



TC02019

Appeal number: TC/2011/10060

INCOME TAX – penalties for careless inaccuracies - failure by taxpayer to include various items of income in tax return – whether careless – yes in part - whether special circumstances – yes – whether decision of HMRC flawed - yes - whether appropriate to suspend penalties – no – allow appeal in part – reduce penalty to take account of special circumstances – Schedule 24, Finance Act 2007

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

SUSAN ROCHE

Appellant

- and -

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

**TRIBUNAL: JUDGE NICHOLAS ALEKSANDER
 ANTHONY HUGHES**

Sitting in public in Bedford Square, London on 23 March 2012

The Appellant in person

Paul Reeve, an officer of HM Revenue & Customs for the Respondents

DECISION

1. This is an appeal by Ms Roche against penalties for careless inaccuracies in her
5 2008/9 tax return. The amount of penalties under appeal is £5,490.62. But contained
within the penalty assessment is an amount of £160.65 which has been suspended by
HMRC and is not under appeal.

2. We heard evidence from Ms Roche and a bundle of documents was presented to
us.

10 **Background Facts**

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

4. Ms Roche is a surveyor by profession and was employed by Legal and General
Resources Limited. She had purchased a derelict house which she was renovating,
with a view to moving into it as her home once the renovations had been completed.
15 Ms Roche had taken out a mortgage to pay for the renovations. During 2007 she
undertook a stressful project at work outsourcing her department and relocating it to a
new office. She was then suddenly and unexpectedly made redundant in late April
2008. This came as a complete shock to her. She had not yet completed the
renovation of the derelict house, but no longer had any income to meet the costs. She
20 considered selling an investment property that she owned, but the property market
crashed, and she was unable to sell the property. She was worried that she would not
be able to sell her old house at all. She tried to transfer her mortgage from her old to
her proposed new home, so that she could rent out her old home, but because of her
reduced financial circumstances, her mortgage lender refused consent. She was under
25 considerable stress, as she did not know if she could finish the refurbishment of her
house or sell her properties.

5. In the end Ms Roche decided to sell her home. In order to do so she had to "de
clutter" by putting books, furniture and paperwork into storage. Included amongst the
papers that were boxed up and placed into storage were the documents relating to her
30 redundancy payment. Ms Roche took the view that she did not need these, as she
believed that tax had been deducted from the payment, and so no further tax was due,
and the amounts would be included in the P60 and other tax records that she retained
specifically so that she could complete her tax return in due course. Eventually, after
reducing the price for her home, she was able to sell it.

35 6. Ms Roche completed her tax return for 2008/09 online on 22 January 2010.
Before starting to complete the forms online, Ms Roche checked that she had all
relevant paperwork. She did not seek assistance from HMRC or a tax advisor as she
did not consider that there were any issues arising out of her tax affairs that needed
clarification.

40 7. As part of the online process, taxpayers are required "tailor" their tax return by
answering a series of "yes/no" questions about the kinds of income and payments they

had received during the year. The answers to these questions are then used by HMRC's system to decide which sections of the tax return are set out on screen for the taxpayer to complete. The intention is that taxpayers are not burdened with having to review and consider sections of the tax return that are irrelevant to them. When "tailoring" her return, Ms Roche answered "no" to the question "did you receive any other UK income, for example employment lump sums, share schemes, life insurance gains, any other income?" In consequence, the section of the tax return which included "redundancy and other lump sums and compensation payments" was suppressed. Ms Roche told us that she had answered "no" to this question as she considered that a redundancy payment was of the nature of "salary" and was not "other income".

8. In completing her tax return online, Ms Roche neglected to include the following items of income

	(a) Redundancy payment	£194,748.65
15	(b) Tameside MBC pension	£332.79
	(c) Health insurance (benefit in kind)	£31.00
	(d) Bank interest	£4,284.88

9. Ms Roche explained that she had omitted the redundancy payment from the tax return because it was not included in the P60 or any other tax papers provided by Legal and General Resources Limited. In any event she had assumed that as tax had been withheld from the payment, there was nothing further to declare.

