



TC07132

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Appeal number: TC/2019/00254

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*Income tax – self assessment – late filing – proof of requirements of s8
Taxes Management Act 1970. Burden of Proof in Penalty cases. Inherent
unreliability of HMRC’s Return Summary documents.*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

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MR ALEXANDRU MUSCA

Appellant

- and -

**THE COMMISSIONERS FOR HER
MAJESTY’S
REVENUE & CUSTOMS**

Respondents

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TRIBUNAL: JUDGE GERAINT JONES QC.

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**The Tribunal determined the appeal on 07 May 2019 without a hearing under the
provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax
Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal
(with enclosures) and HMRC’s Statement of Case (with enclosures).**

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DECISION

5 1. HMRC alleges in its Paper Hearing Submission that it sent late filing penalty notices to the appellant Ms Platt, in respect of the fiscal years ended 5 April 2015 because, it is alleged, he had not timeously filed his self-assessment tax return for that year. I have not been provided with a copy of any such penalty notices. Thus I have no evidence about what was contained in them or any of them. Although HMRC has produced a document headed “Return Summary” in respect of the appellant’s personal tax affairs which contains an entry “06/04/15” alongside the rubric “Return Issued Date”, it gives no clue whatsoever as to whether any Penalty Notices were generated, let alone dispatched. However the (alleged) despatch dates for Penalty Notices are given in a document headed “View/Cancel Penalties” (page 7 of the bundle).

15 2. As this 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.

20 3. 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.

25 (2) The Tribunal making its findings of fact based upon admissible evidence; not based upon unsubstantiated assertions made by the respondents in their Paper Hearing Submission.

30 4. 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 HMRC to prove that factual prerequisite. That is so regardless of whether HMRC is on notice that the appellant expressly asserts that she did not receive a Notice to File because a litigant in person cannot be expected to know that (proof of) service of a Notice to File is a prerequisite to the respondents being able successfully to resist the appeal.

35 5. 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.

40 6. 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

5 may be admitted under the “business records” provision where the courts 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.

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

10 8. With those rather basic and, I venture to think, self-evident principles in mind, I turn to the circumstances of this case.

15 9. The first issue is whether the appeal is out of time and, if so, whether permission to appeal out of time should be granted, keeping in mind the guidance given by the Upper Tribunal in Martland v HMRC [2018] UKUT 178. Thus I have regards to the amount of delay, what (if any) reason or excuse exists for the delay, potential prejudice to each party and I am entitled to have regard to any obvious merit or lack of merit in the (proposed) appeal.

10. Section 8(1) Taxes Management Act 1970 provides as follows:

Return of income.

20 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.

25 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, I 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 ended 5 April 30 2015, the penalties imposed will usually fall at the first hurdle.

12. HMRC has chosen not to adduce any witness evidence.

35 13. In respect of serving a Notice to File HMRC for the fiscal year ended 5 April 2015, HMRC has simply produced a document, presumably printed from some computer held record, headed “Return Summary” which bears the appellant’s name, tax reference number and national insurance number. There is then a column which contains the words “Return Issued Date” alongside which appears “06/04/15”. Inferentially HMRC contends that I can be satisfied that a Notice to File was sent to the appellant’s correct address because it would have been sent to the address for the appellant which the respondents hold on file by way of another computer record headed 40 “Individual Designatory Details”. However that document states “Address Effective

from Date 27/03/2018”. It tells me nothing about the appellant’s address in 2015/2016 and/or anything about what, if any, address the respondents used for the appellant in 2015/2016 if a Notice to File was sent to the appellant.

5 14. In my judgment the “Return Summary” falls well short of being sufficient evidence to prove, even to the civil standard, that a Notice to File was actually sent to the appellant. That is because:

