



TC01738

Appeal number: TC/2011/05821

Income Tax – penalty assessment – Schedule 24 - Finance Act 2007 – redundancy payment - whether error on income tax return was careless – suspension of penalty under Paragraph 14, Schedule 24 considered – Appeal dismissed.

FIRST-TIER TRIBUNAL

TAX

JONATHAN PAUL LINDSAY COBB

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**

The Appellant appeared in person

Helen Durkin, HMRC for the Respondents

DECISION

Introduction

1. This is an appeal by Jonathan Paul Lindsay Cobb (“JC”) against a penalty assessment issued by the Commissioners for Her Majesty’s Revenue and Customs (“HMRC”) on 23 November 2010 in respect of the tax year 2008–2009 for £26,399.22.
2. The penalty was issued as result of an inaccuracy in JC’s tax return which HMRC deemed careless.

Background and Facts

3. JC was made redundant by Fidelity International (“Fidelity”) in November 2008.
4. The employment was terminated in terms of a “compromise agreement” which provided amongst other things for a payment of £60,000 as compensation for loss of employment, a payment of £224,527 in lieu of salary and benefits, “less appropriate deductions for income tax and Employees’ National Insurance Contributions”, a payment of £32,002 to be paid into JC’s pension plan, a payment of £250,000 in respect of JC’s bonus for the calendar year 2008, “less appropriate deductions for income tax and Employees’ National Insurance Contributions” and a payment of £366,861 in recognition of the loss of JC’s phantom shares, again less the appropriate deductions noted above.
5. The discrepancy was discovered during an HMRC enquiry into JC’s tax return which had shown a payment from Fidelity for the year 2008-2009 of £1,333,333 on which tax had been deducted at source of £347,114. The consequent tax calculation issued by HMRC provided for a tax repayment due to JC of £2,503.98.
6. Once the correct figure for JC’s earnings had been assessed, the total remuneration from employment from Fidelity amounted to £1,013,310 on which tax at source had been deducted of £223,110. HMRC’s revised calculations showed total income tax due for the year 2008-2009 of £173,490.82.
7. Only part of the correspondence between JC and HMRC was submitted to the Tribunal.
8. A P14 form was submitted by Fidelity in 2009 to HMRC but JC was not given a copy or indication of what had been returned. JC received very little information from Fidelity and the discussions over his compromise agreement required some discussion and the intervention of his lawyer.
9. Once JC had left Fidelity, he found it both difficult and frustrating to get an accurate picture of how the redundancy package had been settled and was often only aware of the consequence of discussions simply by an amount having been paid into his bank account.

10. JC submitted his paper tax return by the due date of 31 October 2009.
11. On 29 April 2010, HMRC checked the amount of income received under their powers given at Section 9A of the Taxes Management Act 1970.
- 5 12. On 30 June 2010, HMRC wrote to JC acknowledging receipt of payment of £173,491 as a payment on account and advising that a penalty could be charged when a tax return is found to be incorrect.
- 10 13. HMRC stated that the inaccuracies arose due to carelessness which they defined as “a failure to take reasonable care” and that JC should “have been aware that your total remuneration package was in excess of £1 million and not the £193,333 declared. It is your responsibility to ensure your tax return is complete and correct and failure to do so amounts to carelessness”.
14. In this letter, HMRC advised JC that the maximum penalty was 30% of the additional tax due and a minimum of 15%.
- 15 15. In view of the honesty and assistance given by JC, the maximum reductions were applied and a penalty of 15% was assessed on additional tax due which by then amounted to £175,994.80.
16. No evidence of the tax calculation resulting in the increased tax liability was given to the Tribunal but the figure was accepted by JC.
- 20 17. The 15% penalty was therefore calculated using the higher figure and provided a penalty of £26,399.
18. On 14 July 2010, JC responded noting that the penalties seemed harsh.
19. JC stated that he did not have all the information that would have allowed him to submit a full and accurate tax return at the time, that is 31 October 2009, “other than which he entered at the time”.
- 25 20. JC stated he was in some confusion as to whether or not his former employer had made agreed payments into a pension scheme and to what extent this affected the portion of his income liable to tax.
- 30 21. JC also believed that the payment in respect of the “phantom shares” would be entitled to tax relief as an HMRC Approved Scheme and that Fidelity would have paid the right amount of tax on his behalf in any event.
22. JC continued “none of this excuses the fact that I should have highlighted these uncertainties far earlier and I would acknowledge that the tax return allows you to submit additional information on paper. Furthermore, I did have the gross amounts in my letter of redundancy”.

