[2016] UKFTT 117 (TC)

TC04905

Appeal number: TC/2015/00143

INCOME TAX – appeal against a penalty determination for careless behaviour - schedule 24 of the Finance Act 2007 - appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MS BARBARA BEAMENT **Appellant**

- and -

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

TRIBUNAL: JUDGE HARRIET MORGAN
MEMBER TYM MARSH

Sitting in public at Fox Court, 30 Brooke Street, London on 2 November 2015

The Appellant did not appear and was not represented at the hearing

Ms Beverley Levy, an officer of the Respondents, for the Respondents ("HMRC")

DECISION

1. The appellant appealed against a penalty of £1,202.01 issued by HMRC under schedule 24 of the Finance Act 2007 ("**schedule 24**") on 28 August 2014 in respect of an inaccuracy in the appellant's tax return for the tax year 2010/11. HMRC considered that the appellant had been careless in failing to include in the return taxable employment income of £27,117. The penalty was the minimum due for a careless prompted inaccuracy of 15% of the under declared tax of £8,013.40.

2. On 21 October 2015 the appellant wrote to notify the tribunal that she would not be attending the hearing due to the stress of dealing with this matter. She referred in the letter to the matters she wished the tribunal to take into account (being the correspondence set out in detail below). In the circumstances, we decided that it was in the interests of justice and fairness to proceed with the hearing.

Facts and correspondence

3. The appellant was employed by CQS (Global Services) Ltd ("**CQS**") from 14 June 2004 until she was made redundant from the employment on 31 January 2011.

4. Shortly after the redundancy CQS issued the appellant with the following documents:

(1) A P45 dated 25 February 2011. This states in box 4 that the "leaving date" was 31 January 2011. In box 7 there is a reference to "month number 10" and to "total pay to date" of £86,543.30 and "total tax to date" of £29,380.26 and the "tax code at the leaving date" is "K298". Box 8 headed "total pay in this employment" and "total tax in this employment" shows the same figures as in box 7.

(2) A payslip dated 28 February 2011. The first part of this shows headings referring to a "payroll date" of 28 February 2011, a "tax period 11" and "tax code" of BR Y. Underneath there is a list of payments as set out below which total £51,787 and tax deducted of £5,423.40:

Payments	Amount
Basic Pay SSP/SMP/SPP Overtime	0.00
Addition to basic	2,925.00
Holiday Pay	2,942.00
Pay in Lieu	21,250.00
Compromise	24,670.00

(3) The second part of the payslip separately identified "taxable pay" of £27,117 with tax deducted of £5,423.40. It shows payment of the net amount of

45,779.19 as made by BACS. That part of the form also shows basic rate and basic hours/contract hours and overtime pay of zero.

5. CQS submitted two forms P14 to HMRC in respect of the appellant on 4 May 2011. One showed the pay and tax deducted as set out in the P45 and the other showed an amount of taxable pay of £27,117 with tax deducted of £5,423.40.

Submission of tax return

6. The appellant submitted a tax return for the tax year 2010/11 online on 18 December 2012. We were not given information as to who physically filled in the return. In a letter of 4 December 2014 to HMRC the appellant indicates that she did not fill in the return herself:

> "Bearing in mind this penalty appears to be in relation to an oversight in my tax return which incidentally I did not complete and submit, but was certainly completed with all payslip information that was provided at the time of completion….."

7. The return showed pay from the employment with CQS in that year as £86,543 plus a benefit from that employment of £1,700. On the page headed "Share schemes and employment lump sums" £24,670 was shown in box 9 as "Compensation and lump sum £30,000 exemption". This page also contained boxes for "Taxable lump sums excluding redundancy", "Lump sums or other benefits received" and "Redundancy and other lump sums for compensation payments" (boxes 3, 4 and 5) and a box for tax deducted from any such sums (box 6). The appellant's tax adviser was stated to be Churchills. In the "Any other information" box it was stated that the employment with CQS ended on 31 January 2011. The tax calculation showed income tax overpaid of £3,770.60.

Enquiry into return

8. On 15 January 2014 HMRC wrote to the appellant stating they were opening an enquiry into the appellant's return for the tax year 2010/11 under s 9A of the Taxes Management Act 1970 ("**TMA**"). In a letter to Churchills of 14 January 2014 HMRC noted that the appellant's return did not include all the information they had received from CQS on the forms P14 (and they enclosed copies). HMRC asked for an explanation of what the tax free compensation sum of £24,670 related to.

9. On 19 March 2014 HMRC issued a formal notice to the appellant under schedule 36 of the Finance Act 2008 requiring the production of the previously requested information.

10. In a letter of 25 March 2014 the appellant noted that HMRC should have received details of the redundancy payment from CQS and that also she had forwarded the requested information to HMRC in January 2014 together with the final payslip. She referred HMRC to the P45 as showing the correct amount of pay and tax and the separate payslip as showing the redundancy payment. She stated that the forms P14 reflected the information in those documents. She stated she was again

enclosing the P45, the payslip and a letter from CQS dated 12 December 2012 stating that payment of £24,670 was made to the appellant in recognition of redundancy.

11. On 31 March 2014 Churchills sent HMRC a fax noting that the relevant forms P14 seemed to relate to pay in lieu of notice but the appellant believed this was included in the P45 figures. They noted that the appellant had already supplied a copy of CQS' letter regarding the redundancy compensation payment and that the appellant had completed her return on the information received from her employer and reasonably assumed it was correct.

