[2017] UKFTT 613 (TC)

TC06049

Appeal number: TC/2017/03825

Income tax – self assessment – late filing – proof of requirements of s8 Taxes Management Act 1970.

FIRST-TIER TRIBUNAL
TAX CHAMBER

PETER JACKS **Appellant**

- and -

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

TRIBUNAL: JUDGE GERAINT JONES Q. C.
MR. JOHN ROBINSON.

Sitting in public at The Magistrates Court, Portsmouth on 01 August 2017

The Appellant did not appear and was not represented.

Miss Lucy Lawrence, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. In this appeal the appellant, Mr Jacks, appeals against a late filing penalty imposed upon him in respect of the alleged late filing of his self-assessment tax return for the fiscal year ended 5 April 2015. The penalties levied amount to £1200 being made up of £100 for not filing by 31 January 2017, £900 being the daily penalty for 90 days at £10 per day and then £300 because the return was not filed after six months had elapsed.

2. The appellant's appeal was filed with this Tribunal out of time but Miss Lawrence informed us that the respondents do not object to permission to appeal out of time being granted. We considered the matter independently and came to the conclusion that such permission should be granted.

3. The appellant did not attend the appeal hearing. In fact he had paid his tax for the fiscal year ended 5 April 2015 together with the £1,200 penalty by no later than 27 February 2017.

4. Correctly the respondents acknowledged that they bear the burden of proving that a penalty is due and payable with the standard of proof being the balance of probabilities.

5. The starting point must be section 8 of the Taxes Management Act 1970 ("TMA") which 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.

(2) 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 income which is not his income, but in respect of which he is chargeable in any capacity specified in the notice, computed in accordance with the Income Tax Acts and specifying each separate source of income and the amount from each source.

(3) A notice under this section may require a return of income for a specified year of assessment, or a return which is, so far as relates to certain sources of income, a return of income for one year of assessment, and, so far as relates to the remaining sources of income, a return of income for the preceding year of assessment.

(4) So far as a notice under this section relates to income chargeable under Case I or Case II of Schedule D, or any other income which may be computed by reference to the profits or gains of a period which is not a year of assessment, the notice may require a return of profits or gains (computed in accordance with the Income Tax

Acts) for a period for which accounts are made up or a period by reference to which income is to be computed.

(5) A notice under this section may require an individual to deliver a return of all his income computed in accordance with the provisions of the Income Tax Acts relating to surtax, or may require a return of his income which will afford the requisite information for computing his income both in accordance with the provisions of the Income Tax Acts relating to surtax and in accordance with the provisions of those Acts relating to tax at the standard rate.

(6) For the purpose of charging surtax a notice under this section may require a person liable to be charged to tax at the standard rate on the income of any incapacitated, deceased or non-resident person under Part VII or Part VIII of this Act to deliver a return of all the income of the incapacitated, deceased or non-resident person, computed in accordance with the provisions of the Income Tax Acts relating to surtax, and made to the best of his knowledge.

(7) Every return under this section shall include a declaration by the person making the return to the effect that the return is to the best of his knowledge correct and complete.

(8) In this section references to returns of income computed in accordance with the Income Tax Acts are references to returns which include, as well as all particulars relating to income from which tax has not been deducted, all particulars relating to income from which tax has been deducted before receipt, and relating to charges on income, which are required for computing total income for the purposes of the provisions of the Income Tax Acts relating to surtax or, as the case may require, to tax at the standard rate; and in this subsection the expression " charges on income " means amounts which fall to be deducted in computing total income for either or both of those purposes, or which would fall to be so deducted if the person to whose income the return relates were an individual.

6. It can be seen from section 8(1) TMA that it is a precondition to the obligation to file a self-assessment tax return that a notice to file has been given by an officer of HMRC to the taxpayer and so in this appeal, the appellant. That might very often be a matter of admission. But in this appeal it is not a matter of admission. Thus it is for the respondents to prove that a notice to file was given to the appellant.

