



TC01665

Appeal number: TC/2011/05939

Income Tax – Penalty assessment – Schedule 24 Finance Act 2007 – whether error on income tax return was careless – whether special circumstances under Paragraph 11 of Schedule 24. Appeal refused.

FIRST-TIER TRIBUNAL

TAX

DAVID PARKER

Appellant

- and -

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

Respondents

TRIBUNAL JUDGE: W Ruthven Gemmell, WS

**Sitting in public at George House, 126 George Street, Edinburgh on Friday
11 November 2011**

Michael Jones, for the Appellant

William Kelly, H M Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an appeal against a penalty assessment under Schedule 24 of the Finance Act 2007 issued by H M Revenue and Customs (“HMRC”) on 3 March 2011 in respect of the tax year 2008-2009 for £768.15.
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2. There are two issues in this appeal.
3. The first is whether David Parker (“DP”) was careless when he made an error in his 2008-2009 income tax return. The second issue is whether, because of special circumstances, HMRC should reduce the penalty under Paragraph 11, Schedule 24 Finance Act 2007.
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The Facts

4. Evidence was given by DP and by Michael Jones (“MJ”) and both were credible.
5. Both were cross examined by HMRC.
6. DP was employed by Thomas Mitchell until 11 July 2008, Strathclyde Timber until 9 February 2009 and Framewise Limited as at 5 April 2009 in the tax year 2008-2009 and, consequently, had three employers during this period.
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7. DP had been made redundant three times in the thirteen months prior to 31 January 2010 and during this period he had worked in Wales for eleven months, away from his family, living with his employer and under considerable stress to the extent that he was taking medication. DP was also diabetic.
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8. DP was unfamiliar with completing tax returns for multiple employments, having previously been taxed under the PAYE system with income from only one employer.
9. In the year to 5 April 2009, DP’s gross income, stated in his P45s and P60, was £36,773 of which a total tax was deducted of £6,147. In relation to the amount received from Thomas Mitchell, he had received £19,115 from which tax had been deducted of £5,121, adjusted by February 2009 to be £5,013, from Strathclyde Timber he had received £11,485 with no tax deducted and from Framewise Limited he had received £6,173 with tax deducted of £1,134.
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10. By letter dated 19 May 2010, DP enclosed copies of his 2008-2009 P45s and P60, which should have been used to complete his 2009 return and requested that the repayment be dealt with as soon as possible.
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11. The P60 provided by Framewise Limited, detailing the final figures for the year, state that the total pay was £36,774.02 and tax deducted of £6,146.80.
12. Examination of the P45 showed that Strathclyde Homes did not deduct any tax from the earnings of £11,485.45 and, consequently, the cumulative tax deducted at the date of leaving that employment was £5,012.80.
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13. On 8 June 2010, HMRC wrote to DP stating that he had correctly returned the amount of pay and tax for Thomas Mitchell and Framewise but that in relation to Strathclyde Homes Limited, where his pay was £11,485, DP had declared that he had paid £5,013, whereas HMRC stated that his P45 showed nil tax deducted and that they had subsequently ascertained from Strathclyde Homes Limited that DP was due a refund of £109. HMRC asked DP to explain why he had showed £5,013 deducted from his pay from Strathclyde Homes Limited and enclosed a revised calculation for tax due for 2008-2009 which brought out additional tax of £5,121 payable. The letter went on to state that a penalty could be charged when a tax return was found to be incorrect.
14. HMRC claimed this was a careless error and that DP had failed to take reasonable care when completing his tax return as the P60, of which he was in possession, detailed the final figures for the tax year and clearly stated that his total pay was £36,774.02 and tax of £6,146.80.
15. 15. By letter 25 August 2010, HMRC explained that Strathclyde Homes' P45 did not deduct any tax from earnings of £11,485.45 and that the cumulative tax deducted at the date of DP's leaving that employment had reduced from £5,121.53 when he left Thomas Mitchell to £5,012.80 representing an amount of £108.73 of previous deductions which had been repaid to DP through his wages.
- 20 16. HMRC said the P45s and P60s were correct and DP had overstated his tax deductions by £5,122.20 and claimed a refund of £5,121.40 and in doing so failed to take "reasonable care" when completing his tax return.
- 25 17. HMRC stated that if DP had been in any doubt as to the figures to be entered in his return, he should either have contacted HMRC for assistance or sought professional advice. In this letter, HMRC set out how they were calculating the penalty under Schedule 24 and set out the Oxford English Dictionary definition of "want of proper care and attention" and "piece of carelessness" as their definition of "carelessness" as a "failure to take reasonable care".
- 30 18. The letter went on to define carelessness in terms of the *Blithe v the Birmingham Waterworks Company, 1856* case, which stated that "failure to take reasonable care can be likened to the longstanding concept of negligence" and referred to Baron Alderman's statement that an individual may be liable for negligence, if, unintentionally, the individual omitted to do that which a prudent and reasonable person would have done or did that which a person taking care would not have done.
- 35 19. The maximum penalty under Schedule 24 for careless errors is 30% of the potential lost revenue with a minimum of 15%, taking into account "telling", "helping" and "giving".
20. DP was given all the maximum abatements and, accordingly, a 15% penalty was chargeable with 15% of £5,121 being £768.