12. On 16 April 2014 HMRC wrote to the appellant noting that the payslip shows taxable pay of £27,117 which had not been declared on her 2010/11 tax return. They noted that tax was deducted by the employer from this amount at 20% but, as the appellant was a higher rate taxpayer in that year, additional tax was due through self assessment of £8,013.40. HMRC noted that the appellant may also be subject to a penalty.

13. On 30 April 2014 the appellant wrote to HMRC stating that the non reporting of the relevant income was the fault of CQS who she felt had not followed correct procedures. She had only received the P45 and the payslip from CQS. Until she received the letter from CQS on 12 December 2012 (which she had had to request) she had nothing in writing confirming the redundancy payment other than her compromise agreement, the P45 and payslip. Her and her adviser's assumptions were based on the P45 figures yet HMRC were basing their figures on forms P60 sent in by CQS which she had not received.

Notice of intent to charge penalty

14. On 13 May 2014 HMRC issued a notice to the appellant stating they intended to charge a penalty of £1,202.01 under schedule 24 on the basis that the appellant had been careless in failing to take reasonable care in completing her return for 2010/11. HMRC noted the employer provided all the documentation required to complete the return accurately in the P45 and the payslip. HMRC stated that this was a prompted inaccurate disclosure for which, having allowed the maximum reduction permitted, they would charge the minimum penalty of 15% of the under declared income tax.

Representations by the appellant and Churchills before the issue of the penalty notice

15. On 10 June 2013 Churchills wrote to HMRC stating that there should be no penalty as :

(1) The error occurred as the employer payment advice for the additional pay was in the same month as the P45 and so it was reasonable for the appellant to expect the P45 to contain the additional information.

(2) If HMRC wishes to claim penalties for such an error it needs to ensure that the procedure is much clearer by making obvious what is and is not included on the P45 such as by requiring the employer to state on the additional

payslip "these earnings and any tax deducted are not included in the figures on your P45 and need to be entered separately on your tax return."

16. On 8 July 2014 HMRC wrote to the appellant stating that the appellant used only the P45 and payslip figures for the purposes of the 2010/11 return rather than the correct ones from the year end P60s as she made an incorrect assumption that the P45 included the lump sum despite evidence to the contrary.

17. On 14 July 2014 HMRC wrote to the appellant noting that the enquiry had been raised within the correct time limits, CQS had correctly deducted tax at the 20% rate only and the appellant was responsible for accounting for the remaining 20% under the self assessment system.

18. On 8 August 2014 Churchills wrote to HMRC again stating there should be no penalty:

(1) HMRC's procedures are defective as employees are not made fully aware that the P45 does not contain all their earnings (and there is a reasonable expectation that it does), that the information will not be provided on any other official document and that it is probable that insufficient tax will have been deducted. The employee should receive a document stating that amounts should be disclosed on a tax return and are not included on any previous P45.

(2) It would be most unreasonable to charge penalties for carelessness when even HMRC staff do not have full knowledge of the system. HMRC's letter of 8 July refers to the appellant using the P45 figure rather than those taken from P60s as HMRC recommends. No further P60s are issued to employees once an employee leaves so this is incorrect.

19. On 28 August 2014 HMRC wrote to the appellant confirming that they were upholding their decision on the penalty for the following reasons:

(1) The figures needed to correctly complete the 2010/11 return were all on the P45 and the payslip. Had the appellant examined the payslip carefully and in context of all the other information available it should have been clear that the payments on it were additional to those on the P45.

(2) If the appellant was unsure if the payslip figures were additional, she could have contacted HMRC and asked for copies of the P60s.

(3) The appellant could have compared whether the income from CQS declared on the tax return was the same as that received in the appellant's bank account.

(4) The appellant seems to have assumed that the P45 included the payslip income despite a number of indications to the contrary: the dates on the payslip and P45, the different PAYE codes, the descriptions of the payments on the payslip, the amounts of the payments on the payslip, and the boxes these amounts were entered in, the differing amounts on the tax return and in the appellant's bank account. These should at least have made a person who was

reasonably prudent and careful alert to the possibility of a problem with the return's figures.

(5) There is no evidence this was drawn to HMRC's attention; either by making a whitespace entry on the tax return or afterwards when its submission generated an unexpected tax refund.

Conclusion of enquiry and issue of penalty notice

20. On 28 August 2014 HMRC notified the appellant that the enquiry into the return was complete and amended the appellant's self assessment tax return for 2010/11 and issued the penalty notice.

HMRC review of decision

21. On 9 September 2014 Churchills wrote to HMRC notifying them the appellant wished to appeal against the penalty on the following grounds:

(1) HMRC has known since 4 May 2011, when the two P14s were filed by CQS, that tax had been under paid on £27,117. HMRC should have picked this up sooner and advised in good time so that the appellant could put aside monies to pay the tax due.

(2) The HMRC system for dealing with payments after the P45 has been issued is not fit for purpose. It will routinely lead to underpaid tax for higher rate taxpayers.

