



**TC07912**

**Appeal number: TC/2017/03700**

*INCOME TAX – penalties – whether behaviour deliberate – yes – whether special circumstances – no – appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**S SUKUMURAN**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE ANNE FAIRPO  
MS ANN CHRISTIAN**

**Sitting in public at Leeds on 8 August 2019**

**Mr Wadsworth, accountant, for the Appellant**

**Mr Burke, presenting officer, for the Respondents**

**DECISION**

## **Introduction**

1. This is an appeal against the following:
  - (1) penalty assessment for 2013-14 in the sum of £8,611.75 issued on 5 August 2016
  - (2) penalty assessment for 2014-15 in the sum of £2,839.90 issued on 5 August 2016
2. The appellant had originally appealed the amendments made on the same day to the appellant's tax returns for those years but, prior to the hearing, had accepted the amendments.
3. The issue before the tribunal was the basis on which the penalties were assessed: whether or not the inaccuracies in the appellant's tax returns were deliberate, as HMRC contend.

## **Background and facts**

4. The appellant was a doctor in a partnership in a surgery in Halifax. Although there was some discussion as to whether he actually was a partner, as it was stated that there was no formal partnership agreement, it was accepted in the hearing that there was a partnership and that the appellant was a partner. The appellant was entitled to a fixed income amount from the partnership of £84,000 per annum, as confirmed by the appellant in correspondence with HMRC.
5. The partnership returns filed with HMRC for the relevant years showed that the appellant's share of profits for the 2013-14 tax year was £77,000; the profit share shown on the partnership return for the 2014-15 tax year was £48,601.
6. The appellant filed self-assessment tax returns for the relevant tax years showing the following information:
  - (1) 2013-14, filed 31 January 2015 - profits from partnership: £37,230; tax due £11,189.17
  - (2) 2014-15, filed 28 March 2016 - profits from partnership: £35,661; tax due £8,855.22
7. Each return showed other income which is not relevant to this appeal.
8. The "white space" section at part 19 of the 2013-14 return included the statement "Partnership in dispute estimated figures included". Box 20, noting that there were provisional or estimated figures, was checked. No information was provided in either of the same boxes in the 2014-15 return.
9. HMRC opened enquiries into the 2013-14 return on 20 January 2016, and into the 2014-15 return on 9 May 2016. Closure notices, and the penalty assessments, for both years were issued on 5 August 2016.
10. Following correspondence, a "view of the matter" letter was issued by HMRC on 28 October 2016 and a review conclusion letter was issued on 27 February 2017. The appellant appealed to the tribunal on 3 May 2017.

11. The appeal to the tribunal was made approximately one month out of time, as the appellant had incorrectly believed that an application for ADR needed to be made before an appeal to the Tribunal. HMRC raised no particular objections to permission being granted for the appellant to bring an appeal out of time and had prepared in full for the substantive hearing. In the circumstances, we considered that it was appropriate to give permission for the appeal to be brought out of time.

### **HMRC submissions**

12. HMRC accepted that the burden of proof was on them to show that the penalties were properly calculated, in particular that the behaviour that led to the understatement of tax in the returns was deliberate.

13. HMRC submitted that, although the appellant had stated in his 2013-14 return that the figures were estimated, no amendment had subsequently been made to those figures. No calculation was provided to show how the estimated figures had been produced. The appellant's self-assessment return showed income (£37,230) that was approximately half that shown on the partnership return (£77,000).

14. An amendment can be made within twelve months of the filing date to correct estimated figures. Such an amendment should therefore have been made by 31 January 2016 for the 2013-14 return. After that date, the figures can only be corrected by informing HMRC. No amendment had been received when HMRC opened the enquiry into that return on 20 January 2016.

15. HMRC submitted that the appellant was obviously aware that his income from the partnership was considerably higher than the amount shown in the return, as he had advised HMRC in March 2016 that his income from the partnership was £7,000 per month, which would indicate an annual income of £84,000.

16. They submitted that the appellant would therefore have been aware that there had been a gross understatement of income in his return and had not sought to amend the figures in the return.