10. We note that her former employer was correct in omitting the payment from the tax papers was because it was paid after her employment had ceased. And for this same reason, tax would have been withheld under the PAYE regulations from the redundancy payment at basic rate only, and not at Ms Roche's marginal rate.

11. Ms Roche could give no explanation as to why the Tameside MBC pension was omitted from the return. She had obtained a copy of the P60 from Tameside MBC, and the payment was included on the working sheet she had prepared before transferring the amounts onto the online system.

12. Ms Roche did not declare the benefit-in-kind relating to her health insurance as she had thought that the benefit had ceased at the end of the 2007/08 tax year, but in fact the benefit had continued for a short period into 2008/09. As with the redundancy payment, the benefit-in-kind had also not been included in her P60 or other tax papers that she had received from Legal and General Resources Limited.

13. HMRC opened an enquiry into Ms Roche's tax return on 2 December 2010, and the enquiry notice told Ms Roche the amounts that it believed she had failed to return.

14. Following correspondence and telephone calls between Ms Roche and HMRC, HMRC issued a closure notice on 21 July 2011 adjusting Ms Roche's self-assessment to take account of the omitted items of income. On 2 February 2011 HMRC calculated penalties at £5490.62, and offered to suspend penalties of £160.65 in

respect of the bank interest. The reason given by HMRC not to suspend the other penalties was because the occurrence was unlikely to be repeated, and therefore there were no measurable suspension conditions that could be set.

15. The penalties were calculated on the following basis.

5	Potential lost revenue (PLR):	£36,604.37	
	Quality of disclosure: and giving access 30%)	100%	(telling 30%, helping 40%)
	Penalty calculation		
	1 Quality of disclosure	100%	(a)
	2 Maximum disclosure reduction		
	<i>Maximum penalty percentage</i>	30%	(b)
	<i>Less</i>		
	<i>Minimum penalty percentage</i>	15%	(c)
	<i>Equals</i>		
	<i>Maximum disclosure reduction</i>	15%	(d)
	3 Reduction for disclosure percentage (d)x(a)	15%	(e)
	4 Penalty to be charged (b)-(e)	15%	(f)
	5 Penalty chargeable PLR x (f)	£5490.65	

10

16. A formal assessment for the penalties was issued on 8 August 2011. The penalty assessment was then subject to a review by the HMRC Appeals and Reviews team. By a letter dated 13 May 2011 the assessment was upheld on review on the same grounds as the original decision.

15 **The Law**

17. Since 1 April 2008, penalties for errors in tax returns have been governed by Schedule 24, Finance Act 2007.

18. The paragraphs of Schedule 24 that are relevant to this appeal are set out below:

- 20 1(1) A penalty is payable by a person (P) where—
- (a) P gives HMRC a document of a kind listed in the Table below,
and
 - (b) Conditions 1 and 2 are satisfied.
- (2) Condition 1 is that the document contains an inaccuracy which amounts to, or leads to—
- 25 (a) an understatement of P's liability to tax,

- (b) a false or inflated statement of a loss by P, or
- (c) a false or inflated claim to repayment of tax.

(3) Condition 2 is that the inaccuracy was careless or deliberate (within the meaning of paragraph 3).

5

[...]

Tax	Document
[...]	
Income tax or capital gains tax	Return under section 8 of TMA 1970 (personal return).
[...]	

[...]

3(1) Inaccuracy in a document given by P to HMRC is—

10

- (a) “careless” if the inaccuracy is due to failure by P to take reasonable care,

[...]

4(1) The penalty payable under paragraph 1 is—

15

- (a) for careless action, 30% of the potential lost revenue,

[...]

5(1) “The potential lost revenue” in respect of an inaccuracy in a document or a failure to notify an under-assessment is the additional amount due or payable in respect of tax as a result of correcting the inaccuracy or assessment.

20

[...]