(3) Levying a tax based penalty when HMRC knows that its system will always under deduct tax for higher rate taxpayers and so many years after the event is extremely unreasonable. Taxpayers should not be penalised for shortcomings in HMRC's own systems. The appellant's mistake would be irrelevant if HMRC's systems were adequate (i.e. if the correct amount of tax was deducted under PAYE).

22. On 23 September 2014 HMRC responded to Churchills' letter stating that the appellant's behaviour was careless as the amount of income received after the P45 was issued was too large an amount to have been accidentally missed off if reasonable care were taken. HMRC also noted it was the appellant's responsibility to ensure that all taxable income is included in the return and so to pay the correct amount of tax.

23. On 3 October 2014 the appellant wrote to HMRC as follows:

(1) The information provided by CQS gives no indication of the tax due as they only provided a P45 and one P60. CQS did not specify the full pay and tax deduction and did not follow correct procedures. This resulted in the appellant being subject to a tax liability which she was unaware of until nearly 4 years after leaving employment with CQS. The appellant had had to approach CQS for evidence of the redundancy pay and what was provided gave no indication of any tax due. In addition there was nothing from HMRC stating that tax was likely to be underpaid.

(2) She did not question the figures used on the tax return as she had no reason to.

(3) As Churchills have pointed out there are flaws in HMRC's system resulting in the appellant being penalised as a result of CQS' incompetence and these flaws. HMRC are ignoring the fact that the paperwork does not state that the relevant payment is not on the P45 and does not state that it needs to be shown on the tax return.

(4) The appellant has not been careless in submitting figures based on the information and paperwork she was provided with at the time by CQS.

24. HMRC wrote to the appellant on 15 October 2014 and 13 November 2014 again upholding their previous decision. Essentially HMRC noted that in their view adequate checks were not made to ensure all income was included on the return. HMRC offered a review by an officer not involved in the case previously.

25. On 19 November 2014 the appellant wrote to HMRC accepting their offer of a further review and noting again essentially the same points made in the letter of 3 October 2014 as regards her belief that CQS and HMRC had failed in their procedures and that the issue had been raised 4 years after the event. She also gave further details of why she had not contacted HMRC regarding the payment:

(1) There is no reason why the appellant would contact HMRC to check if the payments on the payslip were in addition to those on the P45 or to see whether the figures in the payslip add up to the P45. A P45 is supposed to be a true indicator of monies earned in the relevant year. The appellant had only ever declared income from the P60 and P45. This is a failure of HMRC's system which leads to underpayment of tax in almost every case because the code used doesn't deduct enough tax.

(2) As the appellant was only notified by HMRC 4 years later she had no reason to question the payslips. There is a high likelihood of non compliance because you don't get a P45 or P60 for the income paid after the issue of the original P45.

(3) The appellant was totally unaware there was a problem until HMRC raised the query years after the redundancy.

Upholding of decision on formal review

26. On 24 December 2014 HMRC wrote to the appellant upholding their previous decision on review:

(1) HMRC explained that an employee obtains a copy of the form P14 submitted by employers (the P60) only if he remains employed by the employer at the end of the tax year. If the employee leaves during the tax year, pay and tax details are instead included on a P45. Where a payment is made after the employment has ceased and a P45 has been issued, the employer cannot issue another P45 but is obliged to inform the employee of the pay and tax deductions in some other way. The employer is required to deduct tax from any such payment at the basic rate only (for the tax year 2010/11 and earlier years).

(2) HMRC set out further information on their view of what constitutes a failure to take reasonable care referring to the tribunal cases of *David Collis v Revenue & Customs Commisisoners* [2011] UKFTT 588 (TC) and HMRC's guidance.

(3) The employer is not at fault as they complied with their statutory obligations as explained above.

(4) The appellant had all the information required. The P45 and payslip show different dates, months and amounts. If the appellant had taken care she would have noticed this at the time and if necessary queried it with CQS or HMRC.

(5) Whilst the appellant may have only used the P60 in the past to complete her tax return, 2010/11 was different as the appellant left employment before the year end so received a P45 and a payslip. A variety of documents can be used to complete the employment pages on a tax return.

(6) The penalty was not excessive. It arose from a prompted disclosure and therefore the minimum rate of 15% is due.

(7) There are no special circumstances which would lead HMRC to reduce the penalty (under para 11 of schedule 24).

Notice of appeal

27. The appellant submitted an appeal to the tribunal on 6 January 2015. The appellant noted that the grounds of appeal were summarised in her letter of 3 October 2014 (see 23 above) and added the following:

> "A primary concern I have is that CQS did NOT notify me of the full pay and tax deductions for the year in question and did NOT follow correct HMRC required procedures, thus I am resulting in a tax liability of penalty of £1,202.01 that I was totally unaware of until 2014, 4 years after I was made redundant from CQS. I had to approach CQS in writing for written confirmation of my actual redundancy payment see point 3.
>
> I do question why I was notified by HMRC 4 years of an alleged tax deficit, as I had no reason to question the payslips I had received.
>
> At no point have I acted "carelessly" – I do however think my employer at the time has acted "carelessly" in how they documented and processed the redundancy."

Correspondence after notice of appeal

28. On 21 October 2015 the appellant wrote to notify the tribunal that she would not be attending the hearing due to the stress of dealing with this matter. She referred the tribunal to the correspondence and in particular to emails from Mr Stevens of Churchills of 18 June 2015 and 7 July 2015. She noted that neither she nor Mr Stevens had received any form of official document such as an additional P45 or P60 to cover the post P45 payment whereas HMRC did have an additional P14 (the

equivalent of a P60) from which they obtained their figures. The appellant asked why this information was not passed onto her or Mr Stevens.