23. JC, for these reasons, paid tax on account on 14 June 2010, as he accepted HMRC had reasonably identified a shortfall, pending the outcome of the final assessment.

5 24. JC stated that it had been both difficult and frustrating to get an accurate picture in December 2008 of how his redundancy package had been settled.

10 25. On 11 June 2010, JC wrote, following a telephone conversation with HMRC, explaining the difference between the figure of £1,013,310 on the P14 and £1,075,312, which was shown on JC's P45. This letter explained that the difference was a result of a pension payment and furthermore that the amounts detailed in Fidelity's letter of 9 December were not paid as described.

26. JC said that Fidelity had also made an error in the payment of a pension contribution and that there was then a dispute over whether or not JC's contribution could be accepted as the pension scheme had been closed to him.

15 27. In answering the question of why the matters were omitted from his tax return, JC stated that "I did not have the correct figure to put in my tax return (save for those that were entered). There had been a further omission by Fidelity and I believed in good faith that the correct amount of tax had been paid".

20 28. JC continued, "I can see now that I was wrong in making the assumption that the correct amount of tax had been paid and I should have used the tax return to highlight the uncertainties surrounding the issue of my pension contribution and the payments that had been made to me. These omissions were not an oversight on my part but a conscious decision based on the assumption that HMRC would have the full facts from my returns and those submitted by Fidelity".

25 29. On 6 December 2010, JC wrote intimating an appeal against the penalty assessment on the grounds that JC's former employer did not submit documentation to him in a timely manner to ensure that he could fill in his return with accuracy; that an ongoing dispute with the former employer contributed to the omission; that JC assumed that information provided by Fidelity would confirm the true and correct tax position and that as someone who was redundant he was unable to enjoy the same rights in respect of pension contributions which in turn would have an impact on his tax liability.

30 30. On 19 July 2011, HMRC wrote having carried out a review of their decision explaining that Schedule 24 of the Finance Act 2007 Penalty Regime was to change the behaviours of non-compliant customers and intentionally give rise to stiffer penalties than those in place.

35 31. HMRC noted that on 19 November 2008 JC had been made redundant; that on 20 November 2008 Fidelity provided JC with a calculation of the proposed payment in lieu of notice (PILON); that on 9 December 2008 the Company issued a compromise contract which detailed the proposed PILON payment and that in late December 2008 the Company made a payment to JC's bank account in respect of the

PILON. In January 2009, Fidelity made a second corrective PILON to JC's bank account and on 31 October 2009, JC lodged his 2008-2009 tax return.

5 32. The letter stated that it "seems reasonable to me that it ought to have been clear to you that the details of the PILON payments should have been made on the 2009 self assessment return".

10 33. "The self assessment notes which accompany the annual return make it clear that the details of lump sums and benefits paid on or following termination of employment should be included on the relevant additional information page. It goes on to explain that if you have finished employment during the year to 5 April 2009 you should enter the date your employment ended in the "any other information" box, box 19, on page TR6 of your tax return".

15 34. The letter continued to say that JC would have been "aware of the amount of the remainder of the PILON even although there were ongoing discussions with his ex employer, and that those payments were taxable and that he could have entered at least these details on his tax return; that he did not do amounted to careless behaviour".

35. The HMRC review confirmed that JC's behaviour had merited a full abatement of the penalties.

20 36. The letter then went on to consider the possibility of suspension of the penalty but concluded it was not possible to do so as "there were no conditions which can be set to help you avoid inaccuracies in the future. In particular, because of the one off nature of the offence, there are no measurable conditions that can be set for a particular period not exceeding two years".

37. It was accepted that there was no dishonesty whatsoever in JC's behaviour.

25 38. JC accepted that he knew tax was payable on the PILON and that he had information relating to that payment in October 2008.

