INCOME TAX - incorrect return – penalty – yes – careless – yes – suspension – no - appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

TC07232

Appeal number: TC/2017/00838

BETWEEN

KENNETH ROBERTS **Appellant**

-and-

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

TRIBUNAL: JUDGE ANNE SCOTT

Sitting in public at Aberdeen on 20 September 2018

Mr Graeme Lindsay, for the Appellant

Mr Matthew Mason, Officer of HMRC, for the Respondents

DECISION

INTRODUCTION

1. This is an appeal against the 2013/14 penalty assessment dated 14 December 2016 in the amount of £19,308.15 imposed under Schedule 24 Finance Act 2007 ("Schedule 24"). The penalty relates to the appellant's submission of his self-assessment tax return ("SATR") for the tax year ended 5 April 2014 which contained an inaccuracy.

The Issues

2. There was no dispute that the tax return contained an inaccuracy. The original issue is whether HMRC were correct to issue a penalty assessment under Schedule 24 for the careless submission of a document containing an inaccuracy. If so, then did the appellant have a reasonable excuse for the inaccuracy or were there special circumstances? It has been conceded implicitly that there was no reasonable excuse and nor were there special circumstances and that the only remaining question is whether the penalty should have been suspended. However, given the procedural history of this appeal it is appropriate to make the position absolutely explicit.

Background

3. The Bundle was lodged with the Tribunal, and the appellant, on 6 September 2018, for the hearing which was on 20 September 2018.

4. On 6 and 11 September 2018, Mr Lindsay lodged with the Tribunal substantial further documentation and "Further Grounds of Appeal".

5. On 12 September 2018, I asked the Tribunal administration to issue a letter to Mr Lindsay explaining that the application to lodge Further Grounds of Appeal would be dealt with as a preliminary issue at the hearing. He was invited to formulate either an oral or written submission giving the legal basis for the suggested amended Grounds of Appeal.

6. On 14 September 2018, Mr Lindsay lodged a Skeleton Argument which stated what he now considered to be the Grounds of Appeal being:-

(a) No valid Section 8 TMA Notice had been lodged.

(b) There was a breach of the ECHR.

(c) There was no careless error, it was simply innocent.

(d) There was no Potential Lost Revenue ("PLR").

(e) It was suitable for suspension.

(f) HMRC's procedural failures should give rise to a special reduction.

7. On 17 September 2018, Mr Lindsay lodged a submission in relation to the proposed amended Grounds of Appeal.

8. On the afternoon before the hearing, by which time Mr Mason was already en-route to the Hearing, Mr Lindsay sent to the Tribunal, copies of website pages, video clips and two tax cases. There was no video equipment in the Court and the appellant had only produced the video clip by email.

9. Both parties had lodged Skeleton Arguments. It was clear, from his Skeleton Argument, that Mr Lindsay was labouring under a number of misapprehensions so it was appropriate, and indeed necessary, to clarify a number of issues at the outset of the hearing.

10. Contrary to Mr Lindsay's argument, I explained that there was absolutely no doubt that the standard of proof in this matter was on the balance of probabilities, that it was not beyond reasonable doubt and that although the burden of proof lay with HMRC in the first instance thereafter it lay with him.

11. On 19 May 2018, Judge Richards had issued Directions in response to an application for disclosure, which was refused, and he had very helpfully included Notes and reasons explaining the approach to penalty appeals. Notwithstanding Mr Lindsay's argument to the contrary, I confirmed that I totally agreed with Judge Richards when he stated that "Determining whether Mr Roberts was careless requires an analysis of Mr Roberts' actions, not those of HMRC…". Mr Lindsay has consistently focussed on HMRC's actions.

12. Having made that clear, I had no hesitation in rejecting the argument that I should consider whether HMRC had caused an unreasonable delay in this matter. I pointed out that, on the contrary, Mr Mason's pragmatic approach to the strike-out Decision had saved time and cost for the appellant.

13. I explained that the question as to whether or not a section 8(1)(a) TMA Notice had been issued was not a relevant issue for the Tribunal. In this instance the penalty had been predicated, not on the late lodgement of a tax return but rather, on an inaccuracy in a tax return which the appellant had lodged.

14. Since those Grounds of Appeal were not relevant I declined permission to amend the already amended Grounds of Appeal.