9(1) A person discloses an inaccuracy or a failure to disclose an under-assessment by—

25

- (a) telling HMRC about it,
- (b) giving HMRC reasonable help in quantifying the inaccuracy or under-assessment, and
- (c) allowing HMRC access to records for the purpose of ensuring that the inaccuracy or under-assessment is fully corrected.

30

(2) Disclosure—

- (a) is “unprompted” if made at a time when the person making it has no reason to believe that HMRC have discovered or are about to discover the inaccuracy or under-assessment, and

(b) otherwise, is “prompted”.

(3) In relation to disclosure “quality” includes timing, nature and extent.

5 10(1) Where a person who would otherwise be liable to a 30% penalty has made an unprompted disclosure, HMRC shall reduce the 30% to a percentage (which may be 0%) which reflects the quality of the disclosure.

10 (2) 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.

[...]

15 11(1) If they think it right because of special circumstances, HMRC may reduce a penalty under paragraph 1 or 2.

(2) In sub-paragraph (1) “special circumstances” does not include—

(a) ability to pay, or

(b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

20 [...]

13(1) Where P becomes liable for a penalty under paragraph 1 or 2 HMRC shall—

25 (a) assess the penalty,

(b) notify P, and

(c) state in the notice a tax period in respect of which the penalty is assessed.

[...]

30 (3) An assessment of a penalty under paragraph 1 must be made within the period of 12 months beginning with—

(a) the end of the appeal period for the decision correcting the inaccuracy, or

(b) if there is no assessment within paragraph (a), the date on which the inaccuracy is corrected.

35 [...]

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—

40 (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.

- 15(1) P may appeal against a decision of HMRC that a penalty is payable by P.
- (2) P may appeal against a decision of HMRC as to the amount of a penalty payable by P.
- (3) P may appeal against a decision of HMRC not to suspend a penalty payable by P.
- (4) P may appeal against a decision of HMRC setting conditions of suspension of a penalty payable by P.

- 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 in respect of a 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—
 - (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—
 - (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)—

- (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.
- (5) On an appeal under paragraph 15(4) the tribunal—
- (a) may affirm the conditions of suspension, or
 - (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)).
- (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.

Ms Roche's submissions

- 19. Ms Roche exercises her appeal rights under paragraphs 15(1), (2) and (3), Schedule 24 – namely her liability to a penalty, the amount of the penalty, and the decision of HMRC not to suspend the whole of the penalty. She does not appeal against the decision of HMRC to suspend that part of the penalty relating to bank interest.
- 20. Ms Roche does not dispute that her tax return omitted items of income, and was therefore inaccurate.
- 21. Ms Roche submitted that her actions in preparing her tax return were not careless. She had an exemplary record in preparing and submitting her tax returns, and this was the first and only circumstance where an error had been made.
- 22. Ms Roche drew our attention to the considerable stress that she had suffered as a consequence of her redundancy, and that this continued for some considerable time until she had managed to resolve her finances.
- 23. Although Ms Roche acknowledged that errors had been made, she submitted that she took reasonable care in preparing and submitting her return, and the errors were not made carelessly. She had collated all documents that could be relevant to the return, and used the P60 and other tax documents provided by her former employers to compile her tax return. It was only because the redundancy payment and benefit-in-kind were missing from these documents that they were omitted from the online tax return. Ms Roche submitted that as tax had been deducted from the redundancy payment she had assumed that no further tax was payable in any event.

Ms Roche had not answered "yes" to the question "did you receive any other UK income ... ?" on the online return because she regarded the redundancy payment as salary and not as other income. She had not sought help from HMRC or a tax advisor, as she did not appreciate that she needed any assistance.

5 24. As regards suspension, Ms Roche submitted that if the penalties were upheld, it was appropriate for them to be suspended in their entirety. She considered that the reasons why HMRC were not prepared to suspend penalties were wrong. At the time the penalties were levied, there was every possibility that she might return to work – particularly as she needed funds to pay for the renovation of the derelict house. And
10 if she returned to work, there was a potential risk of her becoming redundant once again. She considered that it was possible for HMRC to specify appropriate conditions to the suspension, for example to keep all relevant paperwork to hand and to maintain spreadsheets of payments received.