29. The email from Mr Stevens of 18 June 2015 states:

> "Frankly, I consider your treatment in this case to be extremely poor. The underpayment is clearly a one off, due to a payment being made after you had been given your P45. You would reasonably expect the P45 to contain all your income and tax deducted, if it didn't you would reasonably expect your ex-employer to give you a further official tax form stating the additional income and tax deducted and warning that (a) it needs to go on the tax return and (b) you may well have underpaid tax because only basic rate tax has been deducted. This would be an extremely easy procedure for HMRC to introduce, yet it fails – at your cost – to do so. Therefore the penalty cannot be considered to be a necessary deterrent because there is no behaviour of yours that needs to be deterred – you have not deliberately or negligently underpaid tax, you have unknowingly done so because that is the result of the inadequacies in HMRC's system and procedures."

30. The email from Mr Stevens of 7 August 2015 states:

> "You may wish to note that HMRC knows that there are issues with the way in which tax is collected in relation to termination payments and has just issued a consultation document.
>
> I must admit I struggle to reconcile the fact that HMRC is seeking penalties from you on tax arising due to a defective system, which leads to almost all taxpayers in your situation often unknowingly having insufficient tax deducted at source and inadequate documentation for tax return purposes – no official form similar to P45/P60 – with its knowledge that the system is complicated an unfair. I would make sure your MP is aware of this and also make sure the tribunal is made aware of it too."

Law

Self assessment and enquiries

31. Under the self assessment system, a taxpayer is required to make and deliver to HMRC a return by the prescribed time limits where he/she received a notice to do so (s 8 TMA). For the purposes of the return the amount payable by a person by way of income tax is the difference between the amount in which he is chargeable to income tax and the aggregate amount of any income tax deducted at source. Amounts deducted at source include those deducted by an employer from amounts paid to the employee under the Pay As You Earn System.

32. Where a taxpayer is required to submit a tax return for a tax year (under s 8 TMA) this is required (under s 9 TMA) to include a "self assessment, that is to say –

"(a) an assessment of the amounts in which, on the basis of the information contained in the return and taking into account any relief or allowance a claim for which is included in the return, the person making the return is chargeable to income tax and capital gains tax for the year of assessment; and

(b) an assessment of the amount payable by him by way of income tax, that is to say, the difference between the amount in which he is assessed to income tax under paragraph (a) above and the aggregate amount of any income tax deducted at source and any tax credits…"

33. Under s 9A TMA an officer of the Board may enquire into a return under s 8 if he gives notice of his intention to do so to the person whose return it is within the time allowed.

PAYE on payments made on termination of employment

34. Under regulation 36 of the Regulations as in force for the tax year 2010/11 on ceasing to employ an employee in respect of whom a code has been issued, the employer must complete a form P45. The employer must then send part of the form to HMRC and part to the employee on the day on which the employment ceases or, if that is not practicable, without unreasonable delay. The P45 is required to include certain information including the date on which employment ceased, the employee's code, the total payments to date and total net tax deducted from those payments.

35. Regulation 37 of the Regulations provides for the employer's obligations as regards payments made following the cessation of employment and not included in the P45 as follows:

> **"37.**—(1) This regulation applies if a relevant payment is made to an employee after the employment has ceased
>
> (a) by the former employer in respect of the former employment or
>
> (b) by any other person in respect of an obligation of the former employer,
>
> and the payment has not been included in Form P45.
>
> (2) The person making the payment must deduct tax at the basic rate in force for the tax year in which the payment is made.
>
> (3) But—
>
> (a) the payment does not affect the cessation of employment, and
> (b) the provisions listed in paragraph (4) do not apply.
>
> (4) The provisions are—

Regulation 21: deduction and repayment of tax by reference to employee's code
regulation 22 and 23: cumulative basis
egulations 26 and 27: non-cumulative basis
Chapters 2 and 3 of this Part: new employees and new pensioners: Forms P45 and P46.

(5) The person making the payment must record the following information in a deductions working sheet (which the person must prepare for the purpose if one has not already been prepared for that tax year).

(6) The information is—

(a) the date of the payment,

(b) the amount of the relevant payment, and

(c) the amount of tax deducted on making the payment, or to be deducted or accounted for under regulation 62(4) or (5) (notional payments).

(7) The person making the payment must also notify the employee of the information mentioned in paragraph (6) without unreasonable delay."

Penalty provisions under schedule 24

36. The penalty provisions of schedule 24 work as follows (all references to paragraphs are to paragraphs of schedule 24):

(1) A penalty is payable by a person (P) who gives HMRC a tax return submitted under s 8 TMA and (a) the return contains an inaccuracy which amounts to or leads to an understatement of a liability to tax and (b) the inaccuracy was careless within the meaning of para 3 (or deliberate) (para 1).

(2) An inaccuracy is careless if the inaccuracy is due to a failure by P to take reasonable care (para 3).

(3) Where these conditions are satisfied the penalty is 30% of the potential lost revenue (para 4).