15. The appeal proceeded and Mr Mason discharged the onus of proof in relation to the imposition of the penalty.

16. The Tribunal then turned to the questions of reasonable excuse and special circumstances. In the Bundle there was a witness statement from the appellant and he informally gave oral evidence but that was to the effect that he had no clear recollection of what he had done at the time.

17. Since there were no video facilities in the court I adjourned the hearing and undertook to view the videos and then issue Directions.

18. I heard the parties and following the hearing I issued Directions with which both parties have complied.

19. Correspondence ensued.

20. I issued further Directions and on 8 November 2018, HMRC contacted the Tribunal making a joint submission on behalf of both parties in response to those Directions.

21. The parties confirmed that they were in agreement that the Schedule 24 penalty charged be reduced to £500 under the provisions afforded by paragraph 11 of Schedule 24. The parties requested that the Tribunal settle the matter of the penalty quantum by Consent under Rule 34 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules"). I had

due regard to both Rules 2 and 34 of the Rules and considered it appropriate to make such an Order. The penalty in this matter was therefore quantified at £500.

Agreed facts

22. It was not possible for the appellant to use HMRC's own self-assessment online service to submit the 2014 SATR as he was non-resident for the tax year ended 5 April 2014.

23. The appellant prepared and electronically submitted the 2014 SATR to HMRC using third-party software, Selftax, on 23 January 2015. That supplier is on HMRC's website list of suppliers.

24. The appellant was working for an overseas employer and claiming UK non-residence. No employment pages were required or completed.

25. The appellant's overseas earnings, UK bank interest and dividends in the year ended 5 April 2014 amounted to £128,721, £563 (including £250 net) and £43.26 respectively.

26. On completing the 2014 SATR, in addition to claiming UK non-residence, entering his days in the UK and overseas work days, claiming personal allowances and providing domicile information, the appellant entered the figure of £1,287,721 in box 21 on residence page RR2.

Further Findings in Fact and reasons therefor

27. The tax return instructions for claims in box 21 state that any entry in that box should be accompanied by a completed Helpsheet 302. (It is not a statutory document so it is not mandatory.) However, that particular Helpsheet relates to dual residence (ie taxpayers resident in the UK and elsewhere). The appellant had claimed to be, and was at that time, non-resident in the UK.

28. By making that entry, which I accept contained a typographical error and should have read £128,721, the appellant effectively submitted a repayment claim.

29. No figure should have been inserted in that box, or at most £nil.

30. No completed Helpsheets were submitted.

31. In his witness statement the appellant stated that:

> "As in previous years, I did not refer to HMRC's Help Sheets, as I considered my tax affairs relatively straightforward and having experienced no issues with HMRC since taking over my tax affairs, from my accountant from the 2011 return onwards."

32. He had used a different software provider for 2012/13 and had made no errors.

33. The appellant was not familiar with the software used for this return. He could not recall viewing the instructional videos that were available and which show the user how to complete the return, check the calculation of the tax that was triggered by completing the return and review the return.

34. If the appellant is correct in saying that the software did not show the numbers on the boxes in the return, that is a compelling argument for taking particular care to ensure that the correct figures are in the correct boxes, yet he did not review the return or print out the return.

35. On the balance of probability, which is the standard of proof in this matter (notwithstanding Mr Lindsay's arguments to the contrary), I find that the appellant did not select the "Tax calculation summary" option to check the tax calculation. Had he done so, he would have seen that he had triggered a huge repayment of tax rather than the small repayment of tax on his investment income in the UK of £62.50 which should have been triggered by submission of the return.

36. Although it was automatically credited to his self-assessment account, fortunately, repayment of the £1,287,783.50 was suspended by HMRC's own internal systems.

37. In summary, I find that the appellant's approach to the completion of the return was cavalier to the point of recklessness. The relevant law provides only for a decision as to whether the behaviour was careless or deliberate. It was not deliberate but it was certainly exceedingly careless. It most certainly did not meet the standard required of a diligent and prudent taxpayer conscious of his obligations in terms of the Taxes Acts, which is what the case law states is required.

38. There certainly was no reasonable excuse for such an approach to completion of a tax return.

39. There are no special circumstances. If the appellant had taken even a modicum of care the situation would have been avoided.

40. The penalty was correctly assessed in terms of the relevant legislation. It is tax geared and there was PLR. The fact that there was no actual loss of revenue is immaterial. To find otherwise would render the legislation meaningless.

