



TC02082

Appeal number: TC/2011/09901

Penalty. Suspension. Flawed decision. Sch 24 Finance Act 2007.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

PHILIP BOUGHEY

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE GERAINT JONES Q. C.

The Tribunal determined the appeal on 06 June 2012 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 15 November 2011 and HMRC's Statement of Case submitted on 07 February 2012.

DECISION

1. The appellant, Mr Boughey, has accepted that he made a careless mis-statement in his 2008/2009 self assessment return because he claimed an exemption from tax in respect of a redundancy payment of £30,000 made by his erstwhile employer, whereas appropriate relief had already been given through the PAYE system. The discovery of the error eventuated in additional tax of £12,000.40p being payable. The respondent levied a 15% penalty, amounting to £1800.
2. The appellant has not appealed against the imposition of the penalty. On a date that I have been unable to ascertain the appellant contended that that penalty should be suspended pursuant to the provisions contained in paragraphs 14 – 17, schedule 24 of the Finance Act 2007. I have not seen the letter in which that request was made. Further, I have not been provided with a copy of the initial letter sent by the respondent, refusing the suspension request.
3. However, I do have a letter dated 22 June 2011 in which the respondent accepts the appellant's right to request suspension before the writer then goes on to set out the reasons for refusing suspension. It is necessary that I should set out the material parts of that letter, in full :
“The reason I have been unable to agree your request for suspension is as follows : to enable a penalty to be suspended, I have to ensure that the conditions for suspension are specific, measurable, achievable, realistic and time bound. This means that I need to set a condition that is specific to the careless inaccuracy - in your case, claiming the relief of £30,000 for a redundancy payment in error. Under the circumstances, I do not see that a specific condition can be set to enable you to show that you are able to correctly declare a redundancy payment and claim the correct reliefs against any such payments. I am unable to set a generic condition such as ensuring you pay HMRC all tax due during the suspension period by the appropriate due dates without setting a specific condition to cover the careless inaccuracy identified.”
4. Paragraph 14(1) of schedule 24 provides that the respondent may suspend all or part of a penalty for careless inaccuracy. The extent of that power is limited by paragraph 14(3) which says *“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.”*
5. It is important to appreciate the breath of paragraph 1, which relates to penalties being imposed in respect of a host of different compliance failures. In other words, it sets the scene for the penalty regime and those failures or defaults that give rise to a penalty. It is important to appreciate the breath of paragraph 1 because any limit of the power, set out in paragraph 14(3), can only properly be understood by reference back to paragraph 1.
6. It is clear that as a matter of statutory construction the reference to *“further penalties”* in paragraph 14(3) is a reference to any penalty that could arise pursuant to paragraph 1, and is not limited to a penalty that could arise in the future for the same kind of default as has given rise to the penalty that the taxpayer has asked to have suspended.
7. Paragraph 17(4) of Schedule 24 provides that an appeal against the respondent's decision can only be allowed if the respondent's decision is *“flawed”*.
8. A consideration of whether the decision is flawed necessarily means looking at the reasons given for the decision of a public body.