21. On 2 March 2011, HMRC carried out a check of DP's self assessment tax return and issued a closure notice. A notice penalty was issued on 3 March 2011 for a penalty in an amount of £768.15.

5 22. A review of the decision was carried out by letter of 8 July 2011 which upheld the decision.

23. There was no suggestion that the inaccuracy was deliberate in any way but HMRC stated that DP had in his possession from each employment forms P45s and P60s and, therefore, information which was clear.

10 24. The error in the tax return came to HMRC's notice as DP's return for 2008-2009 was selected for an enquiry under Section 9A of the Taxes Management Act 1970 as it appeared to have overstated the figure of PAYE tax deducted on income from employment with Strathclyde Homes during the year. The apparent overpayment of tax was £5,121.40. A revised computation was sent, and agreed by DP, showing that no refund of tax was due.

15 25. On 15 March 2011, DP responded that not every inaccuracy in a tax return would incur a penalty and that in terms of HMRC's compliance handbook at CH81120, HMRC had taken no account of DP's "abilities or circumstances" and, in particular, his personal circumstances at the time of making the return; that no sense of proportion appeared to have been taken, given that HMRC did not expect perfection from taxpayers as stated in CH83130 and made reference to the HMRC discussion document of 31 January 2011 entitled "The Simplification of Regulatory Penalties".

25 26. The letter also made reference to paragraph 11 of Schedule 24 of the Finance Act 2007 which gives discretion to HMRC to reduce the penalty in special circumstances and stated that the penalty seemed disproportionate to the circumstances and, accordingly, the discretion should be exercised in favour of DP.

Legislation

27. Schedule 24 Finance Act 2007 -

Paragraph 1(1) of Schedule 24 provides that a penalty is payable by a person when

30 (a) that person gives HMRC a document listed in the Table, which includes a return under Section 8 TMA 1970, and

(b) when conditions 1 and 2 are satisfied

35 Paragraph 1(2) of Schedule 24 states that Condition 1 is that the document contains an inaccuracy which leads to (a) an understatement of tax or (c) a false or inflated claim to repayment of tax.

Paragraph 1(3) of Schedule 24 states that Condition 2 is that the inaccuracy was careless or deliberate within the meaning of Paragraph 3.

Paragraph 3(1) of Schedule 24 defines an inaccuracy as careless if due to a failure to take reasonable care.

Paragraph 4(1)(a) of Schedule 24 states the penalty payable for careless action is 30% of the potential lost revenue.

5 Paragraph 5(1) of Schedule 24 defines the potential lost revenue as the additional tax due as a result of correcting the inaccuracy.

Paragraph 9 (1) of Schedule 24 provides for reductions in the penalty where a person discloses an inaccuracy by

(a) Telling HMRC about the inaccuracy,

10 (b) Giving HMRC reasonable help in quantifying the inaccuracy corrected. and

(c) Allowing HMRC access to the records so the inaccuracy can be.

15 Paragraph 11 of Schedule 24 states that if HMRC think it right because of special circumstances they may reduce the penalty under paragraph 1 or 2.

Cases Referred To

Crabtree v Hinchcliffe 1971, 3 All ER 967

Clarks of Hove Ltd v Bakers' Union 1979, 1All ER 152

Fane v HMRC Commissioners 2011, UKFTT 210

20 **Submission by the Parties**

28. DP states that he misread the P45 issued by Strathclyde Homes Limited but could not explain how the mistake had happened.

25 29. DP says the P60 provided by Framewise for income for the tax year to 5 April 2009 showing a total tax deduction of £6,146.80 appeared to omit what was thought was a deduction of tax by Strathclyde Homes Limited of £5,121.53.

30. DP submitted his tax return electronically on 24 January 2010 within the required time limit.

30 31. DP says that although this was an inaccuracy it was not careless and that in levying the penalty HMRC did not consider all the factors and that they failed to take into account a correct definition of reasonable care. DP referred to the HMRC consultation document where reasonable care is described as pattern of behaviour.

32. DP also made reference to HMRC's discretion and claimed that the circumstance in this case amounted to a special circumstance.

