TC05784

Appeal number: TC/2017/01187

TYPE OF TAX – Income tax Sch 55 Notice. Penalty – requirements. Information Notice must be construed within its own four corners.

FIRST-TIER TRIBUNAL
TAX CHAMBER

FERGUS ANSTOCK **Appellant**

- and -

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

TRIBUNAL: JUDGE GERAINT JONES Q. C.
MS JANE SHILLAKER.

Sitting in public at Fox Court, London on 10 April 2017.

The Appellant in person.
Mr. James, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. On 1 April 2014 the respondents sent the appellant, Mr. Anstock, a letter informing them that they were in possession of information "*that gives us reason to suspect that you have committed tax fraud*". The same letter stated that an investigation would be conducted.

2. On 13 June 2014 a meeting took place at which the appellant was present and the respondents were represented by Miss Manning and Mrs Shields. A Note of that meeting records that various topics were discussed and it was followed by a letter dated 19 June 2014 from the respondents thanking the appellant for his co-operation.

3. The investigation continued, and, by letter dated 19 June 2014, the respondents informed the appellant that enquiries were being opened into The Kathryn Stud, Haldanes Partnership and Newhaven Limited.

4. A further meeting took place on 1 April 2016, attended by the appellant and by Miss Manning and Mrs Donnelly for the respondents. The Notes of that meeting run to 57 paragraphs, but our copy of them is not signed by anybody who attended the meeting.

5. On 28 April 2016 the respondents informed the appellant that his tax return, received on 15 January 2016, was being checked.

6. By letter dated 5 May 2016 the appellant stated that he had reviewed the notes of the meeting on 1 April 2016 and then set out his disagreement with certain of the matters recorded and also made various comments.

7. Then, by letter dated 27 May 2016 the respondents wrote to the appellant seeking information and/or documents from the appellant as set out in the paragraphs numbered 1 – 17 in that letter. The appellant responded to that letter by his letter dated 13 July 2016. However, in the meantime a Notice to Provide Information and Produce Documents dated 5 July 2016 may have been sent by the respondents to the appellant. He did not reply specifically to that letter. Nor is there any letter or other correspondence from the appellant acknowledging receipt of it or otherwise indicating that he was aware of it. His reply dated 13 July 2016, which is specifically a reply to the letter of 27 May 2016, makes no reference to the Notice of 5 July 2016.

8. On 16 August 2016 the respondents, by Miss Manning, wrote to the appellant apologising for the failure to send a copy of the Notes of the meeting of 5 May 2016 to him. By a second letter dated 16 August 2016 the respondents imposed a penalty of £300 for alleged non-compliance with the Information Notice dated 5 July 2016.

9. For the purpose of this appeal the respondents have filed no witness statements and at the appeal hearing did not proposed to call any witness evidence.

10. It is most important to remember that this penalty attracts the requirements of article 6 of the European Convention on Human Rights ("ECHR"). We are in no doubt that that is the position and we apply the reasoning of the European Court of Human Rights in **Jussila v Finland [2006] ECHR 996.** The important point is that we must look at the substance of what is taking place. It is beyond doubt that Parliament has provided for "penalties" to be imposed by civil servants in the event that certain Notices are not complied with. The right of appeal to the Tribunal saves that regime from being non-compliant with article 6 ECHR because it provides for judicial consideration of the propriety of the penalty and its application. It is for the Tribunal to determine whether the penalty has been lawfully imposed.

11. The following requirements are fundamental :

(1) The respondents must prove that the Information Notice was properly sent to and received by the appellant. In many cases that will involve no more than demonstrating that the appellant has acknowledged receipt of same. However, in a case where there is no such acknowledgement or admission, the respondents bear the onus of proving that such a Notice has been sent and received. If the respondents can prove that it has been sent then they may be able to rely upon the presumption of delivery in due course of post but that pre-supposes that the respondents have established that the appropriate letter was committed to the care of the Royal Mail.

(2) If the Tribunal is satisfied, on the balance of probabilities, that the Notice was sent and received, then the next enquiry will be whether the Notice sets out precise, clear and unambiguous requests for (relevant) information and/or documents, so that the requirements of the Notice can be readily understood and complied with. This is essential. A person cannot be subject to a penalty (whether criminal or civil) for being in breach of an obligation unless he is made aware of that which he must do (or must not do) to avoid such a penalty. In the realm of civil injunctions, which may result in punishment for contempt of court if they are not complied with, the courts are assiduous to ensure that any alleged breach of an injunction is particularised by reference to the precise terms of the injunction order which, it is alleged, have been breached. It follows that it is essential for the terms of the injunction to be drafted with care so as to be unambiguous and clear if such an investigation is subsequently to take place.

(3) If the respondents satisfy the Tribunal on each of the two foregoing issues, then the Tribunal will look to see whether there has been substantial compliance with the Notice. We say "substantial" because although the jurisprudence of this Tribunal establishes that partial compliance is not compliance, that is plainly subject to a *de minimis* exception. It does not arise for consideration in the present appeal.

