TC01431

Appeal number: TC/2011/2813

Income tax – penalty for careless inaccuracy – FA 2007, Sch 24 –first occasion on which inaccurate return made - special circumstances – suspension of penalty - proportionality

FIRST-TIER TRIBUNAL

TAX

DAVID COLLIS **Appellant**

- and -

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

TRIBUNAL: JUDGE ROGER BERNER
MR HARVEY ADAMS FCA (Member)

Sitting in public at Copthall House, 9 The Pavement, Sutton, Surrey on 23 August 2011

The Appellant appeared in person

Karen Weare, HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal by Mr Collis against a penalty assessment issued on 28 January 2011 under paragraph 1 of Schedule 24 to the Finance Act 2007 ("FA 2007") on the basis of an inaccuracy contained in Mr Collis' self assessment for the tax year ended 5 April 2009, which is said to be careless.

2. The amount of tax under-declared was £4,757.60. The penalty is £713.55, and has been levied at 15% of £4,757.

3. Mr Collis accepts that his return for 2008/09 was incorrectly completed. He says that this was due to a simple error. He has repaid the tax that was rebated to him by HMRC, together with interest. However, he considers that the levying of a penalty is over-penal, and that, for what he describes as a first offence, argues that it would surely be reasonable for a warning to have been given, rather than the immediate levying of a penalty.

The facts

4. Aside from one aspect, that concerning whether this was the first such default by Mr Collis, the facts are straightforward and uncontroversial. We make the following findings.

5. Mr Collis was issued with a tax return for the year ended 5 April 2009 on 6 April 2009.

6. Mr Collis filed his self assessment return for that period on 17 September 2009.

7. Mr Collis was employed by TTA Holdings Limited and received benefits in kind in the form of car benefits, car fuel benefit and private medical benefit.

8. Mr Collis entered on the tax return his pay and tax figures for the period of his employment from his P45 but did not include details of the benefits in kind he had received. This information could have been ascertained from the form P11D which Mr Collis had received from his employer. Mr Collis was aware of the obligation to enter the details of the benefits in kind on the return. He had made self assessment returns for the years ended 5 April 2007 and 5 April 2008 on which benefits in kind were recorded.

9. On 22 July 2009 HMRC opened an enquiry into the return under s 9, Taxes Management Act 1970. The enquiry closed on 28 January 2011 with the conclusion that Mr Collis had omitted to return the benefits in kind.

10. The self assessment calculation for the year ended 5 April 2009 showed a tax repayment of £4,367. The revised tax due following the conclusion of the enquiry was tax due of £390.60, giving a difference of £4,757.60.

11. The penalty was levied at 15% of the difference between the original and revised tax assessments (rounded down to the nearest £).

Period 2005/06

12. HMRC contend that Mr Collis made the same error in respect of the tax year ended 5 April 2006 in that benefits in kind were omitted from his tax return for that period. Evidence was produced in support of this in the form of a letter to Mr Collis dated 16 January 2008, in which HMRC thanked Mr Collis for additional information enabling them to complete their enquiry into Mr Collis' tax return for that year, and to conclude that car benefit and fuel benefit were not included on the return. We were not shown a copy of any return for that period.

13. Mr Collis submits that the error that was made was not of a similar nature as it was not an error in relation to a self assessment return filed by him. He says that in the relevant period HMRC had not (for whatever reason) required him to submit a self assessment return, and he had not done so. Instead HMRC had relied upon PAYE and his employer's payroll submissions. Although Mr Collis accepts that there was an underpayment of tax in relation to benefits in kind, he argues that this was not in relation to any omitted entries on a return filed by him.

14. On the evidence before us, we conclude that Mr Collis did not file a self assessment return for the year 2005/06. We accept, therefore, that the omission of benefits in kind from his return for 2008/09 was the first time on which such an omission had occurred.

The law

15. Schedule 24 provides for liability for penalties for errors in certain types of document given to HMRC, including a self assessment return. The penalty in this case was charged under para 1, Sch 24, which provides as follows:

> "(1) A penalty is payable by a person (P) where—
>
> (a) P gives HMRC a document of a kind listed in the Table below, and
>
> (b) Conditions 1 and 2 are satisfied.
>
> (2) Condition 1 is that the document contains an inaccuracy which amounts to, or leads to—
>
> (a) an understatement of a liability to tax,
>
> (b) a false or inflated statement of a loss, or
>
> (c) a false or inflated claim to repayment of tax.
>
> (3) Condition 2 is that the inaccuracy was careless (within the meaning of paragraph 3) or deliberate on P's part.
>
> (4) Where a document contains more than one inaccuracy, a penalty is payable for each inaccuracy."