35 33. DP says that his actions were not negligent and that HMRC had failed in terms of the consultation document to take account of the influence of circumstances.

34. DP says he had been taking anti-depressants between January 2009 and January 2010 and had made a simple mistake.
35. DP says he was suffering from stress and a letter dated 10 November 2011 from DP's medical practice states that in January 2009, DP suffered from 'an acute depressive episode precipitated by stresses related to his employment' and was prescribed an anti-depressant drug and remained on this treatment until January 2010.
36. DP states that the mistake was only one mistake and it was isolated and untypical.
37. DP say that the amount of the penalty is disproportionate.
38. HMRC say DP was unemployed for only ten days during the tax year in question and that the medication he was taking did not prevent DP from carrying out his job although it may have caused depression.
39. HMRC say that there was a loss of revenue of £5,121 which would not have come to light unless it had been picked up during an enquiry by HMRC.
40. HMRC say that the minimum amount of penalty is now due and that they have the right to charge the penalty which is proportionate and do not require to suspend it.
41. HMRC say that DP was careless. They say that DP's job and income show him to be an intelligent person and furthermore he completed his tax return on the online system.
42. HMRC drew attention to the processes involved in an online tax return to the extent that when repayment is generated as a result of inputting all the information, two warning messages are given to the taxpayer to check that he wishes to go ahead with the repayment claim. HMRC say that DP overrode this warning on two occasions.
43. The repayment claim was made on 19 May 2010 and in order to do this DP had to enter the figures paid in the tax deducted from his three employments to arrive at the correct return entries. In other words, he had to identify the correct figures from three employments and had three documents from which to do so. In HMRC's view all the information he needed was shown in these forms.
44. HMRC say that the P60 end of year document is quite clear and shows the tax deducted that should have been returned. HMRC say that DP put in £11,269 and the question is whether DP was careless or did he use reasonable care.
45. HMRC asked if DP compared the documents, if DP checked the return and if he did not check once again when he received the two computer warnings. HMRC say that DP did not do so and was careless.
46. HMRC say that the penalty is 30% of the potential lost revenue and not actual lost revenue and that, in any event, DP has been charged the minimum amount of 15%.

47. HMRC emphasise that the matter came to light because it was prompted by an enquiry.

48. HMRC state that DP gave every help and accepts the true liability.

5 49. HMRC say that there are no special circumstances in terms of paragraph 11 of Schedule 24 and that redundancy, depression and living away from home are not special circumstances.

10 50. HMRC refer to the Clerk of Hove Limited case where reference was made to Geoffrey Laing LJ when referring to special circumstances in other legislation said this to mean “those events which are not ordinary but are exceptional or out of the ordinary”.

51. HMRC refer to the Crabtree case where it was said that the word “special” in relation to special circumstances was considered as meaning “unusual or uncommon – perhaps the nearest word to it in this context is “abnormal”.

15 52. HMRC say it is not abnormal to live away from home, it is not unusual to have more than one employment in a year and it is not, unfortunately, uncommon to suffer depression.

53. HMRC say that the penalty is proportionate and that they have considered all abatements, that an independent review was requested and carried out and that the decision was upheld.

20 54. HMRC say that if the inaccuracy in the return had not been spotted it would have led to a considerable loss of potential tax revenue.

Reason for the Decision

55. The Tribunal considered this to be a borderline case.

25 56. The unfortunate circumstance of having three different employments and two P45s and a P60 for a taxpayer who is unused to receiving these documents may have caused confusion, especially where one P45 omits to show any tax payable and where the tax to date figure of £5,121.53 in the first P45 had been reduced to £5,012.80 in the second P45.

30 57. Against this, however, the current amount of tax for the whole tax year was declared on the P60 which DP had in his possession when completing his tax return.

58. In addition, the tax return was filed online and, consequently, two computer warnings were given which should have at least prompted further questions in DP’s mind whether to check the matter again or obtain professional advice.

35 59. The Tribunal is sympathetic to the personal circumstances suffered by DP at the time but in light of all the factors consider that DP was careless in completing his tax return and Schedule 24 introduces a system of penalties and procedures to deter this.

60. The Tribunal do not consider the stress and illness suffered by DP to be at a sufficient level given that he was able to continue working throughout this period albeit under difficult circumstances.

5 61. The Tribunal accept that these were difficult circumstances for DP but do not accept that there were any special circumstances in terms of the legislation and case law.

62. The Appeal is, accordingly, refused.

10 63. 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.

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20 **W RUTHVEN GEMMELL, WS**
TRIBUNAL JUDGE

RELEASE DATE: 15 DECEMBER 2011

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