



TC01817

Appeal number TC/2011/07476

INCOME TAX - penalty assessment - Schedule 24 Finance Act 2007 - whether error on income tax return was careless - whether penalty to be suspended under paragraph 14 Schedule 24 Finance Act 2007 - whether HMRC's decision not to suspend penalty was flawed - appeal dismissed

FIRST-TIER TRIBUNAL

TAX

BARBARA HACKETT

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE ALEKSANDER
E BRIDGE**

Sitting in public at 45 Bedford Square, London WC1 on 23 January 2012

Karen Weare, an officer of HM Revenue and Customs, for the Respondents

The Appellant did not attend and was not represented at the hearing.

DECISION

1. This is an appeal against a penalty assessment issued on 23 May 2011 under Schedule 24, Finance Act 2007 for £257.58 for a careless inaccuracy in the Appellant's self assessment tax return for 2008/09. The penalty has not been suspended.

2. HMRC were represented by Ms Weare. The Appellant, Mrs Hackett, did not attend and was not represented. She informed the Tribunal office in advance of the hearing that she was unable to attend, and asked that the hearing take place in her absence. We were satisfied that Mrs Hackett had been notified of the hearing, and that it was in the interests of justice to proceed with the hearing in her absence.

3. A bundle of correspondence was produced to the Tribunal in evidence.

Background facts

4. The background facts are not in dispute and we find them to be as follows:

5. Mrs Hackett filed her tax return for 2008/09 online on 6 July 2009. On the return, she showed a loss on income from property of £8586, and claimed the loss to be set off against total income, resulting in a repayment of £2149.95.

6. HMRC opened an enquiry on 30 April 2010. HMRC agreed the amount of the loss. However, the return was found to be incorrect. Due to the type of income from property, the loss could not be set off against general income at box 40, it could only be carried forward at box 41 and set against future income from property. Mrs Hackett does not dispute that the loss relief was claimed incorrectly. The enquiry was closed on 23 May 2010, and the self-assessment calculation was amended accordingly.

7. A penalty determination was issued on 23 May 2011 for £257.58 for a careless inaccuracy in the 2008/09 return. HMRC charged the minimum penalty (15%) for a prompted disclosure. The maximum penalty for careless behaviour would have been 30%, but this was reduced to 15% on account of the high level of cooperation received from Mrs Hackett.

8. Mrs Hackett appealed against the penalty on 6 June 2011. HMRC conducted a statutory review, and the reviewing officer held that there was a careless inaccuracy and upheld the penalty. However the reviewing officer also held that HMRC had erred in not bringing to Mrs Hackett's attention the issue of suspension. Consideration was then given to suspending the penalty by Miss Philip (the HMRC officer undertaking the enquiry), and her decision was that the penalty should not be suspended. This decision was made by letter dated 2 August 2011. Mrs Hackett appealed on 27 August 2011. HMRC offered a review on 6 September 2011, but Mrs Hackett then appealed to this Tribunal.

The law

9. 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 was careless or deliberate.

10. It was common ground that the return in this case contained an inaccuracy which led to an understatement of Mrs Hackett's liability to tax.

11. There is no suggestion that the inaccuracy was deliberate.

12. 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.

13. 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.

14. Paragraphs 9 and 10 permit reductions in a 30% penalty where a disclosure is prompted. It is common ground in this case that Mrs Hackett'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.

15. Paragraph 14 enables HMRC to suspend all part of the penalty for a careless inaccuracy as follows:

Suspension

(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
 - 5 (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.

10 16. Paragraphs 15 to 17 of Schedule 24 set out the rights of appeal in respect of penalties and a refusal of a suspension:

Appeal

15 15(1) A person may appeal against a decision of HMRC that a penalty is payable by the person.

(2) A person may appeal against a decision of HMRC as to the amount of a penalty payable by the person.

(3) A person may appeal against a decision of HMRC not to suspend a penalty payable by the person.

20 (4) A person may appeal against a decision of HMRC setting conditions of suspension of a penalty payable [by the person].

25 16(1) An appeal under this Part of this Schedule shall be treated in the same way as an appeal against an assessment to the tax concerned (including by the application of any provision about bringing the appeal by notice to HMRC, about HMRC review of the decision or about determination of the appeal by the First-tier Tribunal or Upper Tribunal).

- (2) Sub-paragraph (1) does not apply—
 - (a) so as to require P to pay a penalty before an appeal against the assessment of the penalty is determined, or
 - 30 (b) in respect of any other matter expressly provided for by this Act.

17(1) On an appeal under paragraph 15(1) the tribunal may affirm or cancel HMRC's decision.

- (2) On an appeal under paragraph 15(2) the tribunal may—
 - 35 (a) affirm HMRC's decision, or
 - (b) substitute for HMRC's decision another decision that HMRC had power to make.

- (3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 11—
 - 40 (a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or

(b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 11 was flawed.

(4) On an appeal under paragraph 15(3)—

5 (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—

10 (i) P may appeal against a provision of the notice of suspension, and

(ii) the tribunal may order HMRC to amend the notice.

(5) On an appeal under paragraph 15(4) the tribunal—

(a) may affirm the conditions of suspension, or

15 (b) may vary the conditions of suspension, but only if the tribunal thinks that HMRC's decision in respect of the conditions was flawed.

(5A) In this paragraph “tribunal” means the First-tier Tribunal or Upper Tribunal (as appropriate by virtue of paragraph 16(1)).

20 (6) In sub-paragraphs (3)(b), (4)(a) and (5)(b) “flawed” means flawed when considered in the light of the principles applicable in proceedings for judicial review.