HMRC's submissions

15 25. HMRC submit that Ms Roche's tax return was inaccurate. The inaccuracy was due to Ms Roche failing to take reasonable care, and was therefore careless. A penalty is therefore chargeable under paragraph 1. HMRC referred us to the case of *Blyth v Birmingham Waterworks Co* (1856) 11 Exch 781 on the basis that taking "reasonable care" can be likened to the concept in general law of "negligence".

20 26. Ms Roche did not take "reasonable care", as she had boxed-up and placed into storage the key documents relating to her redundancy payment. Those documents were therefore not available to Ms Roche at the time she completed her tax return. HMRC contend that a reasonable person receiving a large payment from their employer would take all necessary steps to ensure that it was properly recorded on
25 their tax return. This would include taking professional advice if s/he was unsure of the correct tax treatment.

27. HMRC submit that Ms Roche was careless in failing to answer "yes" to the question " did you receive any other UK income ... ?" when tailoring her tax return online. The question specifically mentions employment lump sums. Having been
30 asked a direct question, Ms Roche must have been careless when she answered the question incorrectly.

28. HMRC submit that Ms Roche's argument, that because tax had been deducted from the redundancy payment, she did not need to include it in her tax return, did not stand up to scrutiny. Ms Roche had received other income from which tax had been
35 deducted (such as basic salary, pensions and investment income), and had included these in her tax returns. There was no logical reason why the redundancy payment should be omitted. In addition if Ms Roche had reviewed the documents relating to her redundancy payment, she would have seen that tax had been deducted at 20%, yet Ms Roche would have been aware that she was a higher rate taxpayer, paying tax at
40 40%, and therefore further tax would be due.

29. HMRC acknowledge that in the period following her redundancy, Ms Roche had suffered considerable stress. However the tax return was filed 21 months after her redundancy, and the stress would have diminished in this time – particularly as by the time she filed her tax return, she had sold one property which would have alleviated her worries.

30. The penalty for careless errors is 30%. HMRC considered the reduction in penalty for disclosure under paragraph 9, and as the disclosure was prompted by the enquiry, the minimum penalty payable was 15%. HMRC reduced the penalty percentage to the 15% minimum allowed. HMRC submit that they have no discretion to reduce the penalty below 15%.

31. We asked Mr Reeve if consideration had been given as to whether there were "special circumstances" which would justify a reduction of the penalty under paragraph 11(1), as there was nothing in HMRC's letter setting out the penalty calculation or the subsequent review decision on the point. Mr Reeve told us that paragraph 11 did not apply. Ms Roche had managed to correctly complete the rest of her tax return. The reason for the failure to include the redundancy payment was due solely to her carelessness, as she had packed away the relevant paperwork, and had not taken the time to retrieve it.

32. As regards suspension, HMRC submit that it is inappropriate to suspend penalties in this case. Suspension is only appropriate if the conditions are practical and measurable (such as improvements to accounting systems). A condition that the taxpayer must file accurate returns is not appropriate. We were referred to the decision of this Tribunal in *Fane v HMRC* [2011] UKFTT 210 (TC).

Discussion

33. Our analysis of the issues in this appeal falls into a number of stages.

34. First, were Ms Roche's actions within the scope of the penalty regime in Schedule 24?

35. Second, had Ms Roche disclosed the inaccuracy to HMRC, as disclosure operates to reduce the amount of the penalty otherwise payable. The amount of the reduction depends on (a) whether the disclosure was unprompted; and (b) the "quality" of the disclosure (paragraph 9, Schedule 24).

