



TC01469

Appeal number: TC/2010/7184

Appeal against a penalty determination for years 2001/02, 2003/04 and 2004/05 - Appellant claimed that penalty excessive – incorrect gift aid claim in 2001/02 return and late election in relation to 2003/04 return – alterations to returns made but not effective – Appellant elderly but had professional advice from persons entirely familiar with his affairs - Appeal Dismissed

FIRST-TIER TRIBUNAL

TAX

VISWANATH KARNANI

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDITH POWELL (TRIBUNAL JUDGE)
ANTHONY HUGHES (MEMBER)**

Sitting in public at 45 Bedford Square, London WC1 on 5 May 2011

Mr Kaul Surinder, De Susman and Mr De, De Susman for the Appellant

Miss Helen S Thorn officer with HM Revenue and Customs for the Respondents

Mr Mark Proctor, Witness for Respondents

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DECISION

1. This appeal was brought against a penalty determination under section 95(1)(a) Taxes Management Act (TMA) 1970 in respect of years of assessment 2000-01, 2003-04 and 2004-05. The penalty imposed was 30% of the maximum amount chargeable (an abatement of 70%) having been reduced from 45% (an abatement of 55%) following a statutory review. The issue was whether the penalty of 30% should remain or whether it should be reduced or increased.

Statutory provisions and internal guidelines

2. Under the statutory provisions then in force a penalty could be imposed if a taxpayer's return was made negligently (section 95(1) TMA) and was based on the tax that would have been payable if the return had been correct. The penalty was otherwise imposed by an authorised officer in such amount as in his opinion is correct or appropriate (section 100(1) TMA) and HMRC has internal guidelines governing how the maximum penalty should be reduced depending on the circumstances and in particular having regard to categories described as "disclosure", "co-operation" and "seriousness". The maximum reduction for disclosure is 20% and the maximum reduction allowed under each of the other two categories is 40%.

The hearing

3. The burden of showing that the penalty is appropriate falls on the Respondents. We heard evidence from Mr Mark Proctor who had initial conduct of the case. Mr Proctor apparently recommended to his authorising officer that the penalty should be 20% of the maximum but we were not told how he had reached his decision and his authorising officer recommended that the penalty should be 45% of the maximum made up of a 10% reduction for disclosure, a 20% reduction for co-operation and 25% reduction for seriousness. The penalty was reduced to 30% following an internal review at the Appellant's request when the maximum was reduced 15% for disclosure, 30% for co-operation and 25% for seriousness. The Appellant had suggested the penalty should be further reduced to 10% but without specifying reasons for this. We found Mr Proctor a helpful witness.

4. The Appellant did not dispute that the tax on which the penalty was based was correct but argued that the penalty was excessive. Although Mr De made a tentative suggestion that the original return for 2003-04 was correct apart from the out of time election he agreed that in fact that it was made negligently as it omitted some £60,000 of employment income. The 2000-01 return contained a gift aid claim for a payment to charity which it was agreed was incorrect and the 2004-05 return omitted a sum of interest income and should have included income resulting from the gift aid payment made in that year which had not been correctly carried back to 2003-04 and which exceeded the taxpayer's income for that year.

5. The taxpayer is 85 years of age but of course was some years younger when the 2001-02 return was prepared. We did not have the opportunity of hearing evidence from him but it seems that he entrusted the preparation of his tax return to Mr De who has acted for him for many years and explained that he was aware of the Appellant's

tax affairs including the creation of the charity to which the various payments had been made. Mr De could not explain the background to the 2001-02 gift aid claim but did not dispute that relief was not available in that year because the charity apparently did not then qualify.

5 6. The 2003-04 return originally understated the Appellant's employment income and contained a claim for relief in the form of an election to carry back a gift aid
10 payment made in the following year. The gift aid payment was made in the 2004-05 year to the same charity involved in the 2001-02 claim. The charity by then satisfied the necessary requirements. Unfortunately the election to carry back the relief to
15 2003-04 was made some 17 days late and we were told that the Respondents have no discretion to allow a late election. This was apparently accepted for the Appellant but without further reference to Mr Proctor he then submitted an amendment to both the 2004-04 and the 2004-05 returns. The amendments deleted the employment income originally included in the 2003-04 return (and increased in amount by a previous amendment to the 2003-04 return) from that return and added an equivalent amount of employment income to the 2004-05 return. If the amendments had been correct the gift aid payment actually made in the year 2004-05 would have automatically reduced the tax due on the employment income since that income would have arisen in the same year as the gift aid payment and no carry back election was necessary. In
20 addition the tax charge arising because there was insufficient income received by the Appellant in the 2004-05 year to cover the gift aid payment would also have been avoided. Essentially the position would have been the same as if the election made for 2003-04 had been made in time and the employment income had - as originally returned and as eventually agreed - arisen in that year.

25 7. Mr Proctor said that when he asked Mr De's firm about the changes to the 2003-04 and 2004-05 returns they had submitted on behalf of the Appellant he was told that the amendments were made because although the employment income was paid in 2003-04 it was in the form of a bonus not approved until 2004-05 (although it seems that in fact the bonus may not have been approved until 2005-06). Internal papers to
30 which we were referred showed that it had previously and unsuccessfully been contended on another occasion that employment income should not be taxed when paid but only when finally approved and in due course the Appellant agreed that the employment income was properly included in the 2003-04 return if it had been paid in that year which was the case. In reaching agreement about the correct income to be
35 declared for 2004-05, Mr De's firm agreed on behalf of the taxpayer that an amount of interest income had been omitted from that return; this income had come to the notice of Mr Proctor as a result of information provided to HMRC by the institution paying the interest. The result of the enquiries into both the returns and the later amendments was that the employment income (increased by some £60,000) was agreed to have
40 arisen in 2003-04 and should be deleted from the 2004-05 return, and that income arising in 2004-05 included omitted interest income. The deletion of the employment income from the 2004-05 return caused income to be treated as arising to the taxpayer because the gift aid payment actually made in that year exceeded the taxpayer's income for that year (even when the originally omitted interest income was included).

45 ***Our reasons***

8. We were sympathetic about the original error in making a late gift aid carry back claim - we could see that this may well have arisen because the return on which the claim was made was submitted after 31 January when the return was due and which was the final date for making a carry back claim. Had that simply been accepted there may well have been no penalty to discuss or if there had been it would have been in relation to a far smaller amount. However the problem was compounded by the changes made to the 2003-04 and 2004-05 returns. We cannot ignore that interest income was omitted from the 2004-05 returns for which there was absolutely no explanation nor any evidence that it would have eventually been disclosed if Mr Proctor had not received details of it from the paying institution. The penalty for the tax due as a result of the disallowed gift aid claim in 2000-01 seems to us to be reasonable against this later background coupled with a lack of any explanation for why the claim was made. On behalf of the Appellant we were told that all the tax had eventually been paid and that the charity had received the payments for which the claims had been made and we accept this. The fact remains that an unfortunate delay in making the gift aid carry back claim was made far worse by the later amendments to the 2003-04 and 2004-05 returns. The erroneous claim in 2001-02 and the omitted income in 2004-05 must be viewed against this background.

Our decision

9. We certainly did not feel able to further abate the penalty. We did consider whether the penalty should be increased but concluded that in all the circumstances we would not do so and decided to dismiss the appeal and not disturb the penalty in the amount of 30% (an abatement of 70%) which had been determined by the Respondents following their internal review.

10. 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.

TRIBUNAL JUDGE

RELEASE DATE: 23 September 2011