17. The 2014-15 return was received late by HMRC in March 2016, and was filed approximately two weeks after the appellant had informed HMRC that his income from the partnership was £7,000 per month. The 2014-15 return showed partnership income of £35,661. This was not stated to be an estimate. HMRC submitted that the appellant representative contention that the return was filed using an estimated unique taxpayer reference number (UTR) did not mean that the return contained estimated figures.

18. No evidence was provided to show how this figure had been calculated. The appellant had referred to deductions for expenses but, if expenses had been claimed, these would have been shown separately in the return. The appellant had later provided evidence of expenses to HMRC but had abandoned a claim for those expenses.

19. The appellant subsequently informed HMRC that he had left the partnership in September 2014; on this basis, he should have declared partnership income of at least

£42,000. The amount actually shown on the partnership return in respect of the appellant was £48,601.

20. HMRC submitted that the scale of the understatement in the 2013/14 return was such that the appellant must have known that the figures in his return were inaccurate, even if he did not know the precise amount of the inaccuracy.

21. HMRC also submitted that the 2014/15 return had been filed at a time when the appellant knew that HMRC were enquiring into his previous return and the income declared therein and following confirmation by the appellant that his income was £7,000 per month. HMRC submitted that the appellant therefore also knew that this return contained an inaccuracy.

22. HMRC submitted that the appellant had therefore intentionally given HMRC documents each of which he knew contained an inaccuracy.

23. HMRC had therefore calculated the penalties on the basis that the behaviour which led to the understatement was deliberate and that the disclosure was prompted, as the appellant had made no disclosure of the inaccuracy before he had reason to believe that HMRC had discovered the inaccuracy. The penalty range was therefore 35% to 70%. Reductions of 25% were given for each of “telling”, “helping” and “giving access” so that a total penalty reduction of 75% was given. Applied to the penalty range, this gave an overall penalty of 43.75% of the potential lost revenue (which was not disputed to be the amount assessed, which was no longer subject to appeal at the hearing date).

24. The amount assessed in respect of partnership income on the 2013/14 return was £19,684 and so the penalty assessed was £8,611.75. The amount assessed in respect of the partnership income on the 2014/15 return was assessed as being £6,491.20 and so the penalty assessed was £2,839.90.

### **Appellant’s submissions**

25. The appellant was unable to appear at the hearing but was represented by his accountant.

26. A witness statement from the appellant was produced, which stated as follows:

(1) He had been a sole practitioner until 2012. As part of his planning for retirement, he had merged his practice with that of another surgery in late 2012.

(2) No formal partnership agreement was produced. It was agreed that the appellant would be paid £7,000 per month and would be paid £15,000 for the sale of his fixtures and fittings to the partnership. The appellant had assumed that he would be reimbursed his business expenses by the partnership.

(3) He had received no copies of partnership accounts, nor any statement of allocated profits.

(4) He was attempting to retire from the partnership on 30 September 2013 and so had submitted an estimated tax return for 2013-14 on the basis that he had retired from 30 September 2013, and had estimated the income figures to

that date as the partnership had withheld holiday payments from him and there were disputes about what he was owed.

(5) He had instructed a lawyer to sort out the difficulties with the partnership; having been told that this was an impossible task, he had left the partnership surgery in September 2014. He resigned formally at the end of June 2015.

(6) He had completed the 2014/15 return on an estimated basis as he still had “no information whatsoever” about his partnership income. His accountants had failed to check the box to indicate that it had been prepared on an estimated basis.

(7) After resigning from the partnership he had surgery for cancer and so had left communication with HMRC to his accountants.

(8) He had made no deliberate errors in his returns.

27. The accountant submitted as follows:

(1) The appellant had not received any partnership accounts, although he had attempted to do so, and so had to submit estimated returns in order to avoid penalties, as he could not prepare his returns on the basis of the accounts.

(2) The appellant’s accountants had had to use a UTR from another client for the partnership details in order to be able to complete the returns, as they did not have the actual partnership UTR.

(3) The appellant and his representatives were aware that the partnership returns would be filed which would demonstrate the appellant’s share of profits, so that there was no risk that HMRC would not be aware of the full position. In addition, the 2013/14 return had clearly stated that the figures were estimates.

(4) HMRC had assumed that the amounts shown on the partnership return were income. It had never been explained to the appellant by the partnership what the payments of £7,000 per month represented, so these could have been capital gains, or loan repayments.