(4) The potential lost revenue in respect of an inaccuracy in a document is the additional amount due or payable in respect of tax as a result of correcting the inaccuracy or assessment (para 5).

(5) There is a reduction in the penalty where a person discloses an inaccuracy by (a) telling HMRC about it, (b) giving HMRC reasonable help in quantifying the inaccuracy or (c) allowing HMRC access to records for the purpose of ensuring that the inaccuracy is fully corrected. The level of reduction depends in part on whether the disclosure is "unprompted" or "prompted". The disclosure is "unprompted" if made at a time when the person making it has no reason to believe that HMRC have discovered it or are about to discover the inaccuracy and otherwise is prompted (para 9).

(6) Where a person has made a disclosure HMRC must reduce the percentage of penalty which would otherwise apply to a percentage that reflects the quality of the disclosure provided that it cannot be reduced below the specified minimum. For this type of penalty the minimum is specified as 15% where the disclosure is prompted and 0% where it is unprompted (para 10).

(7) HMRC may reduce a penalty if they think it right because of "special circumstances" (under para 11).

(8) HMRC may suspend all or part of a careless inaccuracy penalty (under para 14).

Submissions

37. As the appellant was not present and not represented at the hearing we have considered all representations made in the correspondence and notice of appeal as set out in detail above.

38. HMRC made the following submissions:

(1) The return for 2010/11 contained an inaccuracy which led to an understatement of the appellant's tax liability for that year of £8,013.40 and the inaccuracy was caused by a failure to take reasonable care (within para 1 and 3 schedule 24).

(2) As Judge Berner noted in the *David Collis* case at [28] and [29]:

> "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.
>
> 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."

(3) Under the self assessment system it is the appellant's responsibility to make sure the figures submitted in the return were accurate. The appellant failed to take reasonable care in failing to check that all correct figures were entered by checking all documents in their possession including the P45 and payslip. The amount received after employment ceased was substantial and a person taking reasonable care would have checked it was included in the return in its entirety.

(4) This is similar to the case in *Mr Avvtar Channa v HMRC* [2013] UKFTT 499 (TC) where the taxpayer also failed to declare a payment which was not included in his P45. In finding for HMRC the tribunal noted that the appellant did not make the necessary enquiries to find out about those payments and that "it is not unreasonable to expect the appellant to have discussed the termination

payments with his accountant and to have checked the returns before he had signed them off. This is not a difficult matter…"

(5) HMRC are not responsible for the appellant's failings. The employer correctly deducted tax from the payment at the basic rate and complied with its obligations (as per regulation 36 and 37 of the Regulations).

(6) The appellant's P45 clearly shows the appellant's pay to the date of leaving and the payslip shows the payment made after employment ceased. Included on these documents are the dates the payments were made. This provided all the information the appellant needed to correctly complete her 2010/11 return. Although in the past the appellant had relied on a P60 only for filling in the return, the 2010/11 year was different because employment had ceased in that year.

(7) There are other situations where only a basic rate of tax is deducted and it is the responsibility of the individual to ensure that the payments they receive are included in the return in full so that the correct tax is paid.

(8) HMRC has correctly considered this to be a prompted disclosure and has allowed the maximum percentage of reduction for "disclosure" in accordance with the provisions of paras 9 and 10 schedule 24:

(a) For the "telling" element HMRC note that the appellant admitted the return was inaccurate and explained how and why this occurred. The maximum reduction of 30% has been given.

(b) For helping to understand, the appellant has actively engaged in the check to bring matters to a speedy conclusion. The reduction given was the maximum of 40%.

(c) For "giving us access to records, the appellant sent the documents required when she became aware they had not been received. Again the maximum reduction has been applied of 30%.

(d) There are no special circumstances which justify a further reduction.

Discussion

39. Having considered all of the appellant's and HMRC's submissions as set out above, for the reasons set out below we have concluded that the penalty of £1,202.02 has been correctly imposed by HMRC in accordance with the provisions of schedule 24.

Penalty provisions

40. To recap, under schedule 24 a penalty is due where (a) a person submits an inaccurate return under s 8 TMA which amounts or leads to an understatement of tax and (b) the inaccuracy results from the careless behaviour of that person in the sense of a failure to take reasonable care.

Inaccuracy in the return resulting in underpayment of tax

41. The appellant was required to submit a tax return under s 8 TMA for the tax year 2010/11 and this was submitted online on 18 December 2012. Where a taxpayer is required to file a tax return for a tax year, as regards income, the taxpayer is required to make a self assessment of (a) all income tax chargeable in that period and (b) income tax payable, being the difference between the amount chargeable and any income tax deducted at source such as that deducted under the PAYE system (ss 8 and 9 TMA).

42. In the 2010/11 tax year the appellant received total payments of £138,330.30 from her employer CQS. The employment with CQS ended on 31 January 2011, on the appellant being made redundant. CQS provided the appellant with a P45 dated 25 February 2011 showing her taxable employment income paid to the end of the employment of £86,543.30 and the tax deducted from that amount. The remaining £51,787 paid to the appellant and tax deducted from that amount was shown in the payslip provided by CQS dated 28 February 2011.

