



**TC02995**

**Appeal number: TC/2011/09912**

*Income Tax - self assessment return – penalty imposed for inaccuracy of return – mitigation applied – should penalty be reduced to nil – no – appeal dismissed.*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**ELLIS FREEMAN**

**Appellant**

**- and -**

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

**TRIBUNAL:    JUDGE ALISON MCKENNA  
                  JOHN ROBINSON**

**Sitting in public at Bedford Square on 3 October 2013**

**Mr Tyrell from Ronald Metson and Co, Accountants for the Appellant**

**Ms Evans of HMRC for the Respondents**

## DECISION

1. This matter concerns an appeal against the decision contained in HMRC's letter of 7 September 2009. That decision was to impose penalties for incorrect completion of the Appellant's self assessment tax returns from 2002 to 2005. The penalties were imposed under section 95 (2) of the Taxes Management Act 1970 ("TMA") and mitigated to take account of the Appellant's disclosure, co-operation in the enquiry and the seriousness of the omissions. The penalty was finally fixed at 25% of the tax due in this case.

2. The Appellant appealed to this Tribunal by way of a Notice of Appeal dated 23 November 2011. Both parties before us said they had been present at a hearing in 2012 at which the Appellant's application to appeal out of time had been allowed by a differently constituted Tribunal. We had no record of that decision, or the reasons for it, before us but we accept that to be the case.

3. Mr Tyrell, on behalf of the Appellant, explained that he did not contest the 25% penalty applied by HMRC in his client's case but that he did dispute the underlying tax liability figure. He asked the Tribunal to reduce the percentage of the penalty to nil in order to correct what he submitted was an error in the underlying tax liability and to cure what he said was an injustice to the Appellant.

4. The papers before us showed that the Appellant's income tax liability had been determined by the General Commissioners of Income Tax at a hearing on 18 November 2008. We saw a letter to Mr Freeman dated 5 May 2009, from the Clerk to the Commissioners, West Essex Division, stating:

"At the hearing of the Commissioners you were represented by Mr Tyrell of Messrs Ronald Metson & Co and your appeals were determined as follows:

1. 2001/2202 (*sic*) £24,606.20
2. 2002/2003 £26,264
3. 2003/2004 £23,457
4. 2004/2005 £22,249

A copy of this letter has been sent to your Accountant to keep him fully informed".

5. Mr Tyrell submitted that there had not in fact been a determination of the Appellant's tax liability by the General Commissioners because the figure had been agreed between the parties, although he said that he had agreed to an erroneous figure under pressure at an unsatisfactory hearing. He said he had not sought to appeal the General Commissioners' decision due to the transfer of the appeals jurisdiction to the new Tribunal system at that time, his difficulty in obtaining a transcript of the hearing and a general lack of information about how to appeal. He remained convinced that the tax liability as recorded in the General Commissioners' letter was wrong.

6. As we explained to Mr Tyrell, the status of the General Commissioners' decision is the same regardless of whether the figure was arrived at by consent of the

parties or following a contested hearing. It represents the final decision of a competent appeal Tribunal and, as it was not appealed, that decision stands and we may not go behind it. Mr Tyrell submitted that the Tribunal has the power to vary the penalty to nil because it was not a correct or appropriate exercise of discretion by HMRC to impose the penalty in view of the error in the underlying tax liability figure. He did not wish to call Mr Freeman (who was present) to give evidence, explaining that his appeal was on a technical rather than an evidential point.

7. Ms Evans on behalf of HMRC helpfully took the Tribunal to the letter determining the penalty which explained how it had been arrived at. The mitigation for disclosure was 15%, for co-operation 35% and for seriousness 25%. The total mitigation applied was therefore 75%. Ms Evans explained that this figure had been agreed by an HMRC officer authorised under s.100 TMA. She referred us to the relevant letter of authorisation in the bundle. That letter (dated 2 September 2009) had commented that an earlier “offer” letter to Mr Tyrell had not set out in sufficient detail the reasons for the mitigation applied, but the approved officer nevertheless approved the penalty percentage.

8. Ms Evans referred us to s.29 TMA which allowed HMRC to make an assessment and to s.95 TMA which allowed HMRC to impose a penalty for an incorrect return. Section 100 TMA refers to the penalty being set at “such amount as is...correct or appropriate” in the opinion of the authorised officer. There is a right of appeal under s. 100B TMA and the Tribunal has the power to set aside, confirm, increase or reduce the penalty under s. 100B (2)(a) of TMA.

9. We note that TMA s.101 provides that an assessment which is final is sufficient evidence of the amount of tax lost. We consider that the assessment in this case is final by virtue of the decision of the General Commissioners and that, accordingly, we have no power now to decide that the assessment was wrong. It follows that we have no power to vary the penalty based upon Mr Tyrell’s argument that the assessment was wrong. In the absence of any other evidence or argument put before us to suggest that the percentage of the penalty was wrong, we must dismiss this appeal.

10. 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.

**ALISON MCKENNA  
TRIBUNAL JUDGE**

**RELEASE DATE: 25 October 2013**

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