



**TC07091**

**Appeal number TC/2018/03453**

*Income tax - Penalty - FA 2007 Sch 24 - inaccuracy in appellant's 2016-17 tax return - mistake by employer in preparing appellant's P60 which showed only part of his income for 2016-17 - appellant should have been aware of this - whether inaccuracy was careless and prompted - yes - appeal dismissed*

**FIRST-TIER TRIBUNAL**

**TAX**

**RINGO SCHEITHAUER**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE MICHAEL CONNELL  
MEMBER JOHN WILSON**

**Sitting in public at City Exchange, Albion Street, Leeds on 26 October 2018**

**The Appellant did not attend and was not represented**

**Ms Rose Grainger, Officer of HMRC, for the Respondents**

## DECISION

5 1. This is an appeal by Mr Ringo Scheithauer ('the appellant') against a penalty assessment of £694.15 issued under Schedule 24 Finance Act 2007 for a prompted deliberate inaccuracy in his tax return for the year ended 5 April 2017.

2. The assessment of tax which gave rise to the penalty is not in dispute. The points at issue are:

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- whether the penalty assessment has been issued correctly;
  - whether the Appellant was careless in submitting his 2016-17 SA return;
  - whether the discovery by HMRC was prompted.

15 3. The appellant did not attend the hearing. The Tribunal was satisfied that the appellant had been given notice of the time, date and venue of the appeal hearing and that it was in the interests of justice to proceed.

### **Background**

20 4. During the tax year ended 5 April 2017, the appellant was employed by Dunhill Pontefract PLC and received taxable pay of £306,722.

5. On 7 November 2017 HMRC opened an enquiry into the appellant's 2016-17 self-assessment return under s 9A TMA 1970.

25 6. HMRC established that the figure shown on the appellant's 2016-17 tax return show only part of his income (taxable pay of £167,605.48 and tax paid of £71,679.17).

7. Additionally, he had received £139,116.92 income from Dunhill for the period 5 April 2017 to September 2017.

30 8. He had also received employment benefits of £5,411 (car benefit) and £1,288 (in respect of benefits in kind) which had not been included with the rest of his employment benefits on his tax return.

9. HMRC explained to the appellant that he should have received copies of forms P11D and P60 from his employer and asked him to confirm that HMRC's figures were correct or provide documents to support his claim if he disagreed.

35 10. On 16 November 2017 the appellant responded, agreeing the figures of income and benefits in kind. He stated that he had only repeated the figures shown in his P60 and that he could not understand why the employer did not include all of his pay on the P60.

40 11. The reason the appellant's P60 did not include his earnings from April to August 2016 is because in September 2016 payroll arrangements were moved in-house, whereas previously the arrangements had been outsourced to external accountants. In

consequence the appellant's PAYE reference changed from 567/VZ 53163 to 567/A6283. The P45 which his employer's received from the accountants had the appellant on a month one basis tax code throughout the April to August 2016 period and therefore his earlier earnings were not included.

5 12. On 29 November 2017 HMRC wrote to the appellant setting out the revised tax calculation for 2016-17. Their letter also referred to penalties for inaccuracies and enclosed forms CC/FS9 'The Human Rights Act and penalties' and CC/FS7a 'Penalties for inaccuracies in returns or documents'.

10 13. On 22 January 2018 the appellant spoke to the HMRC decision maker and was asked whether he was aware that he had earned more than £300,000 instead of £167,605.48 He told HMRC that when he had received his 2016-17 P60 he noticed that the stated pay was low compared to the stated pay in his P60 for 2015-16. When he queried this with his employer he was told it was correct.

15 14. On 6 February 2018 HMRC wrote to the appellant setting out how they had calculated the penalty in respect of the 2016-17 inaccuracy.

15. On 9 March 2018 HMRC issued the Notice of Penalty Assessment for 2016-17 in the amount of £694.15.

16. On 17 March 2018 the appellant appealed against HMRC's decision as follows

20 "I strongly appeal against this penalty as it is clearly not my fault that I am in this situation as explained multiple times and that my company issued a wrong P60 and the letters/e-mail attached explain why this is the case.

25 I explained to you that I was under the impression, based on HMRC website information that P60 data has to be declared during the self-assessment. What other chance do I have than to use the only P60 that I had?

30 I asked my company Dunhills (Pontefract) PLC before (unfortunately the first time only verbally) to issue a new P60 but I was told that this could not be done and that HMRC had put me on a month 1 basis code for the whole year. So maybe this is Dunhills fault or even HMRC's own fault. HMRC did not provide any previous earnings, as explained in the e-mails attached, So Dunhills was not able to add those numbers. Please read both e-mails and the issue will be clearer.

35 So, all I did in good faith was to use the only P60 data I had available!!!  
Being not familiar with this specific UK tax issue, I feel that I am penalized for being a foreigner who does not fully understand this P60 implications.  
I explained the circumstances to you and agreed instantly that numbers were correct that you provided.

