TC06518

Appeal number: TC/2017/00371

Income tax: Penalties for failure to file self assessment returns, Notices to file issued to collect tax, S8 Taxes Management Act 1970 not satisfied. Appeals allowed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

ABID MANSOOR **Appellant**

- and -

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

TRIBUNAL: JUDGE GETHING
Member Mr Ian Menzies-Conacher

Sitting in public in Court Number 5, Reading Employment Tribunal, 5th Floor, 30-31 Friar Street, Reading, RG1 1DY on Thursday 17 May 2018

Upon hearing Mr Shahzad Niazi of the accounting firm Berkshire Accounting Limited for the Appellant and Mr Daniel Hopkins presenting officer of HMRC.

1. The appeal is against penalties claimed by HMRC for failure to file a self-assessment return in respect of the tax years 10/11, 11/12, 13/14 and 14/15 ("HMRC's purported penalty assessments"). HMRC claim an aggregate amount of penalties for failure to file the returns by the due date of £5,500 which represents in each of the years 10/11, 11/12 and 13/14:

(1) £100 fixed penalty for failure to file by the due date;

(2) £900 daily penalty of £10 per day for 90 days;

(3) £300 six month late filing penalty; and

(4) £300 twelve month late filing penalty.

A total of £1,600 per year.

2. The penalties imposed in respect of 2014/15 are:

(1) £100 late filing penalty; and

(2) £600 daily penalty of £10 for 60 days.

A total of £700.

3. For the reasons set out below we allow the appeal in full and reduce the penalties to zero.

4. The facts were as follows:

(1) Mr Mansoor was employed in all four years by more than one employer. He worked for Perfect Food Services in each of the years engaged in the production of fried fish and chips. He also worked for School Transport Contract as a driver and ASR Travel Ltd as a driver. HMRC had issued PAYE codes to the employers which had been operated.

(2) In relation to the tax year 2011/12 HMRC became aware that insufficient tax had been deducted by his employer from Mr Mansoor's salary. £868.20 was owing.

(3) In order to collect that tax HMRC decided to serve a notice on Mr Mansoor requiring the filing of a self-assessment return under section 8 Taxes Management Act 1970 (TMA").

(4) HMRC's electronic record shows that:

(a) on 11 April 2013 a notice to file a return was served on Mr Mansoor requiring the 2010/11 and 2011/12 returns to be filed in paper or electronically by 18 July 2013.

(b) no notice to file was served in respect of 2012/13

(c) on the 16 October 2014 a notice to file was issued in respect of 13/14 which required the return to be filed by 31 January 2015

(d) on 6 April 2015 a notice to file a return in respect of 2014/15 was served on Mr Mansoor which required the return to be filed by 31 January 2016.

(5) Mr Mansoor said the first time he received any communication from HMRC was in March 2016. Mr Mansoor has poor understanding of tax and financial matters and also has poor English. There was evidence that

communications to his place of residence had been returned to the Tribunal and it is possible that, if the notices were issued as HMRC's file suggests, they had been returned or were not delivered.

(6) Mr Aziz was engaged to assist Mr Mansoor in March 2016 and prepared the returns as quickly as possible and filed them by 30 June 2016.

(7) Mr Hopkins was unaware of why HMRC had not pursued the employer for the under deduction and why they had not issued revised codes to enable the underpayment for 2010/11 to be collected through the PAYE system in 2011/12, this would be the easiest and natural way to recover underpaid PAYE under Regulation 80 of the 2003 PAYE Regulations especially for a relatively low paid worker and where the under collection seems to have been HMRC's failure to issue appropriate codes.

(8) Mr Mansoor is no longer in the self-assessment regime.

5. We allow the appeals in full on the ground that the alleged penalty assessment notices even if they were sent and received (which is in some doubt) were invalid because the issue of the notices to file a self-assessment return in each of the periods 10/11, 11/12 13/14 and 14/15 were themselves invalid. Such notices to require a taxpayer to file a return may be issued under section 8(1) Taxes Management Act 1970 but only for the purpose of establishing the amount of income tax and capital gains tax owed by a taxpayer. They may not be issued for the purpose of collecting amounts of income tax of which HMRC are already aware. The words of the section are exceedingly clear:

> *"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 of tax payable by him by way of income tax and capital gain tax for that year, he may be required by a notice given 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, and*
> >
> > *(b) To deliver with the return such accounts, statements and documents, relating to the information contained in the return, as may reasonably be so required. "*

6. Lady Hale JSC referred in the recent Supreme Court case of *Walumba Lumba v Home Office, Kadian Mighty v Home Office* [2011] UKSC 12, [2012] 1 AC 245 (at paragraph 199) to authority, including the House of Lords case of *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 as exemplifying:

> "the long-established principle of United Kingdom public law that statutory powers must be used for the purpose for which they were conferred and not for some other purpose."

7. None of the other justices of the Supreme Court in *Lumba* dissented from Lady Hale's statement of this principle. We bear in mind that the First-tier Tribunal, as was pointed out in the cases of *Hok* [2012] UKUT 363 (TCC) and *BT Pension Trustees* [2014] EWCA Civ 23 at [142] and [143] has not expressly been granted any judicial review jurisdiction. No submissions were made by either party about the

jurisdiction of the FTT. We note that no express right of appeal against a section 8 notice is conferred by the TMA. In our opinion the absence of an express provision conferring judicial review jurisdiction on the Tribunal does not prevent a collateral challenge, based on the principle applied by the House of Lords decision in *London Borough of Wandsworth v Winder* [1984] UKHL 2, [1985] AC 461 and a number of subsequent cases, to the validity of a purported notice under section 8, and the appeal against the penalties in this case is such a collateral challenge. We would not accept that *Hok*, *BT Pension Trustees* and similar cases oblige the Tribunal in such a case as this to disregard breaches of public law and their effect on the validity of HMRC actions. We consider that the purported use of section 8 to demand returns was (as explained above) a serious breach of public law, amply justifying treatment of the purported section 8 notices as a nullity and a successful collateral challenge by Mr Mansoor. We are comforted in the view we have taken by the decision of Judge Thomas in *Goldsmith* [2018] UK FTT 5 (TC), and the decision of Judge Popplewell in *Lennon* [2018] UK FTT 220 (TC*)* where in each case the facts were very similar to those here, while acknowledging as we must that *Goldsmith* and *Lennon* have no precedential effect.

8. 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.

HEATHER GETHING
TRIBUNAL JUDGE

RELEASE DATE: 31 MAY 2018