43. The appellant correctly reflected £86,543.30 in her tax return for 2010/11 as taxable employment income and £24,170 of the amount shown in the payslip as a tax free compensation lump sum. The remaining £27,117 shown in the payslip was not included in the return. It is not disputed that this £27,117 was employment income received by the appellant in the tax year 2010/11 in addition to the amount shown on her tax return for that year, that this should have been included in the return as taxable employment income for that year and that additional tax was therefore payable by the appellant on that amount.

44. In accordance with regulation 37 of the Regulations, CQS was obliged to deduct tax at the basic rate only from the amount of £27,117 and to provide the appellant with information of the amount of the payment and the tax deducted. There is no prescribed form for providing this information. CQS complied with these obligations by deducting tax at the basic rate and providing the appellant with the payslip showing the payment and tax deducted. CQS also provided details of all payments to HMRC on the P14s. There is no obligation in the applicable tax legislation for CQS or HMRC to provide the appellant with copies of these.

45. The effect of the self assessment system is that it is the appellant's obligation to make sure her tax return for 2010/11 included an assessment of (a) all income tax chargeable on her employment income taxable in that period (even though tax may have been deducted by the employer under PAYE) and (b) any income tax payable by the appellant on the difference between the income tax chargeable on that income and that deducted at source under PAYE. As CQS had correctly only deducted tax from the payment of £27,117 under PAYE at the basic rate, the appellant, as a higher rate taxpayer, was liable to account for the additional higher rate tax. The additional tax amounts to £8,013.40.

46. Accordingly the failure to declare the £27,117 of employment income in the tax return for 2010/11 was an inaccuracy which lead to an understatement of tax chargeable and payable for that year of £8.013.40.

47. The appellant does not dispute the inaccuracy and understatement of tax but argues that the inaccuracy did not result from her careless behaviour.

Was the inaccuracy careless?

48. HMRC consider that the appellant acted carelessly in failing to take reasonable care in filling in her tax return for 2010/11. They have not submitted that there was any intentional or deliberate failure to correctly account for tax due.

49. We considered all submissions of the appellant as set out in the correspondence above. In summary, the appellant's considers she was not careless as:

(1) She assumed that the £27,117 was included in the £86,543.30 shown in the P45 from which tax had been deducted in full under the PAYE system. The appellant considers this to be a reasonable assumption in particular as she had always relied on using the information in her P45 or P60 alone on previous occasions when filling in her tax return and the P45 and payslip were received in the same month. The appellant states she had no reason to question the figure in the P45 or to compare or add up any figures in the payslip.

(2) CQS failed to comply with correct procedures and should have informed the appellant specifically that the payment was not included in the P45 and that additional tax would be due on it.

(3) HMRC's systems and procedures are inadequate. The full amount of tax should have been deducted under the PAYE system and/or HMRC should have alerted the appellant in some way (whether by providing a copy of the P14 or otherwise) that the P45 did not contain all relevant information and that insufficient tax was deducted by the employer.

(4) It is wrong for HMRC to be able to raise the underpayment of tax and penalty so long (4 years) after the event when they have known of the underpayment of tax since May 2011. HMRC should have alerted the appellant to the underpayment at an earlier stage.

(5) It is unreasonable for HMRC to charge a penalty when they knew of the under declared income since May 2011 and their systems are inadequate and likely to lead to underpayments of tax in many cases.

50. As set out in the *David Collis* case to which HMRC refer, whether there is a failure to take reasonable care falls to be judged by reference to a prudent and reasonable taxpayer in the position of the taxpayer in question. The question, therefore, is what action a prudent and reasonable taxpayer, in the appellant's circumstances, would have taken as regards the inclusion of the omitted £27,117 in the tax return for 2010/11.

51. This must be assessed in the context of the self assessment system and the tax rules in place at the relevant time. The question is whether there has been a careless failure to comply with the law as it applied at the time. As set out, it is clear that, under the applicable law at the time, the obligation was on the appellant to account under the self assessment system for income tax on the payment, in excess of that already deducted by the employer under the PAYE system.

52. It is an essential part of a self assessment system that there is an obligation on a taxpayer himself or herself correctly to include all taxable income in a tax return and account for the tax due on it. Our view is that the hypothetical reasonable and prudent taxpayer can be attributed with an awareness of this obligation and with the need to be mindful to take reasonable steps to fulfil that obligation. In the context of declaring all taxable employment income a reasonable and prudent taxpayer would, therefore, take all reasonable steps to ensure he/she is aware of all amounts which may need to be included in the tax return.

53. Where a taxpayer is leaving an employment part way through a tax year on receiving a substantial additional payment such as this, we would expect a reasonable and prudent taxpayer to have regard to all documents and information provided by the employer relating to the payments made. Such a taxpayer who receives both an initial P45 and a subsequent payslip would pay some attention to both documents and would not simply disregard the payslip.

54. We do not accept that in these circumstances a reasonable and prudent taxpayer would assume the P45 is the only source of information to be used to fill in the tax return because on previous occasions the taxpayer used only the information in a P45 or P60 and the P45 and payslip were received in the same month. That the employment was ending part way through a tax year, that substantial payments were received on the employment ending (in addition to the appellant's usual monthly salary), that CQS provided not only a P45 but also a subsequent payslip, which even on a quick look through can be seen to contain information regarding substantial payments other than regular salary (being described as "pay in lieu" and "compromise"), should be sufficient to alert a reasonable and prudent taxpayer of the need to look at all the information set out on both forms. In such circumstances, it is not reasonable for a taxpayer, who is mindful of complying with their self assessment obligations, to assume that there is no need to make some check of the information in both the P45 and the subsequent payslip.

