



TC04331

Appeal number: TC/2011/01948

VAT – Penalties – Schedule 24 Finance Act 2007 – suspension of penalty – whether conditions could be applied – decision of HMRC flawed – whether as a matter of discretion the penalty should be suspended – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

BILAL JAMIA MOSQUE

Appellant

- and -

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

**TRIBUNAL: JUDGE JONATHAN CANNAN
 MR DEREK ROBERTSON**

Sitting in public in Manchester on 18 December 2014

Mr Philip Rayner of Portcullis VAT Consultancy appeared for the Appellant

Mr William Brooke of HM Revenue & Customs appeared for the Respondents

DECISION

Background

- 5 1. This decision follows our decision released on 30 May 2013 (“the Original Decision”) in which we allowed in part an appeal against penalties for what HMRC alleged were deliberate inaccuracies in a claim made in a VAT return. This decision should be read together with the Original Decision which has the reference [2013] UKFTT 324 (TC).
- 10 2. In the Original Decision the result of the appeal was as follows:
- (1) We affirmed that a penalty was payable by the appellant.
 - (2) We substituted our decision that the “35% Claim” was a deliberate inaccuracy and the “65% Claim” was a careless inaccuracy. In each case the penalty imposed was reduced to the minimum percentage so as to reflect the quality of the appellant’s disclosure.
 - 15 (3) In the case of the 35% Claim the minimum penalty for a prompted disclosure was 35% of the PLR which amounted to £5,171.21
 - (4) In the case of the 65% Claim the minimum penalty for a prompted disclosure was 15% of the PLR which amounted to £4,115.86.
- 20 3. Until the Original Decision was released there was no reason for HMRC to consider whether to suspend any part of the penalty. If it had been wholly deliberate as HMRC alleged they would have had no power to do so. In the light of the Original Decision it was necessary for HMRC to consider whether or not to suspend the penalty in relation to the 65% Claim.
- 25 4. We directed that if the parties were unable to agree whether the penalty in relation to the 65% Claim should be suspended or the conditions on which it should be suspended then either party could apply to restore the appeal for consideration of that matter. The parties were unable to agree on suspension of the penalty and the appellant applied to restore the appeal.
- 30 5. In this decision we are concerned with whether the penalty for careless inaccuracy in relation to the 65% claim should be suspended. We make the following findings of fact in relation to that issue which supplement the findings we made in the Original Decision.

Findings of Fact

- 35 6. By letter dated 24 June 2013 Ms Lyddon, who had imposed the original penalties, wrote to Mr Rayner, the appellant’s representative. She stated that she could not suspend the penalties because it was not possible to impose any conditions to help the appellant avoid similar inaccuracies in future. Her reasons were essentially as follows:

- (1) There were two outstanding VAT returns for the business,
 - (2) There was still no option to tax in relation to the Mosque,
 - (3) The appellant was still considering de-registering for VAT and claiming input tax on construction costs under the DIY Builders Scheme.
- 5 7. Ms Lyddon invited Mr Rayner to suggest possible conditions which she would consider.
8. The reference to two outstanding VAT returns was to the returns for periods 01/13 and 04/13. These were due to be made by the appellant by 28 February 2013 and 31 May 2013 respectively. They were not made until 27 June 2013 and both were
10 nil returns.
9. Mr Rayner replied on 5 July 2013 stating that he intended to recommend to the appellant the following steps:
 - (1) The VAT registration be cancelled from a date to be agreed with HMRC so that no returns would be required,
 - 15 (2) The notification of an option to tax would be withdrawn,
 - (3) When building works on the Mosque were completed the appellant would claim repayment of input tax under the DIY Builders Scheme.
10. Mr Rayner intended that steps (1) and (2) could be conditions upon which the penalty for careless inaccuracy could be suspended.
- 20 11. It is implicit in Mr Rayner's letter that as at July 2013 the building works to the Mosque were not yet complete so that a claim under the DIY Builders Scheme could not yet be made. There was no indication in the material before us as to when the building work might be complete. Hence it might well not have been possible for the appellant to submit a DIY Builders claim within the maximum period of 2 years for
25 which a penalty might be suspended.
12. Mr Rayner also invited HMRC to take into account when making their decision on suspension that we had found, at [100] of the Original Decision that the appellant could not have been more helpful in quantifying the inaccuracy given their confusion over the basis of the claim.
- 30 13. Ms Lyddon replied on 23 August 2013. She remained of the view that she was unable to set any conditions for suspension for the following reasons:
 - (1) The VAT number would need to remain in force and future returns would have to be submitted and paid on time for the penalty to be suspended.
 - (2) There was a history of late filing of VAT returns.
- 35 14. In or about December 2013 the appellant applied for its VAT registration to be cancelled with effect from the date of first registration. On 3 January 2014 HMRC refused that application but de-registered the Appellant with effect from 9 December

2013. The appellant appealed that decision to the tribunal but the appeal was withdrawn on 30 June 2014.

Statutory Provisions - Penalties

5 15. The statutory framework for the penalties relevant to this appeal is in *Schedule 24 Finance Act 2007* and was set out in the Original Decision. For present purposes were are concerned with the power of HMRC to suspend a penalty for careless inaccuracy which is contained in paragraph 14 as follows:

- 10 “ (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.*
- 15 (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.*
- 20 (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.*
- 25 (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.”*

16. Paragraph 15(3) provides that a person may appeal against a decision of HMRC not to suspend a penalty.

30 17. Paragraph 17(4) sets out the jurisdiction of the tribunal in an appeal relating to the suspension of a penalty:

- “ (4) *On an appeal under paragraph 15(3)—*
- (a) *the appellate tribunal may order HMRC to suspend the penalty only if it thinks that HMRC's decision not to suspend was flawed, and*
 - 35 (b) *if the appellate tribunal orders HMRC to suspend the penalty—*

- (i) *P may appeal to the appellate tribunal against a provision of the notice of suspension, and*
- (ii) *the appellate tribunal may order HMRC to amend the notice.”*

5 18. The jurisdiction of the Tribunal to suspend a penalty in circumstances where HMRC’s decision on those matters is challenged is restricted to cases where HMRC’s decision is “flawed”. In other words, the Tribunal can only intervene if the decision making officer:

- (1) Failed to take into account relevant matters;
- 10 (2) Took into account irrelevant matters;
- (3) Made an error of law; or
- (4) Reached a conclusion which no reasonable decision making officer properly directed as to the law could have made.

15 *Decision*

19. We are concerned with a decision of Ms Lyddon made on 23 August 2013.

20. Mr Rayner submitted that HMRC should agree to suspend the penalty because the appellant’s VAT registration has been cancelled. Hence there could not be a repetition of the appellant’s conduct which resulted in late returns. Similarly, the option to tax had been withdrawn.

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21. In making that submission Mr Rayner was considering the position as at the date of the hearing. However we are concerned with the position at the date of Ms Lyddon’s decision and in particular whether that decision was flawed. We are not concerned with subsequent events save in so far as they are relevant to the position as at the date of the decision.

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22. It is not relevant that the appellant de-registered for VAT with effect from 9 December 2013. That had not happened at the time of Ms Lyddon’s decision. However it is relevant that Mr Rayner had stated in correspondence that he intended to advise the appellant to de-register for VAT, withdraw the option to tax and make a claim under the self build scheme.

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23. Paragraph 14(3) provides that HMRC may only suspend a penalty if compliance with a condition would help the appellant avoid becoming liable for further penalties under paragraph 1 for careless inaccuracy.

24. If the condition is satisfied over the suspension period then paragraph 14(5) provides that the suspended penalty will be cancelled. If the condition is not satisfied then the penalty will be payable. Irrespective of the conditions, paragraph 14(6)

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provides that if the taxpayer incurs another penalty under paragraph 1, in relation to any document or return, then the suspended penalty will become payable.

25. It is clear that if a penalty is to be suspended then HMRC must impose conditions. If there are no conditions which would help the appellant avoid further penalties then we accept that HMRC cannot suspend a penalty. Equally, even if such conditions can be imposed, HMRC still has discretion not to suspend the penalty.

26. Mr Brooke for the respondents relied on a number of decisions of the F-tT in relation to suspension. He submitted as follows:

(1) The evident purpose of the suspension provisions was to educate traders who had acted carelessly to help prevent repetition. This applied in particular to areas which an honest trader has found confusing and difficult to deal with in the past (see *Shelfside Holdings Ltd v Commissioners for HM Revenue & Customs* [2012] UKFTT 290 (TC)).

(2) If the only conditions would be unlikely to have the desired effect then HMRC cannot suspend the penalty (see *Fane v Commissioners for HM Revenue & Customs* [2011] UKFTT 210 (TC)).

(3) In normal circumstances penalties for “one-off” inaccuracies should not be suspended because in the ordinary course a condition would not help the taxpayer to avoid becoming liable to further penalties (see *Fane v Commissioners for HM Revenue & Customs* [2011] UKFTT 210 (TC) and *Durrant v Commissioners for HM Revenue & Customs* [2014] UKFTT 513 (TC)).

(4) The conditions for suspension must be more than an obligation to avoid making further returns containing careless inaccuracies. Otherwise paragraph 14(6) would be redundant (see *Fane v Commissioners for HM Revenue & Customs* [2011] UKFTT 210 (TC)).

27. We accept these propositions.

28. Mr Brooke submitted that in circumstances where no further returns would be submitted by the appellant, there were no conditions which could have been imposed to help avoid future careless inaccuracies. He relied on a decision of the F-tT in *United European Gastroenterology Federation v Commissioners for HM Revenue & Customs* [2013] UKFTT 292 (TC). In that case it was held that the circumstances did not justify suspension because there was no evidence that the appellant intended to carry on any taxable activities in the future.

29. It is notable that the power to suspend in paragraph 14 refers to avoiding “further penalties under paragraph 1 for careless inaccuracy”. It does not expressly refer to such further penalties arising in respect of the same type of document or indeed the same tax. That is relevant in the present case because Mr Rayner had advised the appellant to de-register and reclaim the input tax incurred pursuant to the DIY Builders Scheme rather than through a VAT return. A claim under the DIY Builders Scheme would be covered by paragraph 1 of Schedule 24 which refers to

inaccuracies in VAT returns and also returns, statements and declarations in connection with a VAT claim.

