[2016] UKFTT 709 (TC)

TC05438

Appeal number: TC/2015/05225

INCOME TAX – self-assessment – penalty – refusal to suspend – whether flawed – yes – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

ALEXANDER DUNCAN **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE FAIRPO

The Tribunal determined the appeal on 11 February 2016 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 18 August 2015 (with enclosures), HMRC's Statement of Case [(with enclosures) acknowledged by the Tribunal on 14 December 2015 and the Appellant's Reply dated 10 December 2015 [(with enclosures) and the bundle of Documents and Authorities provided by the parties.

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DECISION

Background

1. The appellant, Mr Duncan, accepts that he made a number of careless errors in his 2012/13 tax return, namely:

   (1) omission of £30,000 of employment income paid as part of a severance payment, as he did not notice that it had already been taken into account in the figures in the relevant payslip;

   (2) omission of a beneficial loan of £1,466 from an employer due to an oversight; and

   (3) overstatement of pension contributions by £15,988; the reason for this error was unclear but appears to have resulted from the appellant including employer contributions as well as his personal contributions when completing his return.

2. The errors resulted in additional tax being due of £18,959.77; a penalty of 15% (£2,843.96) was levied by the Respondents ('HMRC').

3. The appellant has not appealed against the amount of the penalty; this appeal is against HMRC's refusal to suspend the penalty pursuant to the provisions of paras 14-17, Schedule 24, Finance Act 2007. The appellant requested that HMRC suspend the penalty on the following three conditions:

   (1) that he appoint a qualified adviser to prepare his tax return for the next two years;

   (2) that he meet all his filing obligations for the next two years; and

   (3) that he pay all his tax liabilities for the next two years.

4. HMRC refused to suspend the penalty on the basis that they would only suspend a penalty where the inaccuracy resulted from a weakness in the person's accounting or record keeping system and where they could identify specific improvements which, if made, would help to prevent the person making the same or similar errors in future. In this case, as HMRC considered that the failure here was due to a lack of knowledge with regard to termination payments and personal pension contributions, there was no weakness in the appellant's accounting or record keeping system which could be addressed by a suspension condition.

Relevant law

5. As relevant, para 14, Schedule 24, Finance Act 2007 provides that:

> (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.

6. Para 15(3), Schedule 24, Finance Act 2007 provides that a person may appeal against a decision of HMRC not to suspend a penalty and para 17 of Schedule 24 provides that, on appeal, this tribunal may order HMRC to suspend the penalty only if it thinks that HMRC's decision not to suspend was flawed.

7. In this context, "flawed" means flawed when considered in the context of the principles applicable to proceedings for judicial review.

Appellant's submissions

8. The appellant submits that the use of an adviser has already improved the appellant's tax return process and systems and that the use of an adviser for subsequent tax return has ensured that the appellant has not been liable for careless inaccuracies.

9. The appellant submits that the adviser provides him with checklists and post return checks, both of which have assisted the appellant in improving his record keeping and compliance.

10. The appellant further submits that HMRC's view that there *must* (emphasis added by appellant) be a systematic failure in order for a penalty to be suspended is in correct; that HMRC's own manual states that a careless inaccuracy will usually, but not always, arise from systematic failure. HMRC's position therefore contradicts itself. The appellant submits that this is, in any case, an overly narrow and incorrect interpretation of para 14(3) Schedule 24, Finance Act 2007.

11. The appellant also submits that his systems for completing his tax return were clearly inadequate to identify errors and ensure the accuracy and completeness of the information submitted.

12. The appellant submits that HMRC's submission that a penalty cannot be suspended where a further inaccuracy is unlikely to happen in the future, because specific conditions cannot be set in such a case, is an incorrect interpretation of para 14(3) of Schedule 24, Finance Act 2007.

HMRC submissions

13. HMRC submitted that "in this case the careless inaccuracy arose from a failure to understand and interpret the guidance notes correctly and HMRC say that there are no suitable suspension conditions that can be set to ensure the Appellant interprets the guidance notes correctly" and that "the careless inaccuracy arose from straightforward mistakes. It was not caused by a systemic problem and therefore HMRC submit that they are not able to set a condition that will help the Appellant avoid that mistake in the future. This is because there is no underlying failure or weakness in record keeping to correct by a specific suspension condition".

14. HMRC also submit that if a further inaccuracy is unlikely to happen in the future, a penalty cannot be suspended because they consider that it is not possible to set specific conditions in this case.