55. We would expect a reasonable and prudent taxpayer, on examining the information in the P45 and payslip with reasonable care and attention to conclude that the forms contain different amounts:

(1) The forms were issued at different times (albeit not far apart). The P45 is dated 25 February 2011 and the payslip is dated 28 February 2011.

(2) The P45 refers to "month 10" and "total pay to date" of £86,543.30 and "total tax to date" of £29,380.26. The leaving date is shown as 31 January 2011. It is reasonable to assume from this that the P45 relates to pay to the leaving date for the 10 month period in the tax year 2010/11 ending on that date.

(3) The payslip refers to "tax period 11" and shows a breakdown of amounts totalling £51,787. The constituent parts of the payment are shown as £0.00 for "basic pay", £2,925 for "addition to basic, £2,942 for "holiday pay", £21,250 for "Pay in Lieu" and £24,670 for "Compromise". This indicates that the amounts are those paid in month 11 (being February 2011) and that the payments are not regular salary given the descriptions used and the reference to zero basic pay.

(4) The forms show different tax codes with that on the P45 being described as the code at the leaving date and BR Y used in the payslip.

(5) The payslip separately identifies the total amount of £27,117 as taxable income for the "current period". It shows tax deducted from this payment of £5,423.

(6) The payslip refers to payment of the net amount of 45,779.19 by BACS and gives an account number.

56. In our view the information in the P45 and payslip alone suffices to alert a reasonable and prudent taxpayer to the fact that different sums are included in each document. If we are wrong on this, we would in any event expect this to alert a reasonable and prudent taxpayer to make a simple check of the total amounts shown in the P45 and payslip with that actually received from the employer for the tax year 2010/11. Before filling in a tax return, a reasonable and prudent taxpayer can be expected to be aware, or to have taken reasonable steps to be aware, of the amount of total payments actually received from the employer in the relevant period to which the return relates. A simple comparison of these figures would have alerted the appellant to the fact that the P45 and payslip contain different amount (as together they add up to the total she actually received from CQS of £138,330). The omission of £27,117 is a substantial one. If the appellant could not remember what her monthly pay was and what amount she had received in addition on the employment ending, the steps which would need to be taken to check this are relatively minimal, such as checking the amount of monthly pay and the amount received on the ending of the employment from prior payslips and/or bank statements.

57. Having identified that the payslip contained an additional amount to that shown in the P45 (as should have been the case as set out), we can see no reason why a reasonable and prudent taxpayer would not be alerted to the fact that the £27,117 described as taxable income in that payslip would need to be included in the tax return in some way or that its inclusion at least needed further consideration. We note that the appellant did separately identify in the tax return the £24,670 shown in the payslip described as "compromise".

58. We note the appellant's submissions in effect that it is not reasonable to expect higher rate taxpayers to know that additional tax is likely to be due on a payment such as this because tax has only been deducted at the basic rate in the absence of further information from the employer or HMRC. The appellant submits that CQS or HMRC should have alerted her not only to the fact that £27,117 was not included in the P45 figures but also to the fact that additional tax would be due on this amount in excess to that deducted by CQS. We appreciate that it is a relatively unusual circumstance

for PAYE to operate on a payment by reference to the basic rate only so that a higher rate taxpayer is left with the obligation to account for the additional tax. Usually on payments of salary the PAYE system operates such that the correct or very nearly the correct amount of tax is deducted at source by the employer. We understand that in fact a taxpayer may well not be aware of this particular rule as regards taxable payments received after the issue of the P45.

59. However, we would expect the receipt of such a substantial sum as £27,117 on the ending of an employment combined with the description of the nature of the different elements of the amount received in the payslip, the identification of £27,117 in the payslip as a taxable amount, the low amount of tax deducted from the payment of £27,117 shown in the payslip and the description of taxable amounts on the employment pages of the tax return to prompt a query in a reasonable and prudent taxpayer's mind as to whether and how that amount is to be included in their tax return. In such circumstances we would expect a taxpayer at least to take some steps to find out how to deal with the payment in their tax return whether through their own research, through contacting HMRC or taking tax advice.

60. We do not know who actually filled out the appellant's tax return. The appellant stated in a letter to HMRC that she did not fill it out but that it was filled out on the basis of the information she had at the time. Churchills are named as the appellant's adviser on the return. If Churchills (or another adviser) did fill in and submit the return for the appellant we do not know what degree of reliance (if any) the appellant put on her adviser as regards the submission of the return or precisely what information she provided to any such adviser (for example, whether the payslip itself was sent to the adviser).

61. In general terms where a taxpayer engages an adviser to submit a return on their behalf, as the taxpayer is the person responsible for the self assessment tax return, we would nevertheless expect the taxpayer, acting reasonably and prudently, to take reasonable steps to provide accurate information to the adviser and to review and to take some part in checking the information included in the return. What is reasonable to expect from the taxpayer will depend on all the circumstances of each case but, in a situation such as this, we would expect a reasonable and prudent taxpayer at the least to ensure they provide to the adviser details of all amounts received from the employer (whether the taxpayer knows the precise tax position or not) and, if in doubt as to whether an amount received from the employer requires to be included or not, to check that with the adviser.