(5) The appellant had had expenses which the partnership refused to reimburse, so that the £7,000 per month did not represent pure profit in his hands.

(6) The appellant had been seriously ill during the enquiry period and had left the matter to his accountants.

28. The accountant also gave evidence as to his knowledge of matters and stated that:

(1) The appellant had only worked in a limited capacity whilst he was unwell.

(2) The agents who had completed the partnership returns “went with the partnership”.

(3) The appellant had received £7,000 per month from the partnership but he did not know what this was for; it could have been NHS seniority pay, or payment for fixtures and fittings, or a loan.

29. It was submitted that there was no deliberate error as the appellant did not intend to misrepresent the true position to HMRC (per *Patrick Cannon v HMRC*)

[2017] UK FTT 0859 (TC)). He had, instead, provided the best estimate available of the relevant figures and marked it accordingly. It was also submitted that the errors in the returns were not made carelessly.

30. Further, it was argued that the disclosure was unprompted as the partnership statement contained the relevant information, as the statement was submitted to HMRC on behalf of all of the partners. In addition, the information that the figures in the 2013/14 statement were estimates amounted to a disclosure to HMRC.

31. Finally, the accountant submitted that HMRC should have taken into account special circumstances to reduce the penalty, particularly:

- (1) the serious ill-health of the appellant at the time that the returns were being filed (per *Pendle* [2015] UKFTT 27 (TC), ill-health can amount to special circumstances);
- (2) the lack of access to the partnership accounts;
- (3) the legal uncertainty at the time as to the position of the appellant in the partnership.

32. It was submitted that HMRC had failed to give adequate reasons for their conclusion that special circumstances had not been taken into account, such that it was open to the Tribunal to substitute their own decision on the matter.

33. It was submitted, in summary, that the behaviour was neither careless nor deliberate, nor prompted, and that the penalties were unfair and should be either quashed or reduced to a sensible level.

### **Relevant law**

34. Schedule 24 Finance Act 2007 provides, as relevant:

#### 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.

#### Paragraph 3

- (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).

#### Paragraph 4

- (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.

#### 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.

#### Paragraph 9

- (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.
- (2) Disclosure -
  - (a) is “unprompted” if made at a time when the person making it has no reason to believe that HMRC have discovered or are about to discover the inaccuracy or under-assessment, and
  - (b) otherwise, is “prompted”.
- (3) In relation to disclosure “quality” includes timing, nature and extent.

#### Paragraph 10

- (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.

## Discussion

35. The appellant was unable to attend the hearing due to ill-health, so we had to rely on his witness statement, the evidence of his representative and the information in the bundle. As he was unable to be cross-examined, his witness evidence has been considered in that context.

### *2013/14 return*

36. We consider that the appellant's witness statement is not particularly credible as he states that the figures for the 2013/14 tax return were estimated on the basis that he had retired from the partnership on 30 September 2013. We assume that this is an attempt to explain why there are, approximately, only six months of income declared on the return.

37. It is clear from his own evidence and that of the partnership that the appellant actually retired from the partnership about the end of September 2014. His 2013/14 tax return was filed on 31 January 2015. The appellant cannot reasonably have believed at the time that his tax return was filed that it was reasonable to calculate his income on the basis that he had retired in September 2013.

38. No other credible explanation was given for the substantial understatement as to income: the appellant stated in correspondence that he received £7,000 per month from the partnership and his accountant accepted that payments of that amount had been received in total. To the extent that this was intended to be a submission that the amounts calculated in the 2013/14 return were lower because not all of the payments had been received in that year, this is not a credible explanation for the understatement in that return because:

(1) the partnership dispute correspondence in August 2014 makes no reference to any outstanding payments of the monthly fixed amount. The amounts stated to be outstanding in that correspondence are seniority pay, one month's holiday pay, and payment for the fixtures and fittings; and

(2) there is no additional amount declared in the 2014/15 tax return as one would expect if the returns had been prepared on a receipts basis.

39. The dispute correspondence also makes no reference to the monthly payments having been paid late, although it raises a number of other complaints. We consider that if there had been significant delays in payments that these would have been referred to in the letter.