10 (1) Where the document shows a “Return Issue Date” of “6/04/15” I can be reasonably certain that that is a fiction, because those with experience in this Tribunal well know that, absent special circumstances, that is the date which appears alongside every person’s Return Summary alongside the words “Return Issued Date”. It is equally well known that the reality is that HMRC sends out Notices to File on a staggered basis because, logistically, it simply could not hand over to the Royal Mail the huge volume of letters which it would need to send if every relevant taxpayer was sent a Notice to File on the same day of each year. 15 Nonetheless, that would have to be the factual situation for that record to be a true and reliable record. The record is therefore inherently improbable and unreliable. It may well be that HMRC sends out some Notices to File on 6 April in each year, but there is, literally, no reliable evidence to show that that happened in the case of this appellant on 6 April 2015 or indeed on any other date. Accordingly, the Return Summary probably contains false, or at least unreliable, information and so it would require cogent evidence from HMRC for me to find as a fact that a Notice to File was sent to this appellant on 6 April 2015. 20

25 (2) Even if HMRC could show that a Notice to File was intended to be sent to this appellant on 6 April 2015, there is no evidence to show that any such Notice to File was actually sent. That is because even if the date shown in the Return Summary, whether inserted by a person or a computer, is accurate, it falls far short of evidencing and proving actual dispatch of any particular document.

30 (3) I 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. There is no such evidence in this case. 35

(4) If there had been adequate evidence to show that a Notice to File was sent, there is no evidence to establish to what address it was sent.

40 15. Accordingly in circumstances where HMRC has failed to prove a prerequisite to issuing the penalties in dispute in this appeal, the appeal would ordinarily be allowed in full in respect of the fiscal years ended 5 April 2015.

16. I have set out the foregoing because it is a highly relevant factor when I consider the issue of permission to appeal out of time.
17. On the basis that the time for appealing each penalty runs from the date of receipt of notice of any such penalty, the appeals are variously 2 years to 15 months later.
- 5 18. The purpose of an appeal is to procure finality in and about matters affecting both the appellant and the respondents and to prevent the respondents being troubled by stale matters. That is an important factor but must still be considered against the overall justice of the case (or the possible manifest injustice of shutting out an obviously meritorious appeal; if such it is).
- 10 19. The appellant has equally failed to adduce any witness evidence. However, from the Paper Hearing Submission it appears that the respondents accept that an agent previously acting for the appellant sent in a tax return for the appellant, incorrectly stating that he had income from self-employment notwithstanding that the appellant, in the relevant tax year, was no longer self-employed. That was accepted because the tax due on the incorrectly declared income from self-employment, was later cancelled. The respondents also record that the appellant “was eventually advised not to contact her as she was sick.” I know no further details.
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20. Whilst the evidence is scant I think it just suffices to allow me to find that the appellant was ill served by his erstwhile agent, quite probably because she was suffering from a significant (unknown) illness. Nonetheless I have to keep in mind that the failings of an agent will not provide a reasonable excuse for a failure to file because when an agent files a person’s tax return, he/she simply does so as a functionary, on behalf of the principal.
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21. This is a case in which the respondents have accepted that the appellant’s tax return, once correctly completed, indicated that there was no tax due. Thus if permission to appeal out of time is granted it cannot be the case that the respondents could face any prejudice or difficulty in and about dealing with the correct tax position for the appellant in the relevant fiscal year. The prejudice to the appellant in having to pay penalties (plus interest thereon) is obvious, especially when I keep in mind that the appellant is not a man of significant financial means.
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22. My approach must be that the excuse or reason for the delay is unsatisfactory and does not assist the appellant. The period of delay is significant, bordering upon substantial. On the other side of the coin is the absence of any prejudice to the respondents if permission to appeal out of time is granted. Furthermore and, importantly in my judgement, is the fact that this appeal has very substantial merit and, but for it not being permitted to proceed, would succeed. As the respondents point out at the bottom of page 7 in the bundle, in their Paper Hearing Submission “The legal obligation to make a return is created with (sic, when) the notice to file a return, a notice under 8 TMA 1970, is issued, and once issued, the customer is legally obliged to complete that return.”
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23. Thus the foregoing relevant factors present me with a borderline balancing exercise when it comes to the exercise of my discretion. There will often be cases which could fall just one side of the line or the other. This, in my judgement, is one of them. When I balance the matters I arrive at the conclusion, by the narrowest of margins, that permission to appeal out of time should be permitted.

24. Accordingly in circumstances where HMRC has failed to prove a prerequisite to issuing the penalties in dispute in this appeal, the appeal must be allowed in full in respect of the fiscal years ended 5 April 2015.

25. 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: 9 MAY 2019