36. Third, were there any special circumstances justifying a reduction in the amount of the penalty? (paragraph 11, Schedule 24)

37. Finally, are there any reasons to justify suspension of all or part of the penalty? (paragraph 14, Schedule 24)

Inaccurate Document

38. A penalty is payable if:

(1) a person gives HMRC a document of a kind listed in the table in paragraph 1 (paragraph 1(1)(a) , Schedule 24),

(2) which contains an inaccuracy which leads to an understatement of P's liability to tax (paragraph 1(2) , Schedule 24), and

5 (3) the inaccuracy is careless or deliberate (paragraph 1(3)) , Schedule 24

39. It is not in dispute that Ms Roche gave HMRC a tax return under s8 Taxes Management Act 1970. Tax returns are listed in the table in paragraph 1. Nor is it disputed that the return was inaccurate (by omitting the items of income mentioned in paragraph 8 above), and that as a result of those omissions, the self-assessment
10 understated Ms Roche's liability to income tax.

40. HMRC content that Ms Roche was careless in the preparation of her tax return. Ms Roche contends that she took reasonable care in preparing her tax returns, and therefore the inaccuracy was neither careless nor deliberate.

41. Paragraph 3, Schedule 24 defines an inaccuracy as being "careless" if it is due to
15 a failure by the taxpayer to take reasonable care. HMRC in their submissions referred us to the case of *Blythe*. In that case the issue was whether damage sustained was by reason of the negligence of the waterworks company in not keeping their water pipes and equipment in proper order. The *Blythe* case is not binding on us as it concerns a different legal issue (negligence) and wholly different factual circumstances. We
20 consider that reference to 19th century cases relating to negligence is misplaced in the context of the interpretation of a statutory provision for tax penalties enacted by the Finance Act 2007. It is clear that Parliament deliberately chose not to set the standard required in the preparation of documents by reference to "neglect" or "negligence" (the terms used previously in tax legislation), but instead by reference to carelessness.

25 42. The approach to penalty appeals under Schedule 24 can be derived from more relevant case law, such as *David Collis v HMRC* [2011] UKFTT 588 (TC), where the tribunal found that the standard by which reasonable care fell to be judged is that of a prudent and reasonable taxpayer in the position of the taxpayer in question. The test is therefore an objective one; an error may be innocent, but nevertheless careless.
30 Furthermore, the tribunal in that case went on to say that it is of the essence of the reasonable care test that in normal circumstances this should avoid simple errors of omission, or mere oversights.

43. We consider that the omission by Ms Roche of the Tameside MBC pension from her tax return was careless. She admitted that the payment was included on the
35 working sheet that she had prepared, but that she had neglected to transfer the amount onto the online return.

44. We also consider that the omission of the redundancy payment from the return was careless. A prudent and reasonable taxpayer would not have boxed-up her redundancy papers and placed them into storage, with the consequence that they were
40 not available when preparing her return. In addition, we do not accept that the fact that tax had been deducted from the redundancy payment justifies any failure to include the payment on the tax return. Many payments are received after deduction of

tax (such as normal employment income and investment income), and there is no question of such payments being excluded from a tax return.

45. We do not consider that Ms Roche was careless because she did not seek the assistance of a tax advisor or HMRC. Given that she reasonably thought that she understood what she had to do, it was not careless for her to proceed without taking further advice.

46. We note that Ms Roche did not answer "yes" to the "other income" question when she "tailored" her tax return. However we do not consider that the fact that she was careless in giving this answer, as the question is not clearly expressed, and we consider that it is not unreasonable for Ms Roche to have considered that her redundancy payment ought to be included within her employment income (indeed the redundancy payment is described as being "pay" by HMRC in their enquiry notice).

47. However we do not consider that the omission of the health insurance benefit-in-kind was careless. Ms Roche had not boxed-up the P60 and other tax papers relating to her normal salary and benefits-in-kind, and used the information on these when preparing her tax return. The reason the benefit-in-kind was omitted from her return was because (a) the amount was not included in the P60 or other tax papers, and (b) Ms Roche had a genuine and reasonable belief that the benefit had finished at the end of the previous tax year. Although Ms Roche made a mistake in failing to include this benefit in her tax return, this omission was not made carelessly.