41. The correct reductions for disclosure have been applied.

The remaining issue

42. The only remaining outstanding issue is the matter of suspension of the penalty since the parties are not agreed in regard thereto.

HMRC's arguments

43. HMRC argue that the penalty is not appropriate for suspension because the appellant's circumstances are such that HMRC cannot identify meaningful suspension conditions.

44. Further,

(a) The appellant has not agreed that the inaccuracy in the return arose because of careless behaviour and therefore since agreement to that is a prerequisite for suspension, no suspension agreement can be made.

(b) There was no systemic failing in record keeping which, if corrected, would ensure future compliance.

(c) The appellant has acquired knowledge of what is required for completion of a tax return.

(d) The appellant may no longer be required to submit tax returns.

(e) The appellant no longer resides abroad.

The appellant's arguments

45. The appellant argued that the errors in the tax return both in the amount and by putting the figure into box 21 was "… a basic human error, either through misunderstanding or a lapse in concentration".

46. The appellant has consistently relied on the approach of Judge Berner in *Eastman v HMRC*[1] ("Eastman"). He has equally consistently offered to employ accountants to file any relevant tax papers and he had reiterated that offer at the hearing. In fact he has done so.

The Law

47. Judge Berner set out the relevant law in *Eastman* at paragraphs 3 to 11 and those read as follows:-

> **"The law**
> 3. The power to suspend a penalty such as the one in question in this appeal is given to HMRC by FA 2007, Sch 24, para 14 which provides:
>
> > '**Suspension**
> > 14—
> > (1) HMRC may suspend all or part of a penalty for a careless inaccuracy under paragraph 1 by notice in writing to P.
> >
> > (2) A notice must specify—
> >
> > > (a) what part of the penalty is to be suspended,
> > > (b) a period of suspension not exceeding two years, and
> > > (c) conditions of suspension to be complied with by P.
> >
> > (3) HMRC may suspend all or part of a penalty only if compliance with a condition of suspension would help P to avoid becoming liable to further penalties under paragraph 1 for careless inaccuracy.
> >
> > (4) A condition of suspension may specify—
> >
> > > (a) action to be taken, and
> > > (b) a period within which it must be taken.
> >
> > (5) On the expiry of the period of suspension—
> >
> > > (a) if P satisfies HMRC that the conditions of suspension have been complied with, the suspended penalty or part is cancelled, and
> > > (b) otherwise, the suspended penalty or part becomes payable.
> >
> > (6) If, during the period of suspension of all or part of a penalty under paragraph 1, P becomes liable for another penalty under that paragraph, the suspended penalty or part becomes payable.'
>
> 4. Paragraph 15(3) provides that a person may appeal against a decision of HMRC not to suspend a penalty payable by that person.
>
> 5. The jurisdiction of this Tribunal on such an appeal is set out at para 17(4). That provides:
>
> > '(4) On an appeal under paragraph 15(3)—

[1] 2016 UKFTT 0527

(a) the tribunal may order HMRC to suspend the penalty only if it thinks that HMRC's decision not to suspend was flawed, and
(b) if the tribunal orders HMRC to suspend the penalty—

(i) P may appeal against a provision of the notice of suspension, and
(ii) the tribunal may order HMRC to amend the notice.'

6. The starting point for the Tribunal's jurisdiction is thus the quality of HMRC's decision not to suspend the penalty. The requirement for a finding that HMRC's decision is flawed is explained by para 17(6):

'(6) In sub-paragraph … (4)(a) … "flawed" means flawed when considered in the light of the principles applicable in proceedings for judicial review.'

7. It is thus the case that the jurisdiction of the Tribunal is appellate and not supervisory, but the exercise of that appellate jurisdiction requires the application of principles of judicial review more commonly associated with a supervisory jurisdiction.