16. In this case there is no assertion that the inaccuracy in Mr Collis' return was deliberate. We are concerned only to determine if it was careless.

17. Careless in this context is defined by para 3(1)(a). That provides that inaccuracy in a document is careless if the inaccuracy is due to failure by P (the person giving the document to HMRC) to take reasonable care.

18. Paragraph 4 sets out the standard amounts of penalty for the behaviours that are the subject of the Sch 24 regime. We are concerned only with para 4(1)(a), which imposes a penalty for careless action of 30% of the potential lost revenue. We need not consider the meaning of potential lost revenue (in paras 5 to 8), as there is no dispute that in this case that amounted to £4,757.

19. Paragraphs 9 and 10 provide for reductions in the penalty where a person discloses an inaccuracy, a supply of false information or withholding of information, or a failure to disclose an under-assessment. A person discloses an inaccuracy by (para 9(1)):

> "(a) telling HMRC about it,
>
> (b) giving HMRC reasonable help in quantifying the inaccuracy, the inaccuracy attributable to the supply of false information or withholding of information, or the under-assessment, and
>
> (c) allowing HMRC access to records for the purpose of ensuring that the inaccuracy, the inaccuracy attributable to the supply of false information or withholding of information, or the under-assessment is fully corrected."

20. Paragraph 9(2) distinguishes between disclosure that is "unprompted" and disclosure that is "prompted". It provides:

> "Disclosure—
>
> (a) is 'unprompted' if made at a time when the person making it has no reason to believe that HMRC have discovered or are about to discover the inaccuracy, the supply of false information or withholding of information, or the under-assessment, and
>
> (b) otherwise, is 'prompted'."

There is no dispute in this case that the disclosure made by Mr Collis was a prompted disclosure.

21. Paragraph 10, at the material time, provided that "[w]here a person who would otherwise be liable to a 30% penalty has made a prompted disclosure, HMRC shall reduce the 30% to a percentage, not below 15%, which reflects the quality of the disclosure. "Quality" for this purpose includes timing, nature and extent (para 9(3)).

22. Paragraph 10 accordingly provides, in the case of prompted disclosure, for a minimum penalty for careless inaccuracy. However, even that minimum penalty can be further reduced or mitigated in special circumstances as provided by para 11:

> "(1) If they think it right because of special circumstances, HMRC may reduce a penalty under paragraph 1, 1A or 2.
>
> (2) In sub-paragraph (1) "special circumstances" does not include—

(a) ability to pay, or

(b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

(3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to—

(a) staying a penalty, and

(b) agreeing a compromise in relation to proceedings for a penalty."

23. HMRC also have a power to suspend all or part of a penalty for careless inaccuracy, but only if this would help a person to avoid becoming liable to similar such penalties. Paragraph 14 provides:

"(1) HMRC may suspend all or part of a penalty for a careless inaccuracy under paragraph 1 by notice in writing to P.

(2) A notice must specify—

(a) what part of the penalty is to be suspended,

(b) a period of suspension not exceeding two years, and

(c) conditions of suspension to be complied with by P.

(3) HMRC may suspend all or part of a penalty only if compliance with a condition of suspension would help P to avoid becoming liable to further penalties under paragraph 1 for careless inaccuracy.

(4) A condition of suspension may specify—

(a) action to be taken, and

(b) a period within which it must be taken.

(5) On the expiry of the period of suspension—

(a) if P satisfies HMRC that the conditions of suspension have been complied with, the suspended penalty or part is cancelled, and

(b) otherwise, the suspended penalty or part becomes payable.

(6) If, during the period of suspension of all or part of a penalty under paragraph 1, P becomes liable for another penalty under that paragraph, the suspended penalty or part becomes payable."

Discussion

24. Appeals may be made in respect of penalties charged under Schedule 24 FA 2007 in a number of ways. These are set out in para 15 as follows:

"(1) A person may appeal against a decision of HMRC that a penalty is payable by the person.