5 30. Mr Brooke submitted that any condition would have to relate to the error that was made and gave rise to the penalty. The error in the present case was claiming input tax credit in a VAT return and not in a DIY Builders claim.

10 31. We accept Mr Brooke's submission in so far as it seems to us that any condition would have to relate to the error that was made and gave rise to the penalty. In our view it would not be within the scope of paragraph 14 to impose a condition seeking to avoid careless inaccuracies in an inheritance tax return where the careless inaccuracy arose in relation to a completely separate matter in a VAT return. However, on the facts of the present appeal the error arose in relation to claiming an input tax credit. If a condition could be formulated which sought to avoid a similar error when claiming credit for the same or similar input tax in a DIY Builders claim then in our view it would fall within the scope of paragraph 14. The real question is
15 whether an appropriate condition could have been formulated.

32. In applying the approach described above to the facts of the present appeal, the starting point is the decision of Ms Lyddon. In her letter dated 23 August 2013 she gave her reasons for not suspending the penalty.

20 33. The first reason was that the VAT registration would need to remain in force and future returns would have to be submitted and paid on time for the penalty to be suspended. Ms Lyddon seems to have been saying that because the appellant was intending to cancel the VAT registration, there would be no conditions which could help to avoid errors in future returns because there would be no future returns.

25 34. If that is what Ms Lyddon meant, then in our view she was wrong. For the reasons given above if a condition could be formulated to avoid a similar error in a DIY Builders claim then the penalty could, at least in principle be suspended.

30 35. The second reason was that the appellant had a history of late filing of VAT returns. That does not amount to a reason as to why conditions could not be set. Rather it seems to be one factor which, even if conditions could be set, should be taken into account as a matter of discretion in deciding whether to suspend a penalty.

35 36. In our view therefore Ms Lyddon did not adopt the correct approach to the question of whether the penalty should be suspended. She took too narrow a view as to what conditions might be imposed. She also seems to have conflated the separate questions of whether conditions might be applied in principle, and whether as a matter of discretion the penalty ought to be suspended.

37. We are satisfied therefore that Ms Lyddon's decision not to suspend was flawed. Pursuant to paragraph 17(4) we therefore have discretion to order HMRC to suspend the penalty.

40 38. We must consider whether there are conditions which would help the appellant avoid becoming liable for further penalties. We note that the appellant in 2013 was

intending to de-register for VAT. There is no suggestion that it would not have followed Mr Rayner's advice in that regard. The appellant would not be making input tax reclaims in the future, but it was intending to reclaim input tax under the DIY Builders Scheme.

5 39. In principle there may have been conditions which would have helped the appellant avoid becoming liable for penalties in relation to a claim under the DIY Builders Scheme.

10 40. Mr Rayner did not suggest any conditions which might have been applied, beyond the conditions referred to in his letter dated 5 July 2013. We do not consider that those conditions would help the appellant avoid an inaccuracy in a DIY Builders claim. They are simply conditions which would have removed the requirement to make VAT returns, replacing it with a DIY Builders claim at some time in the future when the building works were complete.

15 41. We can envisage that a condition might have been formulated which required the appellant to have a DIY Builders claim prepared and submitted or perhaps certified in some way by a suitably qualified person. As appears in the Original Decision it was the absence of competent advice at the time of the initial claims which at least contributed to the penalty in the first place.

20 42. Mr Brooke submitted that even if a condition could be formulated so as to help avoid errors in a DIY Builders claim, such a claim could only be made in the period of 3 months after completion of the works. There was no evidence that the works would be completed within the maximum period of 2 years for which penalties can be suspended.

25 43. The fact that there is no certainty or even likelihood that another return, claim or document within paragraph 1 will be submitted in the suspension period is a relevant factor in the exercise of our discretion. We cannot be satisfied that any condition would help to avoid an error because unless a claim is made there is no prospect of an error. The position is similar to the "one-off" errors mentioned above.

30 44. Further, in exercising our discretion whether to order HMRC to suspend the penalty we must take into account all the circumstances. We have considered the facts found in the Original Decision and the facts found in this decision. We note in particular the following matters:

35 (1) The penalty arose in connection with the second claim for input tax credit in the 04/10 Return. The appellant had already been refused input tax credit when the first claim was submitted in the 04/08 Return.

(2) The appellant has been found liable to a penalty for deliberate inaccuracy in connection with the input tax claim.

(3) There was no indication as to when a DIY Builders claim might be made. It might well not have been made in the period of suspension.

45. We acknowledge our finding that the appellant could not have been more helpful in quantifying the inaccuracies when the second claim was challenged by HMRC. However taking all the circumstances into account we do not consider it appropriate to order HMRC to suspend the penalty.

5 *Conclusion*

46. For the reasons given above we dismiss the appeal in so far as it relates to the decision on suspension of the penalty.

47. 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.

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JONATHAN CANNAN
TRIBUNAL JUDGE

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RELEASE DATE: 18 March 2015