8. **The principles applicable to judicial review impose a high threshold, but they nonetheless ensure that the exercise of HMRC's powers to decide whether or not a penalty should be suspended are exercised in a reasonable manner. To be flawed in a judicial review sense the decision must be one that no reasonable body could have come to** (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 25 KB 223, per Lord Greene MR at p 230). In the context of a statutory appeal such as this, the exercise of a supervisory jurisdiction has been explained in *John Dee Ltd v Customs and Excise Commissioners* [1995] STC 941 (a case concerning a statutory condition, namely whether it appeared to the commissioners requisite to require security as a condition of making taxable supplies) by Neill LJ (at p 952) in the 30 following way:

'In examining whether that statutory condition is satisfied the tribunal will, to adopt the language of Lord Lane, consider whether the commissioners had acted in a way in which no reasonable panel of commissioners could have acted or whether they had taken into account some irrelevant matter or had disregarded something to which they should have given weight. The tribunal may also have to consider whether the commissioners have erred on a point of law. I am quite satisfied, however, that the tribunal cannot exercise a fresh discretion on the lines indicated by Lord Diplock in *Hadmor Productions Ltd v Hamilton* [1983] 1 AC 191. The protection of the revenue is not a responsibility of the tribunal or of a court.'

9. It was also held in *John Dee* that where it was shown that a decision of the commissioners (that is, HMRC) was erroneous because of their failure to take relevant material into account, a tribunal could nonetheless dismiss an appeal if the decision would inevitably have been the same had account been taken of the additional material. The same would apply to a case where HMRC had regard to something irrelevant. That possibility is envisaged by the tribunal's powers in such a case: para 17(4)(a) provides the tribunal with a discretion not to order HMRC to suspend a penalty even if it is determined that HMRC's decision is flawed.

10. The use of the word "may" in para 14(1) indicates clearly that the power conferred on HMRC to suspend a penalty requires the exercise by them of a discretion. It is for that reason that, although the Tribunal has an appellate jurisdiction, the statute has provided that its power on an appeal against a refusal to suspend requires the application of judicial review principles, as set out in the *Wednesbury* case and *John Dee*. Interestingly, however, the use of the same word in para 14(3) does not connote the exercise of a discretion; there, when used in conjunction with the word "only", the word "may" is intended to establish a condition that must be met before all or part of a penalty may be suspended. That condition, which is accordingly a threshold which must be crossed before a penalty is suspended, is that compliance with a condition of suspension would help the person liable to the penalty to avoid becoming liable to further penalties for careless inaccuracy. Whether that condition is satisfied is again, having regard to the nature of the Tribunal's jurisdiction, itself a matter for the decision of HMRC, subject to review by the Tribunal on judicial review principles.

11. The Tribunal cannot in that respect substitute its own decision. Its power under para 17(4), if it finds that HMRC's decision not to suspend the penalty was flawed, is to determine whether to order HMRC to suspend the penalty. It cannot suspend the penalty on its own account, nor at that stage direct any particular

> conditions to be attached. That again is a matter for the discretion of HMRC; on an appeal under para 15(4) against a decision of HMRC setting conditions of suspension of a penalty, and a corresponding appeal under para 17(4)(b), the powers of the Tribunal under para 17(5) to vary those conditions are also dependent on the Tribunal finding that HMRC's decision was flawed in the judicial review sense."

Reasons for Decision

48. For the avoidance of doubt, in the short summary decision there was an error in that I stated that the appellant had not filed tax returns since retiring. He has done so and has used accountants to do so. Had that been a final decision incorporating full findings of fact and reasons for the decision then, on receiving the application for leave to appeal I would have reviewed it in terms of the Rules and the outcome would have been reasoning on the basis set out below.

49. Unlike many of the FTT decisions on suspension, in this case both in the course of the enquiry and the appeal, HMRC did consider the question of suspension of the penalty repeatedly.

50. On 7 January 2016, Officer Taylor wrote to the appellant and referred him to factsheets FS7a and FS10. The Officer's conclusion was that

> "..the error in your Return does not stem from a fundamental flaw in your record-keeping; instead, it is from a lack of understanding about the appropriateness of box 21. Going forward, you now understand what you should do and no future inaccuracies should occur. Consequently, if you accept the error was a careless error, HMRC would not be able to suspend the penalty."

51. Whether or not the appellant conceded that he was careless, as I indicate above, I have no hesitation in finding that he was indeed careless. Nowhere in the legislation does it say that he has to agree that he was careless. The simple fact is that he was.

52. I agree with Judge Aleksander in *Steady v HMRC*[2] where he stated at paragraph 27 that: "…it is only because he was careless that he may become entitled to have his penalty suspended."