62. From the submissions and information before the tribunal we cannot see any basis for a conclusion that the appellant in any way considered herself or raised with an adviser or HMRC that there was an amount of £27,117 which she had received which needed to be considered as regards inclusion in her tax return. On the contrary the information indicates that the payment was wholly left out of consideration in the provision of information for the filing of the tax return which is in line with the appellant's assertion that she simply assumed it was included in the figures in the P45.

63. The appellant's/Churchills' assertions that CQS and HMRC failed in a number of respects are essentially assertions as to what, in the appellant's/Churchills' view, the law ought to be rather than made on the basis of what the law was at the relevant time. As noted, an assessment of whether a taxpayer has made an inaccurate return as a result of careless behaviour can only be judged by reference to the relevant tax law as it applied at the time.

64. As set out the law is clear that it is the appellant's obligation to account under the self assessment system for tax on the payment of £27,117, in excess of that deducted by the employer at the basic rate under the PAYE system. This is not a case of any failure by the employer to operate the PAYE rules correctly or by HMRC in enforcing the PAYE rules. The rules as they applied at the time do not provide for the employer to deduct higher rate tax under the PAYE system on such a payment but only at the basic rate which CQS did. HMRC do not have discretion to require employers to deduct tax at the higher rate where the PAYE rules provide for a deduction at the basic rate only. That would require a change in the law by the legislators. HMRC are obliged to abide by the law in place at the time in the same way as taxpayers are.

65. CQS provided the appellant with the information it was required to give her under the PAYE rules. There is no obligation under those rules for CQS to do anything more. Whilst CQS is obliged to comply with the PAYE rules it is not its obligation under the tax legislation to ensure that the appellant complies with her self assessment obligations. Again HMRC do not have discretion to impose additional obligations on employers which are not provided for under the PAYE rules.

66. Similarly there was no obligation on HMRC to provide the taxpayer with any further document as regards the payment of £27,117 and the tax position on it or to work out the appellant's tax position for her at an earlier stage. That is not how the self assessment system works. As noted, it is an essential feature of a self assessment tax system that there is an onus on the taxpayer himself or herself to assess and account correctly for tax due in the tax return for the relevant year. HMRC then have the opportunity to enquire into a taxpayer's return to check the correct amount has been paid provided they start the enquiry within the applicable time limits. It appears that HMRC raised the enquiry within the applicable time limits in this case. This does mean that, where taxpayers make a mistake in their tax return, they may become aware of the additional tax liability only quite some time after the period in question. That is how the system works. Generally a tax based penalty will be due only if the mistake occurs as a result of the taxpayer failing to take reasonable care (or as a result of deliberate action).

67. For all the reasons set out above, we have concluded that appellant was careless in omitting to include £27,117 as taxable employment income in her tax for 2010/11. On the information and evidence before the tribunal the appellant left £27,117 entirely out of account in considering what to include in her tax return. We consider that, in the circumstances, the appellant had sufficient information from the P45 and payslip provided by CQS to know, acting mindfully of her obligations under the self assessment system and considering the available information with reasonable care and

attention, that this amount had been received from her employer in addition to the taxable amount shown in her P45 and which she included in her tax return. We also consider that in these circumstances a reasonable and prudent taxpayer would be alert, having identified the amount of £27,117 as an additional amount received from the employer, to the need to take some action to establish whether and how the amount should be included in the tax return.

68. We do not need to consider precisely what action would suffice for a taxpayer to have taken reasonable care. There is no evidence that the appellant took any action at all whether herself or by raising any query with an adviser or HMRC or anyone else. The appellant's and her adviser's submission is that it was unnecessary for her to take any checking action at all. As we have explained, we do not consider that reasonable in the circumstances and in the context of the appellant's obligations under the self assessment system.

69. We also note that as regards the assertion that it is unreasonable of HMRC to impose a penalty in this case, neither HMRC nor this tribunal has any discretion in the imposition of a penalty where the conditions in schedule 24 are satisfied except as set out in schedule 24 as regards the permitted reductions for "disclosure".

70. The appellant has raised no arguments in relation to the amount of the penalty but we have considered whether the amount of the penalty has been calculated in a way consistent with schedule 24. We are satisfied that the amount of the penalty has been correctly calculated. It is 15% of the potential lost revenue which is the minimum penalty permitted by schedule 24 for a careless inaccuracy where the taxpayer has made a prompted disclosure. We are satisfied that this was a prompted disclosure. HMRC discovered the error during the course of their enquiry into the return for 2010/11. We note that HMRC have given the maximum permitted reductions for a prompted disclosure.

71. We have no jurisdiction to make any further reduction in the amount of the penalty save where there are special circumstances. HMRC have considered whether there are special circumstances and concluded that there are none. If we considered that such a conclusion was flawed in that it failed to take into account relevant factors, took into account irrelevant factors, was wrong in law or was unreasonable then we would have jurisdiction to reduce the penalty ourselves. We can see no reason for any such conclusion.

Conclusion

72. In all the circumstances and for all the reasons given above we affirm the penalty and the amount of the penalty. The appeal is dismissed.

73. 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.

HARRIET MORGAN
TRIBUNAL JUDGE

RELEASE DATE: 22 FEBRUARY 2016