12. It is also vital to remember that the Tribunal proceeds on the basis of evidence. Tribunal proceedings are judicial proceedings and although Tribunals may take a more relaxed or informal approach than some Courts, that does not undermine the essential need for facts to be proved by evidence.

13. On behalf of the respondents Mr. James pointed to no evidence, either by way of witness evidence or documentary evidence, to indicate that the Notice upon which the penalty is based, had either been sent by the respondents and/or received by the appellant. We quite understand that in an organisation the size of the respondents' organisation it might be difficult to lead witness evidence of the sending of each and every letter dispatched. It will be a matter for individual tribunals to decide whether evidence of system is then sufficient in any particular case and that, in turn, will depend upon the quality of that evidence and the content of it.

14. Mr James sought to assure us that the letter had been sent, but the assertions of advocates do not amount to evidence.

15. Accordingly, the respondents have failed to prove that it is more probable than not that the Notice was (i) sent to the appellant and/or (ii) received by him. For that reason alone this appeal must succeed.

16. However, even if the respondents had overcome the first hurdle that we have identified, this appeal would still have succeeded. The Notice offends just about every tenet for the proper drafting of a document which is intended to have legal effect, that is, in the sense that if it is not complied with, then a penalty can be imposed against the party to whom it is sent. The Notice is so poorly drafted that it would be perverse to conclude that the recipient of it could know precisely what it was that he was required to provide to the respondents by way of either information or documents. The Notice proceeds on the erroneous basis that the appellant can be expected to provide documents and/or information held by third parties, in particular companies of which he either is or was a director. That information and those documents are the property of the company; nobody else. The respondents have ample powers to obtain information from third parties, and if that is desired, then the proper procedures should be adopted.

17. It is not right that we should make the generalised statement that we have set out in paragraph 16 above without setting out our justification for it. However, we consider that this can be done by taking examples of the poor drafting rather than by referring to each of the 22 requested pieces of information or documents.

18. By way of example, question 4 in the Notice refers to four separate properties and then says "*provide evidence to show how each property was financed.*" The question seems to assume, without asserting, that the appellant financed either the purchase of, or the acquisition of some other interest in, the four named properties. It does not specify by whom the financing of the four identified properties (or any of them) is alleged to have taken place. It pre-supposes that the appellant may have relevant evidence. In the appellant's letter of 13 July 2016 he nonetheless sought to deal with that query by reference to each of the four named properties, albeit that if the expression "provide evidence" was meant to refer to documentary evidence, none was provided. However, the request did not specifically require documentary evidence. It is often overlooked that statements made orally are evidence. The criminal courts in this country work on the basis of oral evidence, daily.

19. At question 6, a property in Coventry Garden is referred to and the request then says "*please provide further information about this property and any others HMRC has not been made aware of*". There is nothing whatsoever to indicate what type of information is requested. It is not for the recipient of the Notice to guess or to have to make even an informed guess given the context in which the request is made. If the respondents want to know, for example, by whom a particular property was purchased, when it was purchased, at what price and whether it has been sold and, if so, when and that what price, those enquiries are each capable of being specifically set out so that there will be no doubt about what is being asked. If documents are being asked for then, for example, the respondents might ask for a copy of the "Completion Statement" sent to a property owner upon the purchase or sale of any such property (perhaps being prefaced by the comment that the question arises only if a solicitor was engaged to undertake the conveyancing upon purchase and/or sale). The request for unspecified information about properties that "*HMRC has not been made aware of*" is singularly unfair and incapable of being properly understood, because the recipient of the Notice will not necessarily know about which properties "*HMRC has not been made aware of*". If the respondents had intended to ask the recipient of the Notice to state whether he had, within a specified period of time, purchased or sold any properties other than those already specifically referred to in the Notice, it would have been a simple matter to frame an appropriate question to that effect.

20. By way of our last example we refer to request 14 which requests "*fee lists for any companies within the Newhaven Group structure, whether in the UK or overseas, from 2010 to date*". Quite what is meant by a "fee list" is not explained, nor is the expression "Newhaven Group structure". The request also overlooks the fact that the fee lists, whatever they might be, are the property of and might even be the confidential information of any such companies that hold or held same.

21. We should also comment that the request at numbered item 16 seems to have been made without recognising the possibility that the explanation sought might well have been trespassing into legal professional privilege.

22. The Notice relied upon by the respondents is so poorly thought through and so inadequately drafted that it fails the requirement of certainty and precision, which is a fundamental requirement (as explained above). In this context it is also worth pointing out that the requirements made of the recipient of a Notice must be discernible from within the four corners of the Notice itself unless some other document is specifically incorporated by reference. It will not do for it to be argued, as it was argued before us, that some of the details about requested information might have been gleaned by looking at the earlier correspondence. That might be so; it might not be so. However, that is not a legitimate way to proceed because the Notice must be self-contained and must be construed to establish precisely what information and/or documents it properly requires the recipient to provide.

23. A taxpayer cannot be in breach of a Notice unless it is a valid notice. By "valid" we mean one which meets the requirements of certainty and precision, which we have discussed above.

24. For the two separate reasons that we have set out above, this appeal is allowed and the £300 penalty quashed.

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: 13 APRIL 2017