[2014] UKFTT 513 (TC)

TC03640

Appeal numbers: TC/2013/02556

Income Tax – Schedule 24 Finance Act 2007 – Penalty for careless inaccuracy in return – special circumstances – suspension – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

ROGER DURRANT **Appellant**

- and -

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

TRIBUNAL: JUDGE LADY JUDITH MITTING
MRS LIZ POLLARD

Sitting in Manchester on 11 March 2014

The Appellant appeared in person

Mrs Nadine Newham, Presenting Officer, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. Mr Durrant appeals against a penalty issued on 7 September 2012 in the sum of £14,834.33. The penalty was imposed pursuant to Schedule 24(1) Finance Act 2007 for a careless inaccuracy in Mr Durrant's self-assessment tax return for the year 2010/11.

2. The penalty had been mitigated to the statutory minimum of 15% of potential tax lost. Mr Durrant admitted the careless inaccuracy and did not challenge the basis of the calculation. His contention was that HMRC should have either suspended the penalty or allowed a special reduction.

Legislation

3. HMRC's power to suspend is set out in paragraph 14 of Schedule 24 in the following terms:

> "(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) …
>
> (6) …"

4. Paragraph 11 of Schedule 24, relating to special circumstances, reads as follows:

> "(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."

The Facts

5. Mr Durrant had worked for the Royal Mail Group for 43 years until his retirement on 29 April 2010. He ended his career in the senior position of Treasurer. He worked for just one month of the 2010/11 tax year, thus receiving one month's salary paid to him in the normal way under deduction of PAYE. On retirement he went on to the company pension scheme. He would throughout be paying tax at the higher rate.

6. Mr Durrant received two lump sums on his retirement. He received on his 60th birthday, in the tax year 2009/10, a tax free sum of £429,737. He then received, approximately one month into his retirement, and in the 2010/11 tax year, a Long Term Incentive Bonus payment of £346,000. This payment was made to him as would be a salary payment, accompanied by a payslip showing the gross sum and a tax deduction of £69,000. This deduction was at basic rate not at Mr Durrant's higher rate.

7. Mr Durrant's P60 for the tax year 2010/11 showed one month's salary of £10,268 and 11 months pension of £64,460. It did not include the LTIB.

8. Over a year later, Mr Durrant was asked to complete a self assessment tax return for the year 2010/11 which he submitted on 14 July 2012. On the return he declared the salary and pension, both figures taken, we were told, from the P60. Box 19 on the return is headed "Any other information" and was completed by Mr Durrant as follows:

> "Retired from Royal Mail on 29 April 2010. I received a £429,737 cash lump sum from the Royal Mail Pension Scheme which was the maximum that I could take tax free (received in tax year 09/10 on my 60th birthday.)"

The LTIB payment, he did not include. On the basis of the figures returned, Mr Durrant was due a repayment of £45.76.

9. On enquiry into the return, HMRC became aware of the discrepancy between the figures returned and information received from Mr Durrant's pension provider which of course included the LTIB. HMRC calculated the additional tax due at £98,859.50 and they went on to raise the penalty currently under appeal.

Submissions

10. Submissions in this case were made in two parts. Mr Durrant's case at the oral hearing was that HMRC should have either suspended the penalty or allowed a

special reduction. In support of his case, reference was made by Mr Durrant to a number of Tribunal cases. Mrs Newham had not been given prior notice of these legal arguments and was unprepared to respond at the hearing. The case was therefore adjourned to allow HMRC to put in a written submission in response and thereafter for Mr Durrant to make a further response in reply. In this decision we therefore set out initially (paragraphs 13-18) Mr Durrant's oral submission. We then go on to deal with both parties' written submissions.

11. It should be noted that in respect of special circumstances, Mr Durrant's contention had been limited to whether such circumstances should have been found by HMRC to exist. The Tribunal additionally asked HMRC to consider the timing of such consideration.

12. The written submissions of both parties were lengthy and contained in part an analysis of and comparison with other Tribunal decisions. We have read all the cases to which we were referred but think that an analysis of each would take this matter no further as the cases are all fact dependent and are not in any event binding upon us. We make this point to assure the parties that just because we may not mention a specific case or a specific analysis, it is not because we have not read it or considered it.