40. Although reference had been made to expenses deductions, it is clear that these are claimed separately in a return. In correspondence in the bundle, the accountants had indicated to HMRC that the expenses for 2013/14 amounted to £3,806; this is approximately one-tenth of the amount understated in the return.

41. It was suggested that the appellant did not know what the payment of £7,000 each month was for and that it might have been a loan, or payment for fixtures and fittings, or a capital gain, or NHS seniority pay. Again, this is simply not credible.

42. It is clear from the documents provided, including correspondence from the appellant to HMRC in 2015 and correspondence from the appellant's lawyer during



the partnership dispute in 2014, that the appellant knew that his income from the partnership was set at £7,000 per month. There was no evidence put forward that the payments could be reasonably have been thought to have been a loan or a capital gain.

43. In August 2014, in correspondence relating to the dispute, the amount for fixtures and fittings is stated to be outstanding and so the appellant cannot have thought that any part of the amounts paid to him prior to that date represented payment for fixtures and fittings.

44. It was not suggested that NHS seniority pay would not have been taxable so, again, there is no credible reason why any amounts that were thought perhaps to relate to such pay should have been omitted from the returns.

45. It was also contended that the appellant had not seen the partnership accounts and so could not prepare his returns properly; however, as noted above, we find that the appellant was aware that he was entitled to a fixed amount of £7,000 per month.

46. The fact that the appellant had not received partnership accounts does not provide a credible reason for the failure to include half of the income received in his return. It is clear from the partnership dispute correspondence in 2014 (and the appellant's own evidence) that he knew he was entitled to a fixed amount each year and not to a share of the profits of the partnership. No reason was given as to why the return could not have been estimated on the basis of that known fixed share. The information in the partnership accounts would not reduce his entitlement to that fixed amount. No evidence was put forward to suggest that the appellant had asked the partnership to provide him with details of the amount of partnership income declared in respect of his share on the partnership statement.

47. We therefore consider that no credible explanation has been given for the substantial understatement of income in the 2013/14 tax return. The size of the understatement is such that we consider that the appellant must have known at the time of filing the return that there was an inaccuracy in the return. We note that the return states that the figures are estimates but, for the same reasons given above, we do not consider that there was any realistic attempt made to provide a credible estimate as to the amount of income in that return.

48. We also note that no attempt was made by the appellant to provide corrected figures before the deadline for providing such amendments.

49. The word "deliberate" is not defined in the penalty legislation. We were referred to the decision in *Auxilium Project Management* [2016] UKFTT 0249 (TC) ("Auxilium"), where the Tribunal held that "a deliberate inaccuracy occurs when a taxpayer knowingly provides HMRC with a document that contains an error with the intention that HMRC should rely upon it as an accurate document". It is a subjective test, depending on the knowledge and intention of the taxpayer. This is contrasted with a careless error, which arises where the taxpayer fails to take reasonable care. Although the decision in *Auxilium* is not binding upon us, we consider that this is an appropriate approach to take.

50. The appellant submitted that there was no intention to misrepresent the position to HMRC, so that the behaviour could not be regarded as deliberate.

51. As we have mentioned, we consider that much of the evidence put forward was not credible. We do not consider that the taxpayer can reasonably have believed, in January 2015, that his income for 2013/14 should be calculated on the basis that he had retired in September 2013 when he had not in fact retired until September 2014. We do not consider that the taxpayer can have been in doubt as to the nature of the payments made to him, nor as to the amounts he had received. We consider that the size of the understatement is such that the taxpayer knew that the figures stated could not be accurate.

52. We find, therefore, that when the return was filed the taxpayer knew that the figures in that return were inaccurate. As no attempt was made to correct those figures before the deadline for amendments, we consider that the appellant intended HMRC to rely upon the figures in the return. Marking a return as “estimated” without subsequently amending the figures in the return cannot be taken to mean that the appellant did not intend HMRC to rely on the figures in the return by the deadline for amendment.

53. We note the appellant’s contention that the partnership statement would provide HMRC with the correct figures: although this was put forward with regard to the question of whether the disclosure was prompted or unprompted, we have considered whether it might be regarded as grounds for the view that the appellant did not intend HMRC to rely on the figures in his return.