Legislation

39. Schedule 24, Finance Act 2007 provides:-

30 Penalties may be charged under Schedule 24 Finance Act 2007 ("Schedule 24"). Under paragraph 1(1) (a) a penalty is payable where the taxpayer gives HMRC, inter alia, a return and two further conditions are satisfied. The first condition is the document contains an inaccuracy which amounts to, or leads to an understatement of the taxpayer's liability to tax. The second condition is that the inaccuracy
35 was careless or deliberate.

Paragraph 3(1) (a) defines an inaccuracy in a document given by the taxpayer to HMRC as "careless" if the inaccuracy is due to failure by the taxpayer to take reasonable care.

Paragraph 4(1) (a) sets the penalty for careless action as 30% of the potential lost revenue ("PLR"). Paragraph 5 defines PLR as the additional amount due or payable in respect of tax as a result of correcting the inaccuracy.

5 Paragraph 9 and 10 permit reductions in a 30% penalty where a disclosure is prompted. It is common ground in this case that the Appellant's disclosure was prompted. Paragraph 10 (2) provides that where a person who would otherwise be liable to a 30% penalty has made a prompted disclosure, HMRC shall reduce the 30% to a percentage, not below 15%, which reflects the quality of the disclosure. In this case, as noted above, the penalty was reduced to 15% to reflect the high quality of the disclosure.

10 Paragraph 14 enables HMRC to suspend all part of the penalty for a careless inaccuracy. The power to suspend a penalty was a new concept introduced by the Finance Act 2007. Paragraph 14 provides as follows:

- 15 "Suspension"
- (1) HMRC may suspend all or part of a penalty for a careless inaccuracy under paragraph 1 by notice in writing to P.
 - 20 (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.
 - 25 (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.
 - 30 (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.
 - 35 (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.

The relevant extracts from the HMRC Compliance Handbook ("Manual") are set out below. CH 83130 provided as follows:

40 "In certain circumstances it will not be possible to set suspension conditions to avoid future penalties. This may be because of the nature of the tax that the penalties related to, or because of the capacity in which the person has incurred the penalties.

For example -

1. Penalties for a careless inaccuracy in an IHT account for a deceased person will not be suitable for suspension in most cases because of the one-off nature of the tax.

5 2. Jesse incurred a penalty for careless inaccuracy in his return of business profits. However, he retired from business during the course of the compliance check. Suspending the penalty will not help Jesse avoid a similar penalty in the future and so the penalty will be chargeable in full."

10 Manual extract CH 83150 stated as follows:

"Penalties will not be suspended where the circumstances mean that the inaccuracy is a one off. For instance an inaccuracy in an Inheritance Tax account for a deceased person, see CH 83130. However, certain types of settlement may have a continuing requirement to make returns. This means that it may be possible to set suspension conditions."

15 Manual extract CH 83160 provided:

"Penalties for inaccuracies that are not likely to recur, whether because of the nature of the tax or the nature of the understatement, are generally not suitable for suspension because it is not usually possible to set conditions that will avoid careless inaccuracies in the future, or during a period of suspension."

20 For example -

A tennis club sells its land to the Local Authority for a road widening scheme. The authority provides land elsewhere to rent to enable the club to continue its activities.

25 The capital gain was omitted from the return and it is accepted that a penalty is due for a careless inaccuracy.

30 As the club is unlikely to have any capital gains in the future there is no condition that could be set to avoid a similar inaccuracy arising in the future.

The nature of the tax in question may mean that suspension conditions cannot be set. For instance, Inheritance Tax penalties are not suitable for suspension because of the one-off nature of the tax, see CH 83150.

35 The conditions you set must help the future compliance of the person acting in the same capacity.

40 For instance, if the Administrator of an estate only ever needed to make a single return there would be no condition that you could set to avoid a future inaccuracy. However, if the estate needed to make annual returns the Administrator would have an ongoing role in the same capacity. You would then be able to consider whether suspension conditions could be set."

Case Referred To

Anthony Fane v HMRC [2011] UKFTT 210(TC)

Submissions by the Parties

40. JC says that he did not have the information to fill in his tax return accurately; that he had to go back to Fidelity to obtain a schedule of what they thought they had paid; that JC thought that Fidelity had informed HMRC of the tax payments and that
5 any carelessness was not of “a casual kind” but was derived from an inability to know how to answer the questions in the tax return.