How the error came to be made and Mr Durrant's oral submissions

13. We take Mr Durrant's submissions both from his oral evidence and from correspondence which he had sent to HMRC. Prior to this incorrect tax return, Mr Durrant's returns had always been very simple. The only entries which he had to make were those recorded on his P60 so once he got his P60, he would complete his returns "on auto pilot". The problem in this current year was that his P60 included only two of his sources of income. He had no P60 entry for the LTIB and consequently completely overlooked it. It was, said Mr Durrant, an innocent oversight. He admitted he was careless but it was not a case of "couldn't care less".

14. Mr Durrant contended that the manner of his error merited a finding of special circumstances, pursuant to paragraph 11 of Schedule 24. To him, the circumstances surrounding the completion of the 2010/11 return were abnormal and special. The completion of this return was far from routine because for the first time ever he had additional streams of income beyond his salary. He had the one month's salary, his 11 months pension payments and the bonus payment. Further, the completion of the return was only to provide secondary information to HMRC. They received their primary information from the employer and the pension provider. The completion of a return in these circumstances should be viewed differently from a return completed by a self-employed person whose return would be the primary source of information to HMRC. PAYE errors should be viewed differently and a more lenient view taken. He stressed that the tax was paid as soon as he was notified of the omission. There was therefore no permanent loss of tax merely a delay in paying it.

15. In support of his arguments for "special circumstances", we were referred by Mr Durrant to the following cases:

Patsy Barber White v HMRC – TC 02050

Susan Roche v HMRC - TC 02019

Giles Davis v HMRC – TC 01246

Thomas Hardy v HMRC – TC 01435

16. Mr Durrant also contended that HMRC should have suspended payment of the penalty. Suspension had been refused by HMRC in their review letter of 14 March 2013 on the following basis:

> "Suspension is not a legal right but HMRC must consider whether suspension is appropriate in cases where an inaccuracy penalty arises from a failure to take reasonable care. The termination of your employment with Royal Mail which led to the underpayment of tax was a one off event. Suspension is intended to help avoid making similar mistakes in the future by suggesting improvements to record keeping or the accounting process. As this was a one off event they are unable to suggest any suspension conditions that would help prevent this happening again."

17. HMRC's oral case with regard to suspension was that the point of suspension was to reward the taxpayer for not making a similar error in the future. Mr Durrant could not make such an error again because he was no longer obliged to complete a tax return. Mr Durrant suggested that this was a device which HMRC came up with to prevent them having to suspend. He told us that he had been advised that he need no longer complete a return just six weeks after he had lodged his appeal. It was, in Mr Durrant's words, a convenient contrivance. We should say in relation to this point that Mrs Newham did point out that in fact Mr Durrant had been advised the previous year in April/May 2012 that he would no longer have to complete a return.

18. In support of his case on suspension, Mr Durrant relied on the cases of:

David Testa v HMRC – TC 02549

Philip Boughey – TC 02082

These cases were authority, contended Mr Durrant, for saying it just was not good enough for HMRC to say the mistake could not be repeated and thus avoid suspending the penalty. This was too narrow an approach. In any event, who knew what might happen in the future? He might take up employment again or he might receive a further bonus. Further, it was possible for HMRC to set conditions. They could for example suspend on the basis that in future he should double check his P60 against his payslips.

HMRC's written submission

19. In respect of the timing of when special circumstances should have been considered, Mrs Newham referred the Tribunal to three cases namely:

Agar Limited v HMRC - TC 01625

Algarve Granite Limited v HMRC – TC 02142

Robert Morgan & Keith Donaldson v HMRC – TC 02720

Whilst recognising that these decisions were on the face of it contradictory, Mrs Newham contended that *Morgan & Donaldson* represented the view of HMRC in that paragraph 11 does not put a time restriction on when HMRC should consider special circumstances and they are allowed to consider any new circumstances as they emerge or as are put them by the taxpayer at any stage.