54. The partnership statement for 2013/14 was filed with HMRC on 30 January 2015. No evidence was put to us to suggest that the appellant, or his advisers, had contacted the partnership, or HMRC, to establish what figures had been reported in the statement for his partnership income, so that they could amend his return.

55. Accordingly, we find that the appellant provided HMRC with a document which he knew contained an inaccuracy, and made no attempt to resolve that inaccuracy, so that we consider that he intended HMRC to rely upon the document as submitted. We consider, therefore, that the appellant’s behaviour was deliberate within the meaning of the penalty legislation.

#### *2014/15 return*

56. With regard to the 2014/15 return, the appellant filed this return over a month after HMRC opened an enquiry into his 2013/14 return. He must have known at that time that HMRC did not agree with his calculations as to his taxable income from the partnership. The amount understated in this return was more than 25% below the amount in the partnership statement. Again, no credible reason was given for the understatement.

57. The partnership statement for this period was filed on 31 January 2016, two months before the appellant filed his tax return. No explanation was given as to why the relevant figures for his income could not have been obtained from the partnership before the appellant’s return was filed.

58. Accordingly, we consider that the appellant knew that this return also contained an inaccuracy and provided it to HMRC intending that HMRC rely on the document.

### *Penalties calculation*

59. During the hearing, HMRC made some submissions to the effect that the behaviour was also concealed. However, the penalty assessments do not include any statement to that effect, and the matter was not raised in HMRC's skeleton argument. As such, we consider that the submissions may have been made in something of an attempt to cover all eventualities in the hearing. In any case, we do not consider that there are any grounds to consider that the appellant concealed deliberate behaviour, as we consider that a person would need to take active steps to conceal a deliberate inaccuracy and there were no such steps indicated here.

60. We note the appellant's submissions as to whether the disclosures were prompted or unprompted. We do not agree that the appellant can rely on the partnership statement as establishing unprompted disclosure, especially in circumstances where the appellant made no attempt to establish what information had been provided to HMRC or to endeavour to provide updated return figures to reflect the partnership statements before the enquiries were opened. We find that the disclosure was prompted.

61. We have considered HMRC's calculation of the penalty, including the discounts given for telling, helping and giving access, and do not consider that there is any reason to alter the discounts given. As such we consider that the penalty has been correctly calculated.

### *Special circumstances*

62. Finally, we have considered the submissions made as to whether special circumstances should apply to reduce the penalty. The tribunal has jurisdiction to reduce a penalty if it considers that HMRC's decision with regard to special circumstances is flawed.

63. The appellant argued that HMRC had failed to give adequate reasons for their conclusion that special circumstances had been taken into account and that this meant that their decision was flawed.

64. The penalty assessments state that HMRC consider that no special circumstances apply. The "view of the matter" letter, dated 27 February 2017, does not address the question of special circumstances. HMRC's statement of case states that "it was not considered that there were any special reductions to be given". In the hearing, HMRC submitted that the appellant's ill health did not amount to special circumstances.

65. Although it is not clear that HMRC had addressed all of the arguments put forward as special circumstances, we are not satisfied that HMRC's decision was flawed: the appellant's claimed ill-health at the time that the returns were submitted is not substantiated. The appellant had continued to work for his own company, albeit in a limited capacity, during 2015 and around the time that the 2013/14 return was filed had been corresponding with HMRC by letter and telephone with regard to his enquiry. We do not consider that any such ill-health can be considered to be a special circumstance which merits a reduction in the penalty.

66. We have concluded that the lack of access to partnership accounts did not provide a credible reason for the understatement in the return; it follows that we do not consider that it can amount to special circumstances meriting a reduction in the penalty.

67. The appellant contends that the legal uncertainty as to his position in the partnership amounts to special circumstances; it is clear from the dispute correspondence that such uncertainty had been resolved by August 2014, as the correspondence there is clearly as to a partnership dispute and contains no reference to any uncertainty as to the appellant's position. As such, it cannot amount to special circumstances in relation to the filing of the returns in January 2015 and March 2016 and so does not merit any reduction in the penalty.

### **Decision**

68. For the reasons given above, the appeal is dismissed and the penalties upheld in full.

69. 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: 30 OCTOBER 2020**