(2) A person may appeal against a decision of HMRC as to the amount of a penalty payable by the person.

> (3) A person may appeal against a decision of HMRC not to suspend a penalty payable by the person.
>
> (4) A person may appeal against a decision of HMRC setting conditions of suspension of a penalty payable by the person."

25. Although set out in this way, there will be many cases, in fact it is likely to be common, where a taxpayer subject to a penalty will want to make an appeal under more than one of the heads of appeal available. In many cases taxpayers will be unrepresented, and will not make any distinction, based on para 15, in the nature of the appeal that is made. In such cases, in the interests of fairness and justice the tribunal should be slow to exclude any avenue of appeal available to an appellant purely on the technical nature of the appeal that has been made. Issues of liability and amount will often go hand in hand and should normally be considered in that way by the tribunal. Accordingly, if a tribunal affirms the decision of HMRC that a penalty is payable, it should normally go on to consider the amount of that penalty, including any decision regarding the existence or effect of any special circumstances, and also any decision whether or not to suspend the penalty and any conditions of any such suspension.

26. In this case, therefore, it is appropriate for us to consider whether Mr Collis is liable to the penalty that has been charged, and whether the amount is correct. But there is also a curious feature in this case that we must consider. It is that HMRC considered the question of the suspension of the penalty and decided not to suspend it, but did not notify Mr Collis of that decision. The first that Mr Collis knew of this was when he received HMRC's bundle of documents for the hearing of the appeal. At the very last page of that bundle there appears a copy of an internal HMRC note which concludes that the penalty cannot be suspended.

27. It follows from this that Mr Collis did not receive anything from HMRC regarding suspension of the penalty against which he could appeal under para 15(3). Despite this, Ms Weare addressed the tribunal on the issue, and we make some general comments later. But at the outset we make the point that it is entirely wrong for HMRC to make a determination that a penalty shall not be suspended and not notify that decision to the person to be charged. Although we ourselves make comments later on the position as we see it as a matter of law, we do not consider that Mr Collis has in this respect been afforded a fair opportunity to make any case he would have done if he had been able to appeal against the decision not to suspend the penalty. Although we can make no direction to this effect, the proper course is for HMRC now formally to notify Mr Collis in writing of the decision not to suspend the penalty so that Mr Collis may, if he sees fit, make an appeal to the tribunal in that respect.

Careless inaccuracy

28. Mr Collis says that his error in not including his benefits in kind was an oversight, and that he was in no way attempting to defraud HMRC or be dishonest. No allegation of fraud or dishonesty has been made. The penalty regime itself recognises, however, that there can be a degree of culpability that Parliament has

determined should be penalised, even though it falls short of dishonesty or other deliberate conduct. A lesser penalty is prescribed for that purpose.

29. That penalty applies if the inaccuracy in the relevant document is due to a failure on the part of the taxpayer (or other person giving the document) to take reasonable care. We consider that the standard by which this falls to be judged is that of a prudent and reasonable taxpayer in the position of the taxpayer in question.

30. Applying that test, we conclude that such a taxpayer, knowing that benefits had been received, and the amounts of those benefits, would have included them in the tax return. The taking of reasonable care would, in our view, have resulted in Mr Collis not overlooking the need to make the relevant entry in his return. He was well aware of the need to include benefits in the return, and had quite recent experience of the consequences of failure to declare such receipts. It is of the essence of the reasonable care test that in normal circumstances this should avoid simple errors of omission, or mere oversights.

31. We conclude therefore that the omission of the benefits in kind from Mr Collis' return was a careless inaccuracy on his part.

Special circumstances

32. On the basis of our conclusion that the inaccuracy was careless, and subject to other submissions to which we shall return later, there was no dispute on the basic calculation of the penalty. The correct rate of 30% had been applied, and this had properly been reduced for prompted disclosure to the minimum level of 15% of the potential lost revenue.

33. On an appeal against the amount of a penalty the tribunal may either (a) affirm HMRC's decision, or (b) substitute for HMRC's decision another decision that HMRC had power to make (FA 2007, Sch 24, para 17(2)). No reduction on account of disclosure can therefore take the penalty below the 15% minimum.