20. In respect of whether or not special circumstances exist at all, HMRC do not accept that different consideration should be given to an employee and to a self-employed person. All taxpayers were expected to complete their returns correctly. Further, where a taxpayer completes a return the PAYE information received by HMRC is not automatically reconciled and by omitting the income, Mr Durrant underpaid his tax. Mrs Newham stated that if the tax return had not been taken up for enquiry, then the tax would never have been paid. The amount of omitted income here was high and should have been obvious to Mr Durrant. Mrs Newham went on to point out that the Tribunal is only allowed to substitute its own decision for that of HMRC if the Tribunal finds the HMRC decision to have been "flawed". We were referred to the case of *Avttar Channa v HMRC* – TC 02888.

21. In considering suspension, Mrs Newham pointed out that in the two cases to which Mr Durrant referred (*Testa* and *Boughey*) both Appellants had proposed a condition that during any period of suspension tax returns should be prepared by a qualified accountant. Mr Durrant had not proposed any such condition. Mrs Newham cited at some length the case of *Anthony Fane v HMRC* - TC 01075, in which the question raised by the Tribunal for their consideration was whether a condition of suspension would have the required effect. In other words there had to be a link between the condition and the statutory objective: a condition which would help the taxpayer to avoid becoming liable for further careless inaccuracy penalties. It was Mrs Newham's contention that the decision not to suspend was now flawed and further there were no conditions that could be set to enforce conditions of suspension.

Mr Durrant's written submission

22. On the question of timing of when special circumstances should be considered, Mr Durrant relied on *Algarve*, citing in particular paragraph 59 in which the Tribunal had found the penalty assessment to have been flawed because of the HMRC failure to consider whether special circumstances existed. Mr Durrant also took from paragraphs 52 and 53 of *Algarve* that special circumstances should be considered prior to the issue of the penalty assessment and that the exercise of a discretion should be initiated by HMRC and not the taxpayer.

23. Mr Durrant's contention was that in any event there were special circumstances in his case as no loss of revenue could have arisen. Mr Durrant did not accept Mrs

Newham's contention that the discrepancy was only detected through a random check. His view was that in a computerised system a full reconciliation of PAYE tax returns against employer provided data would always be undertaken.

24. Mr Durrant contended, in relation to suspension, that his case was very similar to those of *Boughey* and *Testa*. Mr Durrant advised that he fully intends to continue to submit an annual self assessment tax return, despite not being required to do so, and he would have no objection to agreeing to a similar stipulation as in *Boughey* and *Testa*, namely that his returns would be completed for two years by a professional accountant.

Conclusions

25. We should make it clear, for the avoidance of doubt, that at no time did Mr Durrant argue that he had a reasonable excuse for the submission of his incorrect return. His arguments were, in our view quite rightly, confined to the issues of suspension and special circumstances. It should be noted, as indeed Mr Durrant accepts, that in relation to each, the Tribunal can only make its own finding if it finds that the HMRC decision not to allow suspension or not to allow a special reduction was flawed.

Special circumstances

26. We can find nothing in the legislation which requires HMRC to consider, *before* raising a penalty, whether there are special circumstances why it should be reduced. We, with respect, adopt the Tribunal view expressed in paragraph 30 of *Agar*:

> "Indeed, the use of the phrase "they may reduce a penalty" implies that a perfectly valid penalty may exist before the question of reducing it, by reason of special circumstances, arises."

27. Mr Durrant's reliance on paragraph 59 of *Algarve* in which the Tribunal found that the penalty assessment "was flawed because of the failure by HMRC to consider whether "special circumstances" existed" has to be qualified by the following sentence that the Tribunal had no evidence before it that any consideration had been given to special circumstances at any stage either before or after the raising of the penalty.

28. Mr Durrant is right to point out that on the papers before us, it would appear that the issue was only considered once he had raised it but it was clearly considered by letter dated 20 December 2012, before Mr Durrant put in his appeal. To be perfectly fair to Mr Durrant, timing was not a point raised by him, but by the Tribunal and we would therefore merely say that we are quite satisfied that the penalty assessment is not rendered invalid merely because HMRC did not consider special circumstances until after the penalty had been issued.

29. We therefore come to consider whether or not the decision not to allow a reduction for "special circumstances" was flawed. In the letter of 20 December 2012,

HMRC rejected Mr Durrant's contention that the special circumstances were that the bonus payment was a PAYE issue and that there could have been no loss of revenue. This was in our view a perfectly proper view to take.

