Evidence of system might establish the propositions advanced by Miss Donovan; but there is no such evidence before us.

17. We do not consider the "evidence" adduced by the respondents to be anywhere near sufficient to prove, on the balance of probabilities, that in respect of each relevant tax year the respondents sent the appellant a notice to file within the meaning of section 8 of the Taxes get Management Act 1970. The production of a "Return Summary" sheet showing "Return Issued date" with a date appearing alongside, is not adequate to allow us to infer (for it would have to be an inference) that any notice to file was in fact put into the post by the respondents with the postage prepaid, properly addressed to the appellant. We arrive at that conclusion when we remind ourselves of the stringent requirements for drawing inferences (or making secondary findings of fact) from established primary facts. The leading judgement and guidance on that issue is to be found in **Regina v Alan Peter Ronald Hedgcock, David Charles James Dyer, Robert Mayers:** Court of Appeal Criminal Division [2007] EWCA Crim 3486,

Per Laws L. J. :

19. "There has been some little controversy (at least in the written arguments with which we have been supplied) as to the correct approach to be taken by the jury in a criminal case to an invitation by the Crown to draw an inference adverse to a defendant from primary facts. Here the inference would be the actual intention of the appellants to carry out the agreement to rape. Lord Diplock's observations in *Kwan Ping Bong v R [1979] AC 609* , 615G were cited to the judge as follows:

"The requirement of proof beyond all reasonable doubt does not prevent a jury from inferring, from the facts that have been the subject of direct evidence before them, the existence of some further fact, such as the knowledge or intent of the accused, which

constitutes an essential element of the offence; but the inference must be compelling — one (and the only one) that no reasonable man could fail to draw from the direct facts proved."

That is the test which the trial judge appeared to apply in ruling that there was a case to answer.

20 Sir Alan Green QC for the Crown draws attention, however, in his skeleton argument to the decision in *R v Jabber [2006] EWCA Crim 2694* in which the court said:

"20. Read literally, Lord Diplock's dicta might be understood to be saying that an inference was only to be regarded as compelling if all juries, assumed to be composed of those who are reasonable, would be bound to draw such an inference. In short, an inference could only be drawn if no one would dissent from it".

21. We reject that as an approach to be taken by the judge at the close of the prosecution case, even where the evidence is only circumstantial. The correct approach is to ask whether a reasonable jury, properly directed, would be entitled to draw an adverse inference. To draw an adverse inference from a combination of factual circumstances necessarily does involve the rejection of all realistic possibilities consistent with innocence."

22. We do not consider, with great respect, that there was any real distance between the authorities here. Elementarily the jury must apply the criminal standard of proof to the exercise of drawing inferences as to every other facet of the fact-finding process.

23. The question was whether a reasonable jury properly directed, not least as to the standard of proof, could draw the inference proposed and thus (as it was put in Jabber) reject all realistic possibilities consistent with innocence. That approach it seems to us is entirely consistent with Lord Diplock's remarks. If at the close of the Crown's case the trial judge concludes that a reasonable jury could not reject all realistic explanations that would be consistent with innocence, then it would be his duty to stop the case. What then is the position here?"

18. That judgement reminds us that a Court or Tribunal may only draw proper inferences and an inference will only be properly drawn in a civil action if it is more probable than not that the inference contended for is probably the only available inference that can be properly drawn.

19. In the absence of cogent and/or reliable evidence of system we do not consider it right or proper to draw the inference for which Miss Donovan, inferentially, contended. The simple fact of the matter is that the respondents have adduced no more than equivocal documentary evidence to the effect that it might have sent notices to file to

the appellant. In circumstances where the respondents were on notice that the appellant denied receipt of any such notices to file (being evidence capable of indicating that same were not sent) it should have been obvious to the respondents that they needed to adduce cogent and persuasive evidence to prove the fact of such sending, if such evidence was/is available.

20. In circumstances where we find that it has not been proved, on the balance of probabilities, that the necessary notices to file were sent by the respondents to the appellant, the appeal is allowed in full and the penalties (in total £2700) are quashed.

21. 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: 6 March 2018