(7) Paragraph 14 (see in particular paragraph 14(3)) is subject to the possibility of an order under this paragraph.

25 **Contentions of the parties**

17. Mrs Hackett acknowledges that she inadvertently ticked the wrong box when completing her 2008/09 tax return. However she states that this was the first time that she had filed a tax return online, and as the system had accepted her tax calculation and issued a tax rebate, she assumed that all was in order. When she appealed against
30 the penalty, she was advised by the Appeals and Reviews Unit that HMRC had not followed the correct protocol as they had not given consideration to the suspension of the penalty. She strongly believes that she has been treated in a harsh and unjust manner and the penalty should never have been issued.

18. Ms Weare submitted that 15% was the minimum penalty for a prompted careless
35 inaccuracy in a self-assessment income tax return and that this penalty had been correctly imposed. As regards suspension, Ms Weare submitted that the suspension of the penalty was not permitted in this case in accordance with paragraph 14. The legislation required that compliance with the condition of suspension would avoid further similar penalties. Ms Weare submitted that the only condition that could be
40 imposed would be that Mrs Hackett should not make the same mistake again. Such a condition would not fall within the circumstances envisaged by paragraph 14. We were referred to the decision of the First Tier Tribunal in *Fane*[2011] UKFTT 210 (TC).

19. Ms Weare told us that HMRC had given consideration as to whether there were any special circumstances relevant to paragraph 11, but had concluded that there were not.

20. Finally, Ms Weare submitted that the onus of proof was on HMRC to show that the penalty was competent and that the standard of proof was the ordinary civil standard of the balance of probabilities.

Conclusions

21. There are two separate issues in this appeal. First, was Mrs Hackett careless, within the meaning of paragraph 1 Schedule 24, when she made an error on her 2008/09 tax return? If she was careless, then 15% is the minimum penalty that could be imposed for a prompted disclosure. Secondly, was the decision of HMRC not to suspend the penalty, pursuant to paragraph 14 Schedule 24, flawed?

22. On the first question, paragraph 17(1) Schedule 24 allows the Tribunal on appeal to affirm or cancel HMRC's decision to charge a penalty. On the second question, the Tribunal may order HMRC to suspend the penalty only if it thinks that HMRC's decision not to suspend was flawed (paragraph 17(4)(a)). Paragraph 17(6) states that "flawed" means flawed when considered in the light of the principles applicable to proceedings for judicial review. In addition, if the Tribunal orders HMRC to suspend the penalty the taxpayer may appeal to the Tribunal against a provision of the notice of suspension and the Tribunal may order HMRC to amend the notice (paragraph 17(4)(b)(i) and (ii)).

Careless Inaccuracy

23. On the first question, the definition of "careless" given by paragraph 3(1)(a) is a failure by the taxpayer "to take reasonable care". It is an objective test. It is a familiar test used in the context of civil law, particularly tort. It does not require over-elaboration.

24. In this case we consider that Mrs Hackett failed to exercise reasonable care when she completed her 2008/09 tax return in claiming relief for property losses against total income. Although the error was innocent, it was careless.

25. For these reasons, we have concluded that the 15% penalty was correctly charged.

Suspension of Penalty

26. As regards the issue of suspension of the penalty, our jurisdiction is limited. We cannot substitute our opinion for that of HMRC simply because, if we had been in their shoes, we might have come to a different conclusion. We can only overturn HMRC's decision on suspension if we consider it to be "flawed".

27. We agree with the reasoning of the Tribunal in *Fane* that:

58. The important feature of paragraph 14(3) is the link between the condition and the statutory objective: there must be a condition which

5 would help the taxpayer to avoid becoming liable for further careless
inaccuracy penalties. In other words, if the circumstances of the case
are such that a condition would be unlikely to have the desired effect
(e.g. because the taxpayer in question has previously breached other
conditions or has a record of repeated non-compliance) HMRC cannot
suspend a penalty. The question therefore is whether a condition of
suspension would have the required effect.

[...]

10 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:

15 "If, during the period of suspension of all part of a penalty
under paragraph 1, [the taxpayer] becomes liable for another
penalty and that paragraph, the suspended penalty or part
becomes payable."

20 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.

25 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.

30 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.

35 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.

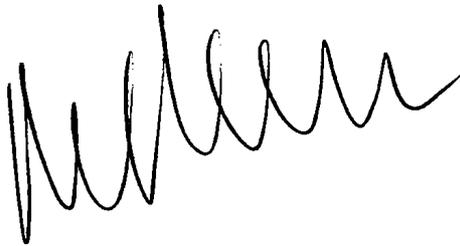
40 65. Bearing these considerations in mind, HMRC's guidance
indicating that a one-off error would not normally be suitable for a
suspended penalty is understandable and, in our view, justified.

45 28. As with the taxpayer in *Fane*, the only potential condition attaching to a
suspension of penalties in this case could be that Mrs Hackett would not repeat the
mistake again. For the same reasons as those adopted by the Tribunal in *Fane*, we
consider that Miss Phillip did not misdirect herself when deciding that she could not
suspend the penalty in this case.

29. For completeness we would add that we do not consider that HMRC took account of irrelevant (or failed to take account of all relevant) factors in taking its decision not to suspend the penalty. In our view, HMRC's exercise of its discretion could not be said to be unreasonable or irrational. Indeed, in our view, HMRC were correct in thinking that a condition of suspension could not properly be imposed in this case.

30. Accordingly, we dismiss the appeal against both the penalty and against HMRC's decision not to suspend the penalty charged on the Appellant.

31. 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.



NICHOLAS ALEKSANDER

TRIBUNAL JUDGE

RELEASE DATE: 10 February 2012