34. However, a further reduction can be made by HMRC under para 11 if HMRC think it right because of special circumstances. Ms Weare said that HMRC were not aware of any special circumstances. Accordingly, no such reduction has been made. As HMRC have this power, however, the jurisdiction of the tribunal to substitute its own decision for that of HMRC may include a reduction on account of special circumstances. The extent to which the tribunal may rely upon para 11 is provided for by Sch 24, para 17(3), (6):

> "If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 11—
>
> > (a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or

> (b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 11 was flawed.
>
> …
>
> (6) In sub-paragraphs (3)(b), (4)(a) and (5)(b) "flawed" means flawed when considered in the light of the principles applicable in proceedings for judicial review."

35. HMRC have made no reduction for special circumstances, and so we can only rely on paragraph 11 if we consider that HMRC's decision that there were no special circumstances is flawed on judicial review principles.

36. Judicial review may be pursued in relation to decisions of public bodies on a number of grounds. Included amongst these are the grounds of illegality and fairness. In the context of a decision of HMRC as to whether a reduction in a penalty should be made on account of special circumstances, the general test will be whether the decision is so demonstrably unreasonable as to be irrational or perverse, such that no reasonable authority could ever have come to it (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, HL).

37. Paragraph 11 gives HMRC a discretion to reduce a penalty if they think it right because of special circumstances. The exercise of such a discretion may be subject to judicial review. The tribunal itself does not have a supervisory jurisdiction in relation to penalty appeals within Schedule 24, but an appellate one. Nevertheless, in the context of determining whether a decision of HMRC in the exercise of their discretion under para 11 is flawed, in the terms of para 17(6), the tribunal must consider whether HMRC acted in a way that no reasonable body of commissioners could have acted, or whether they took into account some irrelevant matter or disregarded something to which they should have given weight. The tribunal should also consider whether HMRC have erred on a point of law (see *Customs & Excise Commissioners v J H Corbitt (Numismatists) Ltd* [1980] STC 231; *John Dee Ltd v Customs & Excise Commissioners* [1995] STC 941). This will also include considering whether any internal HMRC policy on the application of the special circumstances rule is being applied too rigidly so as to amount to a fetter on HMRC's discretion.

38. Not surprisingly, Mr Collis did not put his case in terms that HMRC's decision that there were no special circumstances was flawed. Nonetheless, he raised the issue of the application of the penalty to him on a - as he put it - first offence. We think it right therefore to consider whether such a feature could qualify as a special circumstance, and whether HMRC's decision in this respect was flawed.

39. HMRC's position on the question whether Mr Collis had made a previous similar error was, as we have found, misjudged. They did not therefore take into account that this was the first occasion on which Mr Collis himself had omitted to enter the benefits in kind on his self assessment return. To that extent, therefore, we consider that HMRC's decision was flawed. Because they did not accept that fact, they cannot have considered whether it amounted to special circumstances.

40. That is not the end of the matter. Even if HMRC's decision is flawed, the tribunal itself has the power to rely on paragraph 11 to the extent that it thinks fit, including determining whether the fact that Mr Collis had not previously failed to return his benefits in kind is a special circumstance. We are satisfied that it is not. The scheme of the penalty provisions is that an inaccuracy of the nature provided for is to be penalised irrespective of the number of occasions on which such an inaccuracy has arisen. To be a special circumstance the circumstance in question must operate on the particular individual, and not be a mere general circumstance that applies to many taxpayers by virtue of the scheme of the provisions themselves.

41. We conclude therefore that, although HMRC's decision in relation to the application of para 11 was flawed, there were no special circumstances, and no reduction in the penalty is to be made on that account.

Suspension of penalty

42. We have referred earlier to the unsatisfactory position in this case, in that a decision was made by HMRC not to suspend the penalty, but no notification of that decision was given to Mr Collis. If, as they should, HMRC now give Mr Collis written notification of that decision, he may appeal it.