40 What I do not understand is that I have to suffer for a problem Dunhills and HMRC themselves have created.  
Never did I have any intention to cheat - as I explained to you as well - nor did I do something unlawful, from my point of view. Also, during all my  
45 years as a tax payer I never declared something wrong. The first time a mistake happens from Dunhill's side or HMRC's side and I am being

penalized. As a foreigner in the UK I am feeling that I being treated extremely unfair.

5 I also think that you issued a penalty because of the level of taxable income I earned and that for the fact that I am German. This feeling I got after the last verbal conversation.

10 Because of the situation I appeal and would like to have my case reviewed by an HMRC officer not previously involved in that matter.”

17. On 6 April 2018 HMRC reviewed their decision in a letter to the appellant as follows:

“Background

15 1) Incorrect P60

20 In September 2016 Dunhill took your payroll in-house as explained in the email from Tina Coggon of 13 November 2017. When this happened, Dunhill received a form P45 from the accountants that were previously paying you. Dunhill explained that you should have received form P45 in September 2016, but you said in a telephone conversation on 22 January 2018 that you did not receive this. Not having received information on what you had been paid before the change in payroll arrangements, Dunhill issued a P60 showing a total pay of £167,605.48 and total tax deducted of £71,679.17. 25 Your actual total earnings were £306,722.40 and the tax deducted at source £129,654.09.

30 2) Actions before submitting 2016-17 tax return

35 You noticed that the total figures on the P60 were incorrect. You compared it to your previous P60 and the totals in 2016-17 were lower than the previous year’s totals. You verbally contacted your employer asking for a new P60 but they could not issue a new P60 as they could not get the employment figures relating to the period before the payroll change. In good faith, you used the only P60 data that he had received.

40 3) HMRC’s view of the behaviour

45 The reason HMRC issued a penalty was not the inaccurate P60, as it is not your responsibility to issue the P60. However, it is your responsibility to include all of your income in your tax return. You must have known what your income was. It was easy to calculate by adding up the figures on the payslips.

50 You should have contacted a tax advisor/agent asking for advice or double checked your payslips to calculate the correct employment figures. As you did not do this before submitting your tax return, HMRC considered that you did not take reasonable care to include all of your employment related figures on your return.

You incorrectly believed that all you had to do was to declare the figures as shown on your P60, although you knew that the P60 was not correct. HMRC do not consider that you deliberately put incorrect figures on your return. You

misunderstood what had to go on the tax return and acted carelessly in doing so.”

5 18. HMRC provided the appellant their own guidance, which is contained in CH81120:

10 “Every person must take reasonable care but ‘reasonable care’ cannot be identified without consideration of the particular person’s ability and circumstances, HMRC recognises the wide range of abilities and circumstances of those persons completing returns and claims.

15 So whilst each person has a responsibility to take reasonable care, what is necessary for each person to discharge that responsibility has to be viewed in the light of that person’s abilities and circumstances.

In HMRC’s view it is reasonable to expect a person who encounters a transaction or other event which they are not familiar with, to take to find out the correct tax treatment or to seek appropriate advice.

20 If after that the person is still unsure they should draw attention to the entry and the uncertainty when they send the return or documents to us. In these circumstances the person will have taken reasonable care to draw our attention to the point and if they are wrong they will not have been carelessly so.

25 The guidance at CH81140 states-  
The law defines ‘careless’ as a failure to take reasonable care.  
The Courts are agreed that reasonable care can best be defined as the behaviour which is that of a prudent and reasonable person in the position of the person in question.

30 Failure to take reasonable care can be best explained in an extract taken from the FTT decision in *HMRC v David Collis* where Judge Berner said;  
35 “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.”

40 19. HMRC concluded in their review that the appellant did not take reasonable care when making his 2016-17 self-assessment return and as such HMRC were correct to issue a penalty in accordance with the legislation.

#### *Special Reduction*

45 20. Under paragraph 11 Schedule 24 FA 2007, HMRC may reduce a penalty if they think it is right to do so because of ‘special circumstances’.

21. Whilst ‘special circumstances’ are not defined in the legislation, the explanatory notes to the Finance Bill 2007 state that HMRC has discretion, but only in ‘special circumstances’, to reduce the penalty further, for different reasons. Special

circumstances is a phrase with which the courts are familiar and refer to circumstances which are ‘uncommon or out of the ordinary’ and usually to those which are not already provided for in the legislative framework.

22. The Decision Maker considered ‘special circumstances’ and concluded that they did not consider further reduction appropriate.

### **The Appellant’s case.**

23. The appellant lodged an appeal with the Tribunal on 27 May 2018. His grounds of appeal were as argued with HMRC in correspondence.

### **HMRC’s case**

24. HMRC contend that a penalty is payable as the appellant gave HMRC an incorrect personal tax return. The return contained an inaccuracy which led to an understatement of liability to tax. This is not in dispute. HMRC says that it was a prompted discovery and that the inaccuracies were careless.