41. JC acknowledged that he should have filled in the information on the tax return and told HMRC of the dispute.

42. JC relied on the compromise agreement whereby Fidelity had said they would
10 settle sums on him net of tax and National Insurance Contributions and relied on this as a means of providing HMRC with the information and settling those tax liabilities.

43. JC says that taking this into account and the fact that he had given information to HMRC when he had it and when it was requested, he did take reasonable care.

44. JC stated that HMRC’s stance on suspension seemed perverse in these
15 circumstances in that he had paid his tax penalty but was deemed unable to re-offend and could not be given a suspension whereas someone who was deemed possible to reoffend was capable of being given a suspension.

45. HMRC say that the potential loss of tax revenue only came to light as a result of their enquiry.

20 46. HMRC say that the Schedule 24 new penalties came into force on 1 April 2008 and introduced a harsher regime.

47. HMRC say that because of this harsher regime and, in this case, because of the sums involved, a senior officer of HMRC looked at each penalty.

25 48. HMRC say that the employer did give JC the information; that JC had sufficient information even although he was in dispute with his former employers and that JC has to make returns of his income to HMRC and not rely on his employers to do so.

49. HMRC say Schedule 24, paragraph 1(1)(a) states that a penalty is payable where the tax payer has returns and inter alia two further conditions are satisfied. The first
30 condition is the document contains an inaccuracy which amounts or leads to an understatement of the tax payer’s liability to tax. The second condition is that the inaccuracy was careless or deliberate.

50. HMRC say that “there is no suggestion that JC’s inaccuracy was deliberate but they say that it was careless because of a failure to take reasonable care”.

35 51. HMRC say that they are unable to suspend the penalty in terms of paragraph 14 of Schedule 24 which is set out at length in the *Anthony Fane* case to which HMRC referred to.

52. HMRC say that redundancy is one off event (“offence”) and, consequently, future conditions cannot be set and, consequently, the penalty could not be suspended in terms of the *Anthony Fane* case to which they referred.

Reasons for the Decision

5 53. The Tribunal were mindful of JC’s predicament in October 2009 concerning his redundancy in November 2008.

54. It was clear he would have been consumed in dealing with a number of difficult matters involving large sums of money with his former employers, the decisions on which would affect the amount of tax that he would be liable to pay, particularly when
10 account is taken of the amounts expended on pension contributions or the treatment of “phantom shares”.

55. By JC’s own admission, however, he had in his possession at least some of the actual information of payments received and could have returned these to HMRC together with intimation that he was involved in a dispute with his former employers
15 as to the exact amount of his taxable income for the relevant tax year.

56. The Schedule 24 penalty regime is purposely harsh and penalties are expressed as a percentage of the tax due so that the sum involved, in this case, is, as HMRC stated, large.

57. It is clear that there was no deliberate inaccuracy nor any dishonesty in how JC
20 completed his tax return but albeit as a result of uncertainty or confusion he did complete the income figure which he ought to have known by October 2009 was not complete and might not be accurate.

58. In addition, JC made no mention in his tax return of the additional payments he had received and relying on an employer to provide relevant tax information to
25 HMRC does not amount to an excuse for failing to take reasonable care.

59. The standard by which failing to take reasonable care is judged is that of the prudent and reasonable tax payer.

60. Applying that test, the Tribunal conclude that JC, knowing that benefits had been received, and even the approximate amounts of those benefits, would have included
30 them in his tax return. Consequently, the taking of reasonable care would, in the Tribunal’s view, have resulted in JC not overlooking the need to make the relevant entries in his return.

61. To the extent that JC was faced with difficulties in how to correctly complete his tax return in view of the ongoing discussions and negotiations with his former
35 employer, the Tribunal felt that it would be reasonable to expect a person who was unsure, to take care to find out the correct position or draw HMRC’s attention to the relevant entries and, if necessary, obtain professional advice in view of the fact the transactions were unusual and, therefore, care was needed to ensure that all

transactions were fully understood and the correct documentation was obtained in completion of the tax return.