43. We say nothing therefore about Mr Collis' own position in this respect. However, we were referred by Ms Weare to the decision of the tribunal (Judge Brannan and Ms O'Neill) in *Anthony Fane v Revenue and Customs Commissioners* [2011] UKFTT 210 (TC) in which the tribunal concluded that it was clear from the statutory context of Schedule 24 that a condition of suspension must be more than an obligation to avoid making further returns containing careless inaccuracies over the period of suspension (a maximum period of two years). The tribunal held that an important feature of para 14(3) is the link between the condition and the statutory objective, in that there must be a condition which would help the taxpayer to avoid becoming liable for further careless inaccuracy penalties. We agree with the tribunal's reasoning on this point. In particular, the power to suspend a penalty must be seen in the context of influencing future behaviour; it is not applicable as a general mitigation of the penalty.

Proportionality

44. Mr Collis' primary submission was that the application of the penalty regime to a "first offence" was over-penal or disproportionate. We invited submissions from Ms Weare on the question of proportionality, but she was not in a position to address this issue.

45. We have considered whether we should ask the parties to make further submissions on proportionality, but have concluded that we are able to determine the matter without taking that step. For the reasons we shall explain, we think the point is a short one, and we do not consider that it would be proportionate to put either of the parties to any expense in pursuing it.

46. The issue raised by Mr Collis must be seen in the context of the First Protocol to the European Convention on Human Rights, which reads as follows:

> "**Protection of Property**
>
> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

47. The second paragraph introduces the concept of proportionality. An interference with the entitlement to peaceful enjoyment must achieve a fair balance between the demand of the general interest of the community and the protection of the individual's fundamental rights. There must therefore be a reasonable relationship between the means employed and the aims pursued (*Gasus Dosier und Fordertechnik v Netherlands* (1995) 20 ECHR 403 at [62]). But a contracting state, not least when framing policies in the area of taxation, enjoys a wide margin of appreciation. The European Court of Human Rights will respect the legislature's assessment in such matters unless it is devoid of reasonable foundation (*National and Provincial Building Society v United Kingdom* [1997] STC 1466 at [80]).

48. It has nonetheless been recognised that it is implicit in the concept of proportionality that, not merely must the impairment of the individual's rights be no more than necessary for the attainment of the public policy objective sought, but also that it must not impose an excessive burden on the individual concerned (*International Transport Roth GmbH v Home Secretary* [2002] 3 WLR 344 at [52]). In *Roth* Simon Brown LJ formulated the relevant question (at [26]) as: "Is the scheme not merely harsh but plainly unfair so that, however effectively that unfairness may assist in achieving the social goal it simply cannot be permitted?

49. Applying these principles we conclude that the application of a penalty under Schedule 24 on each occasion of a careless or other relevant inaccuracy, even if it is the first occasion on which the taxpayer has submitted an inaccurate return, is well within the margin of appreciation which Parliament has in this respect. In our view such an application of the penalty regime is neither harsh nor plainly unfair.

50. In reaching this conclusion we take into account the protections afforded by the statutory provisions to a taxpayer. The inaccuracy must be careless or deliberate. The maximum penalty is lower for lesser culpability (careless) than for greater degrees (deliberate but not concealed, and deliberate and concealed). In each case HMRC must reduce the maximum penalty to reflect the quality of disclosure, potentially down to a minimum percentage depending on the nature of the inaccuracy. A further reduction may be made by reason of special circumstances. A penalty may, in appropriate circumstances, be suspended subject to conditions. Finally, a taxpayer has a number of avenues to appeal to the tribunal.

51. There are many ways in which a state may choose to impose penalties for failure to comply with tax obligations, and many ways in which those provisions may seek to protect the fundamental rights of a taxpayer subject to those provisions. The choice of such protections and the way in which the fair balance is maintained between those fundamental rights and the general interest of the community is for the state to determine, within its margin of appreciation. It would of course have been open to Parliament to have provided for a warning for a first occasion on which a penalty might otherwise have been levied, but in the context of the overall protections available under Schedule 24 it was well within its margin of appreciation not to have done so.

52. Accordingly, in the context of the provisions of Schedule 24 taken as a whole we do not consider that the penalty imposed on Mr Collis was over-penal or disproportionate.

Decision

53. For the reasons we have given we dismiss the appeal before us, and affirm HMRC's decision that a penalty is payable and as to the amount of the penalty.

54. We make no decision on the issue of suspension of penalty which, for the reasons we have described, is not the subject of an appeal to the tribunal.

Application for permission to appeal

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.

ROGER BERNER

TRIBUNAL JUDGE
RELEASE DATE: 9 SEPTEMBER 2011