9. In its Statement of Case the respondent refers to the decision of this Tribunal in *Fane v HMRC [TC01075]* where Judge Brennan, entirely accurately, held that there is an important feature in paragraph 14(3) of Schedule 24, being the link between the condition and the statutory objective, which requires that there must be a condition which would help the taxpayer to avoid becoming liable for further careless inaccuracy penalties. He went on to say that “*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 conditional suspension would have the required effect.*”
10. Judge Brennan went on to point out that on the face of the wording of paragraph 14(3) there is no restriction in respect of a "one of event". He went on to say that “*Nonetheless, it is clear from the statutory context that a conditional suspension must be more than an obligation to avoid making further returns containing careless inaccuracies over the period of suspension (two years)*”.
11. I agree with that analysis but consider it worthwhile pointing out that the Tribunal was not saying that a penalty cannot be suspended simply because the careless error relates to a one off event that is unlikely to be repeated. Indeed, Judge Brennan made it clear that he was saying no such thing. He went no further than to say that a condition should be more than an obligation to avoid making further careless mistakes during the period of suspension. I respectfully agree.
12. I should also add that when the Tribunal referred to a condition being designed to have “*the required effect*” that was plainly a reference to a condition being designed to avoid the taxpayer becoming liable to a penalty, by reason of carelessness, in respect of any of the matters set out in paragraph 1 to Schedule 24 that would be capable of giving rise to a penalty. Indeed, when the whole scheme of schedule 24 is considered in that way, it plainly militates against the view that a condition must be specific to the default that has given rise to the penalty which the taxpayer has asked to have suspended. Any such condition might do so; but it not necessarily have to do so.
13. It is with that analysis in mind that I must look to see whether the decision made by the respondent is or is not flawed. Upon normal public law principles that involves looking at the reasons given by the respondent for arriving at its decisions that no suspension could or should take place.
14. When I look at the letter of 22 June 2011 it is plain beyond doubt that the respondent's decision is flawed. That is because the writer of the letter has proceeded on the basis that he must set a condition “*that is specific to the careless inaccuracy*”. That is not a statutory requirement; nor is it implicit in the statutory regime set out in Schedule 24. The fact that the decision maker thought that a condition would have to relate to future redundancy payments becomes very clear from the following paragraph in which he/she says “*Under the circumstances I do not see that a specific condition can be set to enable you to show that you are able to correctly declare a redundancy payment and claim the correct reliefs against any such payments.*”
15. It is clear from the foregoing that the decision maker proceeded on the erroneous legal basis that any condition of suspension must be designed to ensure that, in the future, the appellant correctly declared the receipt of any redundancy payments. That was far too narrow a view and discloses a highly material error of law.

16. The appellant has proposed a condition to apply during any period of suspension being that during that period his tax returns should be prepared by a qualified accountant. That is not a generic condition but it is a condition that would be designed to or would assist in the submitting of accurate returns, so as to avoid any penalty arising based upon any of the various possible defaults set out in paragraph 1 of Schedule 24.
17. As I find that the decision-making process by the respondent was flawed because it was based upon an error of law, I have to exercise my discretion upon the appellant's request for suspension.
18. The respondent has accepted that the appellant has been co-operative and had a good relationship with the tax inspector who enquired into the default giving rise to the penalty. That is a material consideration, especially when added to the fact that the respondent has proceeded on the basis that this default arose out of carelessness, rather than anything more serious than that.
19. The appellant's position is that he made a mistake and that to err is human. The respondent itself makes mistakes, as widely publicised in the national press, sometimes relating in tens of thousands of taxpayers being sent incorrect demands and/or refunds. The appellant says that since been made redundant he has taken up self employment in a business venture and that, to ensure that future submissions are checked and accurate, he proposes a condition of suspension to the effect that during the period of suspension his self-assessment returns should be prepared by qualified accountants. He also makes the point that in 2011 he expected to receive a further lump sum payment, in some way related to his erstwhile employment, and an accountant would ensure that the correct tax treatment is applied thereto.
20. Although this is a borderline case I have come to the conclusion that there is a proper and sufficient basis for the penalty to be suspended pursuant to paragraph 14(1) of Schedule 24. Accordingly I direct the respondent to suspend the penalty upon applying a suitable condition. My decision as to the condition is set out under the "Decision", below.
21. 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.

Decision.

The appeal is allowed as the respondent's decision not to suspend the penalty of £1800 was flawed in that it was based on an error of law.

I order the respondent to suspend the penalty for a period of two years. It is a condition of that suspension that for the period of two years from the date of this Decision, the appellant's self assessment tax returns must be completed on his behalf by a Chartered or Certified Accountant and be certified by that Chartered or Certified Accountant to be accurate to the best of his/her knowledge and belief.

**GERAINT JONES QC
TRIBUNAL JUDGE**

RELEASE DATE: 18 June 2012