Disclosure

48. The standard percentage penalty for careless inaccuracies is 30% of the potential lost revenue. If the taxpayer has disclosed the inaccuracy to HMRC, paragraph 10, Schedule 24 requires that HMRC must reduce the standard percentage to one that reflects the quality of the disclosure. However the penalty cannot be reduced below a specified minimum depending upon whether the disclosure is prompted or unprompted.

49. HMRC acknowledge that Ms Roche disclosed the inaccuracies immediately following the opening of the enquiry into her tax return. The HMRC letter informing Ms Roche of the enquiry referred to the missing income. So Ms Roche's disclosure was "prompted", as it was made at a time when Ms Roche was aware that HMRC had discovered the inaccuracy. HMRC therefore have no discretion to reduce the penalty below 15% (paragraph 10(2), Schedule 24). In fact HMRC reduced the penalty to 15% - the maximum reduction allowed.

50. We agree that the maximum reduction is appropriate in this case, as Ms Roche co-operated fully and promptly. The timing, nature and extent of her disclosure (paragraph 9(3), Schedule 24) was the best that could be expected in the circumstances.

Special circumstances

51. A crucial feature of Schedule 24 is that it does not include a defence of a "reasonable excuse". So although penalties for late filing of returns or late payment of tax are subject to such a defence, there is no such concept in the case of penalties for inaccuracies. That said, it may be that the particular circumstances of the case are such that the actions of the taxpayer are not careless, or they might constitute "special circumstances" justifying a reduction in the amount of the penalty.

52. Paragraph 11, Schedule 24 gives HMRC discretion to reduce the amount of a penalty because of special circumstances.

53. Special circumstances do not include the (in-)ability of the taxpayer to pay the penalty itself (paragraph 11(2)(a) , Schedule 24), or the fact that the loss of revenue from one taxpayer is balanced by an overpayment by another (paragraph 11(2)(b) , Schedule 24). Neither of these circumstances is in point in this case.

54. The jurisdiction of the Tribunal in an appeal relating to special circumstances is limited. We can only apply a reduction on account of special circumstances (to a different extent than that applied by HMRC) if we consider that HMRC's decision is "flawed" when considered in the light of principles applicable to proceedings for judicial review (paragraph 17(3)(b), Schedule 24). HMRC applied no reduction on account of special circumstances. We need to consider whether HMRC, in exercising their discretion not to make any reduction, acted in a manner that no reasonable body of Revenue commissioners could have acted. Did the HMRC take into account any irrelevant factors, or fail to take into account relevant factors, in reaching their decision?

55. In our view HMRC's decision to apply no reduction was flawed.

56. Mr Reeve in his submissions told us that HMRC had considered that paragraph 11 did not apply, as the reason for the inaccuracies in Ms Roche's return was her carelessness. However we find that HMRC did not give proper consideration to the issue of special circumstances. Although both the original letter calculating the amount of penalties (dated 2 February 2011) and the review letter (dated 13 May 2011) mention Ms Roche's redundancy, it is only to state that the redundancy occurred 21 months before the date of the tax return, and that therefore Ms Roche's stress would have diminished by then. No consideration was given to the reasons why Ms Roche had boxed-up her papers, and the stress she was under at the time she packed-up her home – even though these issues were raised by Ms Roche in her correspondence with HMRC.

57. In particular no reference is made in any of HMRC's letters to their discretion to reduce penalties to take account of special circumstances, and there is no statement that they had reached a decision that no such circumstances existed. Nor can the letters be read in any way that might suggest that, although no express reference is made in the correspondence to special circumstances, HMRC had in fact applied their mind to the issue and had reached the conclusion that there were none.

58. We therefore find that HMRC had not given proper consideration to the potential for there to have been special circumstances, and we find that HMRC's failure to turn their mind to this issue amounts to a "flaw".