7. These Tribunal appeal proceeding are judicial proceedings. Facts, if not admitted, must be proved by evidence. Sometimes it is said that the Tribunal process and procedure is more informal than that adopted in Courts, but that is not to say that there is informality or laxness concerning the need for facts, if relevant, to be proved by proper evidence. By “proper evidence” we mean reliable documents which are admitted or proved in evidence and/or reliable witness evidence. Business records, (which would include those maintained by the respondents) can be admitted as hearsay evidence of the facts stated therein, but the provenance of any such document must itself be proved, if not admitted.

8. In this appeal the respondents have produced a document, at page 10 of the appeal bundle, headed "Timeline" which asserts that a Notice to File was sent to the appellant on 6 April 2015. That is neither established by way of witness evidence nor is that document a reliable document of evidential quality. That is because it has been compiled solely for this appeal and is simply a convenient chronology document.

9. Miss Lawrence relied upon page 18 of the appeal bundle which is a document headed "Return Summary" and she described this as the respondents' "system evidence." Page 18 is headed "Return Summary" with the appellant's name and unique tax reference number on it. Miss Lawrence relies upon an entry "Return Issued Type" followed by "Notice to File" and then on the next line the words "Return Issued Date" followed by "06/04/2015".

10. The document to which we have just referred does not even purport to record that any such Notice to File was dispatched to the appellant or, even if it could be construed as an assertion that a Notice to File was dispatched, it does not disclose any address to which it may have been dispatched and/or the means of dispatch. We cannot simply assume that it was posted to the appellant at his correct address. That is just the kind of essential fact that must be proved by evidence. We say that because we must keep in mind that the appellant is entitled to a fair trial as to whether he is liable to a penalty. The respondents accept that they bear the onus of proof on this issue and accordingly it is for them to adduce admissible and relevant evidence to prove each and every necessary fact or matter which must exist (and be proved in evidence) before liability to a penalty arises. The fundamental facts that must be proved cannot be glossed over and/or assumed.

11. Miss Lawrence informed us that because of the large number of people with whom the respondents engage, there can be no further record and so no further evidence. In effect she submitted that the "Record Summary" was sufficient evidence to prove dispatch and, equally importantly, dispatch to the appellant's then address.

12. We cannot accept that submission. Many large commercial organisations which regularly deal with very large numbers of customers are able to detail what communications have taken place with its customers, to whom any correspondence has been sent, the means by which any such correspondence has been sent (whether by mail or electronic mail) and the date of dispatch. It is commonplace for such organisations to maintain a Post Book or Post Log, quite apart from having electronic records of emails sent and received. The very reason why such records are kept is that it can be relevant, from time to time, for the fact of such correspondence to be proved evidentially.

13. Adequate proof is a necessity; not a luxury. We do not consider that we can be, or should be, satisfied, on the balance of probabilities, that a Notice to File was posted by an officer of HMRC to the appellant simply based upon the computer held note "Return Issued Date" alongside which appears "6/4/15". Even if the Notice to File was issued on 6 April 2015 there is, quite literally, no evidence or even any note to the effect that it was dispatched to the appellant at a specified address. That is a fundamental link in the chain upon which liability to a penalty depends. A fact that it

is essential for the respondents to prove cannot be assumed. An inference of fact may well be legitimate in certain factual circumstances, but it is very clear in our jurisprudence that an inference of fact will only be drawn if it is the only reasonable inference available to the fact finding body, whether it be a judge or a jury. In a criminal case, a jury must be sure that the inference which it is invited to draw is the only reasonable inference to be drawn whereas in a civil context, we have to be satisfied that it is probably the only reasonable inference to be drawn. We have reminded ourselves of the judgement of the Court of Appeal (Criminal Division) in **Regina v Alan Peter Ronald Hedgcock, David Charles James Dyer, Robert Mayers**

No. 2007/00048/D1, 2007/0233/D1, 2007/00227/D1
Court of Appeal Criminal Division
[2007] EWCA Crim 3486

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."

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

21 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?

14. Proof of the giving of the notice requiring the appellant to file a tax return is a prerequisite to liability to a penalty for not filing a self-assessment tax return on time and must be strictly proved. In our judgement the giving of such notice has not been proved, strictly or otherwise, so that we can be satisfied as a matter of probability that such notice was given.

15. For the above reason this appeal succeeds in full.

16. 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
TRIBUNAL JUDGE

RELEASE DATE: 4 AUGUST 2017