- 5 62. The Tribunal conclude that the omission of the sums or mention of them in the tax return was a careless inaccuracy on JC's part and that the penalty of 15% was proportionate in all the circumstances.

Suspension

63. No appeal was made on the issue of suspension under Paragraph 14 of Schedule 24 but this was raised by HMRC in their review letter of 19 July 2011 and at the Hearing and was also commented on at the Hearing by JC.

- 10 64. Reference was made to the *Anthony Fane* case heard in London, and within that, to the extracts from HMRC's Compliance Handbook ("Manual").

15 65. In their review letter, HMRC stated that they could not suspend the penalty because there were "no conditions which could be set to help JC avoid inaccuracies in the future" and "in particular because of the one off nature of the offence, there were no measurable conditions that could be set for a particular period not exceeding two years".

One Off Events

66. The references in the Manual are to "one off events" and not to one off "offences" but these are seen to be, in this case, one and the same.

- 20 67. As Judge Brannan stated in the *Anthony Fane* case "on the face of it the wording of Paragraph 14(3) provides no restriction in respect of a one off event".

25 68. The examples within the Manual at CHA38150 all have an element of finality such as an inaccuracy in an inheritance tax account of a deceased person or in the tax return of someone retiring from their occupation. Self evidently, there can only be an inheritance tax return for a deceased person once, as there is finality.

69. The Tribunal, therefore, does not accept the attribution of such finality or "one off" nature to someone being made redundant and at a hearing on the same day as this case (David Parker – TC/2011/05939), the Appellant tax payer had been made redundant twice within the same year.

- 30 70. In David Parker, HMRC, in support of their decision that the penalty should not be reduced under Paragraph 11 of Schedule 24, stated that their decision was proportionate and that redundancy was not a special circumstance to the extent that it was not unusual or uncommon for a tax payer to have more than one employment in the same year. This, therefore, would necessitate completing the income of more than
35 one employment in a particular tax year.

71. The Tribunal noted in *Anthony Fane* the Tribunal view that there should be a clear link between the condition and the statutory objective which is to help the tax payer to avoid becoming liable for further careless inaccuracies in the future.

5 72. The Tribunal's view, therefore, is that HMRC should be able to suspend all or part of the penalty for a careless inaccuracy in the return of an individual who is made redundant, particularly in relation to more complex redundancy settlements such as payments in lieu of notice as being made redundant may not be a "one off event".

Conditions

10 73. Manual extract CH83160 states that suspension should only be considered where it is possible to set conditions that will avoid careless inaccuracies "*in the future*" (emphasis added), or during a period of suspension.

15 74. If, during a period of suspension for careless inaccuracy, a taxpayer became liable for another penalty under that paragraph, that is to say, a penalty for careless inaccuracy in the completion of another tax return, then there seemed no reason why the suspended penalty or part of it should not become payable. In terms of the Manual HMRC could during a period of suspension for careless inaccuracy require that the suspended penalty should in all or in part become payable if the same error were made in the completion of a further tax return.

20 75. The Manual specifically states that suspension may be appropriate, at CH38150, in relation to certain types of settlement that have "a continuing requirement to make returns".

25 76. This covers the careless inaccuracy in the return of a settlement in relation to inheritance tax and, following this logic, there should be no impediment to setting conditions for the continuing requirement to make returns for an individual taxpayer for income or any other tax without careless inaccuracies, including the return of an individual who is made redundant, even if that may be a rare occurrence, particularly in relation to more complex and possibly contentious redundancy settlements including payments in lieu of notice.

30 77. The Tribunal's jurisdiction in respect of a suspension of a penalty is that of a judicial review and it cannot substitute its opinion for that of HMRC because it might have come to a different conclusion. The Tribunal can only overturn HMRC's decision on suspension if it is considered to be "flawed" in the judicial review sense of the expression. HMRC have discretion in paragraph 15 to suspend all or part of the penalty.

35 78. JC was given a fair opportunity to address the issue of suspension as it was raised in the review letter but it was not given as a ground of appeal and the Tribunal makes no decision on the issue.

79. 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

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

RELEASE DATE: 11 JANUARY 2012

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