30. Whether or not there are special circumstances is always going to be dependent upon the facts and those facts will include the degree of knowledge and/or experience of the taxpayer and his capabilities. Mr Durrant was a highly successful and clearly very intelligent professional man. He held a very senior position with Royal Mail and was used to completing his own tax returns. It may well be that normally the return mirrors the P60 but the fact that in this one year it didn't goes nowhere near providing special circumstances for there to be a reduction in the penalty. Mr Durrant was sufficiently aware, when completing the return, to make reference to the tax free sum in the previous tax year, even though this would not have been included on the P60. It is totally unacceptable that he should have just overlooked the taxable sum in the current tax year. It is a naïve view to suggest that someone of Mr Durrant's ability could find the completion of a tax return with additional sources of income to be so out of the ordinary that it excused the omission. Equally, it cannot credibly be argued that different standards are expected of an employee and a self-employed person. It is true that different consequences may flow from their returns in that, as Mr Durrant pointed out, in the case of a self-employed person, the information he provides is the primary source. This however does not mean that their obligations to render correct and full tax returns differ. Each has a legal obligation to submit a full and correct return. It is not even as if Mr Durrant would have had to have made enquiries of third parties before he could complete the return. He knew he had received the taxable lump sum. He had the paperwork available to him, merely not on the P60.

31. We conclude that there were no special circumstances here which could justify a reduction in the penalty and that the decision of HMRC to so find was not flawed.

Suspension

32. HMRC had rejected suspension on the grounds which we set out in para 16 of this decision.

33. A one-off event of itself clearly cannot preclude suspension. First, there is nothing in the legislation which gives rise to that restriction and secondly the one-off event could quite easily be indicative of something further amiss in the taxpayer's recordkeeping or procedure for completing his returns. The Tribunal in *Anthony Fane* deals with the question of one-off errors in paragraphs 60-64 and we can do no better than set those paragraphs out here as representing our view:

> "60. On the face of the wording of paragraph 14(3) there is no restriction in respect of a "one-off event". Nonetheless, it is clear from the statutory context that a condition of suspension must be more than an obligation to avoid making further returns containing careless inaccuracies over the period of suspension (two years). Paragraph 14(6) provides:

> "If, during the period of suspension of all part of a penalty under paragraph 1, [the taxpayer] becomes liable for another penalty and that paragraph, the suspended penalty or part becomes payable."

61. If the condition of suspension was simply that, for example, the taxpayer must file tax returns for a period of two years free from material careless inaccuracies, paragraph 14(6) would be redundant.

62. Moreover, it is difficult to see how a taxpayer could satisfy HMRC that the condition of suspension, if it contained no requirement other than a condition not to submit careless inaccuracies in future tax returns, had been satisfied as required by paragraph 14(6). This would, effectively, require the taxpayer to prove a negative will require HMRC to conduct a detailed review of the taxpayer's tax returns.

63. For these reasons we do not agree with Mr Lever's suggestion that a suitable condition of suspension would be a requirement that the Appellant correctly returned other income (e.g. rental income) on his tax return for the next two years.

64. A condition of suspension, therefore, must contain something more than just a basic requirement that tax returns should be free from careless inaccuracies. This suggests, therefore, that the condition of suspension must contain a more practical and measurable condition (e.g. improvement to systems) which would help the taxpayer to achieve the statutory objective i.e. the tax returns should be free from errors caused by a failure to exercise reasonable care.

65. Bearing these considerations in mind, HMRC's guidance indicating that a one-off error would not normally be suitable for a suspended penalty is understandable and, in our view, justified."

34. Mr Durrant complains that this is too narrow an approach. His argument is that it is not the nature of the payment that was the problem but the P60 omission. Mr Durrant maintains that his suggestion that he reconciles his payslips to his P60 each year before submitting a return would prevent this error from happening again and would therefore be a suitable condition of suspension. This, we reject. First it is not measurable and secondly we would have thought that to do this was quite simply a basic pre-requirement of submitting your return – you check that it is correct.

35. We therefore reject Mr Durrant's contention that the HMRC decision to refuse suspension was flawed.

36. For all these reasons the appeal is dismissed and the penalty in the mitigated amount is upheld.

37. 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.

LADY JUDITH MITTING
TRIBUNAL JUDGE

RELEASE DATE: 28 May 2014