[2018] UKFTT 0190 (TC)

TC06431

Appeal number: TC/2016/03478

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

MR A. GALIARA **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.

Mr. M. Irfan appeared for the Appellant.

Miss A. Wilkins, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents.

DECISION

1. The appellant, Mr Galiara, appeals against penalties imposed upon him 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 2013 and 5 April 2014.

2. Although the appellant has not asserted as a Ground of Appeal that he did not receive a Notices to File pursuant to section 8 Taxes Management Act 1970, that is a prerequisite to any penalty being levied for non-filing.

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. 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 our judgement it would be dangerous to infer that the appellant has not put that matter expressly in issue because he accepts or admits that the requisite notices to file were served.

6. 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?"

7. 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. An equally feasible inference in this case is that the appellant was and

is not aware that it is a prerequisite to the imposition of a penalty that a Notice to File has been sent to him.

8. 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.

9. 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 court 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.

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

11. 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.

12. 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.

13. It is an unusual feature of this case that the appellant had historically paid his tax through the PAYE system but, for a reason or reasons not made known to us, the respondents asserted that for the tax year ended 5 April 2013 there was a sum of £1,211 outstanding on his PAYE liability which, it seems, could not be collected through the PAYE system either in the tax year to which that sum related or in a subsequent tax year. The reason for this situation arising was not in evidence nor could either party give a coherent explanation as to why or how it had come about. However, we believe that we found the reason which emerges from the respondents' letter dated 10 March

2016 when the respondents wrote to the appellant asserting that because the £1,211 could not be collected through his tax code "*as income from your current employment is less than the allowance and you are therefore not paying any tax*." The respondents then went on to say that because no reply had been received to letters inviting the appellant to make voluntary payments *"you were set up in self-assessment to enable us to collect the tax owing."* Miss Wilkins was unable to explain to us by what right the respondents acted in that way. She simply asserted that it was a mechanism for collecting money that the appellant had not voluntarily paid to the respondents. Miss Wilkins could not assist us on the issue of whether it was/is a legitimate tactic to impose a requirement that somebody submits self-assessment returns, for the purpose of collecting what may or may not be an enforceable sum against a taxpayer. Miss Wilkins was even unable to tell us when the appellant was "*set up in self-assessment …".*

14. Miss Wilkins referred us to pages 34 and 35 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 "12/3/15", 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 Wilkins 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.

15. 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 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.

16. 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.

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

18. 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 pre-paid, 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, summarised in **Hedgcock** (above).

19. Further, in the absence of any positive case being advanced or explained to us, to justify the respondents imposing self-assessment upon the appellant because he had failed to make payments which the respondents had asked him to make voluntarily, we are not satisfied that the respondents could justifiably act in that way. It might be that they could; it might be that they could not. If it is their case that they could act in that way then it was for them, through their advocate, to demonstrate to us why that was so.

20. It follows that this appeal is allowed in full and the penalties are quashed in respect of each of the two tax years to which they relate.

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
TRIBUNAL JUDGE

RELEASE DATE: 3 APRIL 2018