53. The fact that HMRC argued that the appellant had to accept that he was careless does not render their decision not to suspend the penalty flawed in a judicial review sense. On every occasion, and there were a number, that the question of suspension was considered, HMRC also looked at other reasons of whether or not to suspend. In any event, ultimately, in agreeing the penalty the appellant implicitly conceded that he had been careless.

54. On 12 February 2016, Officer Taylor discussed the question of suspension of the penalty with Mr Lindsay who was acting for the appellant.

55. He stated that there were no SMART conditions that could be set which would allow the penalty to be suspended. The taxpayer now had the relevant knowledge to complete a tax return and his tax affairs were so straightforward that no future inaccuracies should occur. Mr Lindsay argued, as he has before the Tribunal, that employment of an accountant would satisfy the SMART criteria. The officer disagreed on the basis that that would force the appellant to incur cost. That would be disproportionate.

[2] [2016]UKFTT 473 (TC)

56. I agree with Judge Brannan in *Fane v HMRC*[3] ("Fane") where he stated at paragraph 59 *et seq:*

> "59. Mr Woodroff explained how he applied HMRC's guidance as mentioned at paragraph 18 above. In particular he considered that a condition of suspension could not properly apply to a "one-off event."
>
> 60. On the face of the wording of paragraph 14(3) there is no restriction in respect of a "one-off event". Nonetheless, it is clear from the statutory context that a condition of suspension must be more than an obligation to avoid making further returns containing careless inaccuracies over the period of suspension (two years). Paragraph 14(6) provides:
>
> > 61"If, during the period of suspension of all or part of a penalty under paragraph 1, [the taxpayer] becomes liable for another penalty under that paragraph, the suspended penalty or part becomes payable."
>
> 61. If the condition of suspension was simply that, for example, the taxpayer must file tax returns for a period of two years free from material careless inaccuracies, paragraph 14(6) would be redundant.
>
> 62. Moreover, it is difficult to see how a taxpayer could satisfy HMRC that the condition of suspension, if it contained no requirement other than a condition not to submit careless inaccuracies in future tax returns, had been satisfied as required by paragraph 14(6). This would, effectively, require the taxpayer to prove a negative will require HMRC to conduct a detailed review of the taxpayer's tax returns.
>
> 63. For these reasons we do not agree with Mr Lever's suggestion that a suitable condition of suspension would be a requirement that the Appellant correctly returned other income (e.g. rental income) on his tax return for the next two years.
>
> 64. A condition of suspension, therefore, must contain something more than just a basic requirement that tax returns should be free from careless inaccuracies. This suggests, therefore, that the condition of suspension must contain a more practical and measurable condition (e.g. improvement to systems) which would help the taxpayer to achieve the statutory objective i.e. the tax returns should be free from errors caused by a failure to exercise reasonable care.
>
> 65. Bearing these considerations in mind, HMRC's guidance indicating that a one-off error would not normally be suitable for a suspended penalty is understandable and, in our view, justified.
>
> 66. We are fortified in this view by reference to the Explanatory Notes published together with the Finance Bill 2007 in respect of the provisions which were eventually enacted as Schedule 24 Finance Act 2007. The relevant extract from the Explanatory Notes reads as follows:
>
> > "Suspended penalties will not be appropriate for one off inaccuracies in returns such as a capital gain or a one off transaction. They are more likely to be appropriate for accounting system or record keeping weaknesses, where the money that may have been spent on the penalty could be used to remedy the defective processes ensuring future returns are accurate."
>
> 67. For these reasons, we consider that Mr Woodroff did not mis-direct himself when deciding that he could not suspend the penalty in this case."

56. HMRC did point out that there was no systemic failure in this case. There was not. Their other arguments point to this being very much a "one off" occurrence. I agree. HMRC did not misdirect themselves when deciding not to suspend the penalty in this case.

[3] [2011] UKFTT 210 (TC)

57. I am clear that HMRC have considered all potentially relevant factors. They have not disregarded anything to which they should have given weight. Indeed, I have rarely seen quite such extensive correspondence in a penalty appeal where the inaccuracy was caused by carelessness. The Officer sought guidance from higher officers and Policy more than once.

58. I have highlighted in bold the pertinent section of paragraph 8 of *Eastman* where Judge Berner discusses judicial review. HMRC's decision was not flawed in a judicial review sense.

59. The appeal in relation to the decision not to suspend the penalty is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

60. 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 SCOTT
TRIBUNAL JUDGE

Release date: 14 June 2019