25. The size of a penalty is dictated by the potential lost revenue, multiplied by a percentage which depends upon whether the inaccuracy was concealed, prompted, or unprompted, and whether the inaccuracy was careless or deliberate. The resulting figure is then further reduced according to HMRC’s view of how much assistance the appellant gave in the enquiry. This is separated into ‘telling’, ‘helping’ and ‘giving’.

26. For a prompted careless discovery the minimum penalty (after all adjustments) is 15% and the maximum is 30%. The range is therefore 15%.

27. HMRC has given:

- A 30% deduction for ‘telling’.
- A 40% deduction for providing the amount of the benefit.
- A 30% deduction, for giving HMRC access to records.

28. The 100% total deduction is then applied to the 15% range resulting in the full 15% being deducted from 30% i.e. 15% which is then applied to the potential lost revenue (‘PLR’).

29. The PLR was £4,627.73. A 15% penalty was applied to this figure, resulting in a penalty of £694.15.

### **Relevant Legislation**

30. The relevant legislation is at Schedule 24 Finance Act 2007 and summarised below.

#### Paragraph 1

- (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.

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Paragraph 3

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- (1) For the purposes of a penalty under paragraph 1, inaccuracy in a document given by P to HMRC is-
- (a) "careless" if the inaccuracy is due to failure by P to take reasonable care,
  - (b) "deliberate but not concealed" if the inaccuracy is deliberate but P does not make arrangements to conceal it, and
  - (c) "deliberate and concealed" if the inaccuracy is deliberate and P makes arrangements to conceal it (for example, by submitting false evidence in support of an inaccurate figure).

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Paragraph 4

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- (2) If the inaccuracy is in category 1, the penalty is
- (a) for careless action, 30% of the potential lost revenue,
  - (b) for deliberate but not concealed action, 70% of the potential lost revenue, and
  - (c) for deliberate and concealed action, 100% of the potential lost revenue.

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Paragraph 5

- (1) "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.

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Paragraph 9

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- (1) A person discloses an inaccuracy or a failure to disclose an under-assessment by-
- (a) telling HMRC about it,
  - (b) giving HMRC reasonable help in quantifying the inaccuracy or under-assessment, and
  - (c) allowing HMRC access to records for the purpose of ensuring that the inaccuracy or under-assessment is fully corrected.

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- (2) Disclosure-

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- (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 or under-assessment, and
- (b) otherwise, is "prompted".

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- (3) In relation to disclosure “quality” includes timing, nature and extent.

Paragraph 10

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- (4) (4)Where a person who would otherwise be liable to a 70% penalty has made a prompted disclosure, HMRC shall reduce the 70% to a percentage, not below 35%, which reflects the quality of the disclosure.

Paragraph 15

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- (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.

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- (3) A person may appeal against a decision of HMRC not to suspend a penalty payable by the person.

Paragraph 17

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- (1) On an appeal under paragraph 15(1) the tribunal may affirm or cancel HMRC's decision.

- (2) On an appeal under paragraph 15(2) the tribunal may-

(a) affirm HMRC's decision, or

(b) substitute for HMRC's decision another decision that HMRC had power to make.

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- (3) 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

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(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.

**Conclusion**

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31. The Appellant does not appeal the fact that there was a prompted disclosure of an inaccuracy in his return for 2016-17.

32. However, he argues that he was not careless and that the inaccuracy was caused by either his employer giving him erroneous figures or HMRC, who would have been aware of the correct figures from PAYE returns.

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33. The law defines ‘careless’ as a failure to take reasonable care. The Courts are agreed that reasonable care can be best defined as the behaviour which is that of a prudent and reasonable person in the position of the person in question.

34. Failure to take reasonable care can be best explained in an extract taken from the First-tier Tribunal decision in *HMRC v David Collis* where Judge Berner said:

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“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.”



35. Failure to take reasonable care can be linked to the long standing concept in general law of “negligence”. In *Blyth v Birmingham Waterworks Co* 1856. At page 784 Baron Alderson states:

5 “Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. The defendants might be liable of negligence if unintentionally they omitted to do that which a reasonable person would have done, or did that which a person taking reasonable precautions would not have done.”

10 36. In our view the appellant made an honest mistake, possibly caused by erroneous assurances given to him by his employer. However, he knew or should have known that the income figure for 2016-17 on his P60 which he transferred to his tax return was incorrect. As HMRC say, it was a relatively simple matter to add up the figures contained in his pay slips. The difference between the amount shown in his P60 and  
15 his true earnings was very significant. The law does not provide shelter for honest mistakes.

37. The disclosure was prompted because the appellant did not inform HMRC about the inaccuracy before he had reason to believe HMRC either had discovered it or were about to discover it.

20 38. HMRC were therefore correct in applying a penalty calculated by reference to the PLR on the basis of a prompted disclosure of a careless inaccuracy.

39. That has resulted in a penalty of £694.15 being 15% (the minimum penalty) of the PLR.

40. The Appeal is accordingly refused and the penalty confirmed.

25 41. 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  
30 “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

35 **MICHAEL CONNELL**  
**TRIBUNAL JUDGE**

**RELEASE DATE: 12 APRIL 2019**