59. Even if (contrary to our finding) HMRC had made a considered decision that no reduction for special circumstances was appropriate, we find that this decision was flawed, as HMRC had not taken into account the stress suffered by Ms Roche at the time she packed-up her home (including boxing-up her redundancy papers), and that it was the fact that these papers were therefore not available at the time she completed her tax return that led to the redundancy payment being omitted from her self-assessment. Ms Roche had found herself suddenly and unexpectedly made redundant. Her redundancy occurred at a time when she was part way through refurbishing a derelict house to create a new home. She was therefore placed under severe financial pressure. This occurred during the financial crash, which made it difficult for her to refinance her mortgage or sell her old house and investment property, thus increasing her financial stress. Although it may have been careless of Ms Roche to have boxed-up her redundancy papers (as judged by the objective standard of a reasonable and prudent taxpayer), we can understand why she did so, given the stress that she was under and her desperate need to de-clutter her home to make it as saleable as possible. Because Ms Roche had boxed-up her redundancy papers, they were not available to her at the time she completed her tax return online. As the redundancy payment was not included in the P60 or other tax papers, when she transcribed her income as stated in those papers to the tax return, so the redundancy payment came to be omitted from the tax return.

60. As we have decided that HMRC's decision was flawed, under paragraph 17(3)(b), Schedule 24 we have discretion to rely upon paragraph 11 to a different extent to that applied by HMRC. We consider that it is right for some reduction to be made for special circumstances. We consider that the penalty attributable to the omission of the redundancy payment should be reduced by 50% to take account of special circumstances. Although the stress suffered by Ms Roche explains the reasons for the default, we consider that it should not completely excuse her conduct. A reduction of 50% is therefore in our opinion appropriate.

Suspension

61. As regards the issue of suspension of the penalty we can only overturn HMRC's decision on suspension if we consider it to be "flawed" (paragraph 17(4), Schedule 24). We agree with the reasoning of the Tribunal in *Fane v HMRC* [2011] UKFTT 210 (TC).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 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.

[...]

5 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:

10 "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."

15 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.

20 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.

25 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.

30 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.

35 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.

40 62. As with the taxpayer in *Fane*, the only potential condition attaching to a suspension of penalties in this case could be that Ms Roche would not repeat the mistake again. For the same reasons as those adopted by the Tribunal in *Fane*, we consider that HMRC did not misdirect herself when deciding that penalties relating to the redundancy payment, Tameside MBC pension or the health insurance benefit cannot be suspended.

Conclusions

63. The penalties for failure to declare bank interest (and HMRC's decision to suspend those penalties) are not being appealed.

64. We have found that Ms Roche had given HMRC a tax return under s8 Taxes Management Act 1970 which contained inaccuracies.

5 65. We have found that Ms Roche was not careless in failing to include the health insurance benefit-in-kind in her tax return. Her appeal against the penalties for that inaccuracy is allowed.

10 66. We have found that Ms Roche was careless in failing to include her redundancy payment and Tameside MBC pension in her tax return. We agree with HMRC that Ms Roche gave prompted disclosure of these inaccuracies. We also agree with HMRC that the quality of her disclosure was very good, and she should be given the maximum reduction for the quality of her disclosure.

15 67. We have found that HMRC's decision not to give a reduction for special circumstances was flawed. We have found that there were special circumstances which resulted in the failure of Ms Roche to include her redundancy payment in her tax return, and that it would be appropriate to give a further 50% reduction in the amount of the penalty relating to this.

68. We have found that HMRC's decision not to suspend the penalties attributable to redundancy payment, Tameside MBC pension and health insurance benefit was not flawed.

69. Therefore penalties should be charged as follows:

- 20 (a) On the potential lost revenue attributable to the redundancy payment, at the rate of 7.5%
- (b) On the potential lost revenue attributable to the Tameside MBC pension and the bank interest, at the rate of 15%
- 25 (c) Penalties in respect of the bank interest should be suspended on the conditions set out in HMRC's letter of 2 February 2011

70. We leave it to the parties to agree the amount of penalties payable in accordance with this decision. If they are unable to reach agreement, we give leave for them to apply to this Tribunal (acting by a single Judge sitting alone) to determine the penalties payable.

30 71. 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
35 "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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**NICHOLAS ALEKSANDER
TRIBUNAL JUDGE**

RELEASE DATE: 11 May 2012