[2018] UKFTT 138 (TC)

TC06391

Appeal number: TC/2017/08014

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 CYNTHIA LOIAL **Appellant**

- and -

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

TRIBUNAL: JUDGE GERAINT JONES Q. C.
MR. DAVID EARLE.

Sitting in public at Taylor House, London on 21 February 2018.

The Appellant appeared in person.

Miss Gill Clissold, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. By her Notice of Appeal, filed online on 01 November 2017, the appellant, Mrs Loial, appeals against a penalty imposed upon her by the respondents in respect of alleged late filing of her self-assessment tax return for the fiscal year ended 05 April 2015.

2. In the Notice of Appeal the appellant expressly states in numbered paragraph 3, in the section headed "Grounds for Appeal", that she did not receive any letter from the respondents, prior to 13 June 2017, requiring her to submit a self-assessment tax return for the fiscal year ended 5 April 2015.

3. As the 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:

(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 them to prove that factual prerequisite. In this appeal the appellant has put that factual matter very much in issue (in her Grounds for Appeal). Thus, the respondents have been on notice that it would be incumbent upon them to prove the sending of the requisite Notice to File.

6. We stress that 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 and Tribunals 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. There is no more than a rebuttable presumption as to its accuracy. 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, we venture to think, self-evident principles in mind, we 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 the relevant tax year. If the respondents cannot prove that the notice to file was served in respect of the tax year 2014/15, the penalty imposed falls at the first hurdle.

11. Miss Clissold sought to rely upon the document, at page 73 in our bundles, headed "Return Summary 2014/15". She contended that the fact that it contains the words "Return Issued Date" alongside which appears the date "06/04/2015" is proof, at least on the preponderance of probabilities, that a Notice to File was sent to the appellant on that date. Her position is that it "would have been" sent because it is so recorded. We keep in mind the requirement that the respondents prove that the Notice to File was sent to the taxpayer's last known address. It is not necessary for it to be proved that it was actually received.

12. 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 suggested that the entries at page 73 are sufficient for us to draw an inference of fact to the effect that the Notice to File was (i) actually sent on 6 April 2015, (ii) in a postage pre-paid envelope; (iii) correctly addressed to the appellant's last known address (then held on file). In our judgement no such inferences can possibly be justified.

13. 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 judgment 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”.
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> 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 standard 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. 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.

15. In our judgement, there are plainly other available inferences. One would be that although a date was entered alongside the rubric "Return Issued Date" no notice to File was actually dispatched. Another would be that no inference can be drawn concerning the address to which any such document was sent (as to which, see below). The first inference is especially available in a case where the appellant specifically states that she did not receive a Notice to File until a much later date. We observe that the duty is not for the respondents to ensure that a Notice to File is received by a taxpayer; it is to send a Notice to File to that person's last known address. Nonetheless, the fact that the appellant states that no such Notice to File was received is cogent evidence supporting one alternative available inference because Court and Tribunals usually (and properly) proceed on the basis that when people entrust letters and parcels to the tender care of the Royal Mail, it delivers such items in the ordinary course of post.

16. In this case, the document at page 75 shows that as at 6 April 2015 the address held on file by the respondents, for the appellant, was: 12 Rue Hector Berlioz, Ville-le-Grand in France.

16. We then asked Miss Clissold to explain to us what was meant by various acronyms appearing at page 79, in the bundle. We were particularly interested in an entry for 17 June 2016 which reads "Base Address RLS set". We were told that "RLS" means "returned letter service". This is capable of suggesting that a letter was sent to the appellant and may well refer to the entry on 31 May 2016, indicating that a "30 day daily pens reminder letter issued."

17. We also then observed that on the same page the entry for 6 December 2013 reads "Base Address changed from 12 Rue Hector Berlioz". That is at odds with the address history document which appears at page 76 in our bundle. Either the entry at page 76 is wrong or the entry at page 79 is wrong. We rather suspect that the error is at page 79, and that the word "from" should read "to". However, the plain discrepancy upon the face of the respondents' documents (which they rely upon as adequate evidence) hardly inspires confidence in the submission that inferences contrary to the interests of the appellant can and should be drawn therefrom. Indeed, if the word "from" was correctly used. It might suggest that any letter sent to the appellant on 6 April 2015 was sent to an address other than the Rue Hector Berlios address.

18. It is not for us to have to speculate about these matters. It is for the respondents to prove their case if they can.

19. 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 pre-paid envelope before committing it to the 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 in this case.

20. The upshot is that the respondents have failed to satisfy us, on the balance of probabilities, that a Notice to File as required by section 8 Taxes Management Act 1970, was sent to the appellant, to her then last known address held on file by the respondents, on or about 6 April 2015. Such a notice may have been sent; it may not have been sent. Our conclusion is that there is such a paucity of cogent evidence to prove that it was sent, that the respondents have failed to prove an essential prerequisite to the imposition of a penalty. It follows that this appeal is allowed in full.

20. 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: 13 MARCH 2018