15. HMRC contended that a condition of suspension should contain something more than what is at the very least expected by a taxpayer which is that their returns should be free from careless inaccuracies, and that the Appellant's suggested suspension condition "which is that there would be correctly interpreting the guidance notes when entering pension payments on future returns" is no more than would be expected of a taxpayer.

Discussion

16. The second two conditions proposed by the appellant for suspension of the penalty can be dealt with quickly: compliance with filing obligations and payment of tax liabilities are both requirements of the law and cannot form suitable conditions for suspension of a penalty; it is clear from the context of the statute that something more than compliance with the law is required as a condition, as stated by Judge Brennan in *Fane* [2011] UKFTT 210 (paras 60-61).

17. Regard to the decision not to suspend generally, HMRC's contention that a penalty for a one-off error cannot be the subject of suspension was considered in *Testa* [2013] UKFTT 151, referred to by the parties, where it was held that "the legislation … has been drafted deliberately broadly and HMRC should not be placing unwarranted limits on it by reference to general policies which exclude whole classes of case which, in our view, would have been intended to be covered by it". Although this tribunal is not bound by the decision in *Testa*, the principle is agreed.

18. HMRC clearly has a discretion under para 14 Schedule 24 Finance Act 2007 whether or not to grant suspension but, while guidance on how to apply that discretion, such as department policy, can be helpful, it is still the case that HMRC should exercise that discretion and not simply follow policy without considering whether it is appropriate to a particular case where they have discretion.

19. There is nothing in para 14, Schedule 24, Finance Act 2007 that limits suspension of penalties to situations involving a "systematic problem" or "underlying failure or weakness in record keeping". Instead, as stated by Judge Brennan in *Fane*, "The important feature of paragraph 14 (3) is the link between the condition and the

statutory objective: there must be a condition which would help the taxpayer to avoid becoming liable for further careless inaccuracy penalties. In other words, if the circumstances of the case are such that a condition would be unlikely to have the desired effect (e.g. because the taxpayer in question has previously breached other conditions or has a record of repeated non-compliance) HMRC cannot suspend a penalty. The question therefore is whether a condition of suspension would have the required effect."

20. Judge Brenann goes on to say that "the condition of suspension must contain a … 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". That is, the purpose of the statute is to assist taxpayers in producing tax returns which are free from careless errors, rather than the much narrower remit of improving the taxpayer's record keeping systems.

21. In this case, there has been no indication of a history of non-compliance or breaches of other conditions; instead, there are a number of careless errors which have been made. The appellant's evidence is that further errors may well have occurred in subsequent tax returns, due to complexities in his tax affairs, if he had not appointed a qualified adviser. The appellant's evidence is that the involvement of the adviser has also improved his systems by ensuring that the correct information is produced and entered.

22. Considering the information provided, HMRC appear in their statement of case to have disregarded the appellant's main proposed condition: that he appoint a qualified adviser to assist with completing his tax returns for two years. Instead, HMRC's statement of case refers to a suspension condition of "correctly interpreting the guidance notes" which is not a suspension condition proposed by the appellant.

23. HMRC's statutory review of their decision not to suspend the penalty, dated 13 August 2015, also disregards the appellant's proposed condition of appointment of a qualified tax adviser.

24. It is clear from the foregoing that HMRC erroneously considered that the purpose of the statute is specifically to correct record keeping systems, rather than the wider purpose of enabling taxpayers to produce tax returns which are free from careless errors. They have also failed to take the appellant's proposed condition into account when coming to their decision not to suspend the penalty.

25. Accordingly, as I find that HMRC's decision making process in this case was flawed, I have to consider whether to exercise the tribunal's discretion to order that the penalty be suspended. On balance, I take the view that a condition requiring the appellant to retain a qualified tax adviser to assist in the completion and submission of self-assessment tax returns for a period of two years, including the setting up of checklists as described by the appellant, would be a condition which would assist the appellant in producing tax returns free from careless errors.

26. The appeal is therefore allowed as the respondent’s decision not to suspend the penalty was flawed in that it was based on an error of law. The respondent is ordered to suspend the penalty for a period of two years on the condition that for the period of two years from the date of this Decision, the appellant’s the appellant's self-assessment tax returns must be completed on his behalf by a Chartered or Certified Accountant or a Chartered Tax Adviser.

27. 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.

ANNE FAIRPO
TRIBUNAL JUDGE

RELEASE DATE: 24 OCTOBER 2016