[2016] UKFTT 0103 (TC)

TC04894

Appeal number: TC/2015/06552

Income Tax - penalty assessment - Schedule 24 - Finance Act 2007 - policy proceeds from surrendered investment bond-whether error on income tax return was careless – Yes - Appeal dismissed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

AILEEN BRYSON **Appellant**

- and -

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

TRIBUNAL: JUDGE W RUTHVEN GEMMELL WS
IAN SHEARER

Sitting in public at George House, 126 George Street, Edinburgh on 25 January 2016

Aileen Bryson for the Appellant

Claire Robertson, Officer of HMRC, for the Respondents

DECISION

1. This is an appeal by Aileen Bryson ("AB") against a penalty assessment issued by Her Majesty's Revenue and Customs ("HMRC") on 10 March 2015 under Schedule 24 of the Finance Act 2007 for the sum of £748.16 in respect of the tax year 2012-2013.

2. The penalty was issued as a result of an inaccuracy in AB's tax return which HMRC deemed careless.

3. At the start of the hearing HMRC advised AB and the Tribunal that the sum of the penalty was inaccurate and incorrect and should be £747.90. The Tribunal requested that HMRC explain to AB, and the Tribunal, whether their error invalidated the proceedings and, after a short adjournment, HMRC referred to Section 114 of the Taxes Management Act 1970. The Tribunal considered, in terms of this section of the 1970 Act, that HMRC's error did not invalidate the proceedings.

Background and Facts

4. AB surrendered a life policy with Aviva during the tax year 2012-2013 and received a letter from them dated 7 September 2012 advising that a payment would be made of £51,939. 21. The letter stated "we will be in touch again soon if a chargeable event has arisen as a result of this withdrawal. This means you could be liable for any income tax on any gain. Under HM Revenue and Customs regulations, any chargeable event must be reported within three months of the surrender date". AB had no recollection of receiving this letter until she became aware of its existence on 29 October 2014 when she searched again and found it.

5. A copy of a "Notice of a Gain for Income Tax Purposes" in respect of AB's policy, dated 19 September 2012, was submitted to the Tribunal but AB stated that she had never received this. The Notice confirmed that the gain on the policy was £24,939, that there were 10 years applicable for top-slicing relief and that the amount treated as paid in tax was £4,988.

6. AB explained that the policy had been surrendered in order to produce funds to invest in her husband's business which was involved in green chemistry. AB is a Policy and Practice lead for the Royal Pharmaceutical Society in Scotland.

7. On 22 April 2013, AB's husband died very suddenly, aged 56, and much of the remainder of that year was spent coping with this loss and dealing with her own job but also her husband's business. On her husband's death, AB was made a director of the business which had four members of staff. Subsequently, AB inherited a 70% shareholder in the business and, as it took some time to find a buyer for that business, it was not sold until mid-2014.

8. These events caused AB to put her personal circumstances on the "back burner" and, accordingly, her tax return was completed at the last minute for the deadline of 31 January 2014. The 2012-2013 tax return was the first return after AB's husband's

death and was prepared by the bookkeeper of her late husband's company who had done this for AB before.

9. When the policy had been surrendered, AB had made a mental note that some tax would be payable and had put aside £5,000 for the potential tax liability. This was placed in an offset mortgage account.

10. AB received a letter dated 29 October 2014 from HMRC confirming that there had been a check of her self-assessment tax return because HMRC had received information of a chargeable gain of £24,939 on a UK life insurance policy that was not declared on AB's return. AB stated that this was the first time the matter had been drawn to her attention.

11. On 11 November 2014, AB called HMRC to explain that the policy had been taken out several years ago and she had been withdrawing 5% each year. In September 2012, AB was asked if she would encash the policy to help finance her husband's business and she had done so. HMRC's note of the telephone call stated "unfortunately her husband died last year and she had completely forgotten about the policy being cashed".

12. On 17 November 2014, AB called HMRC again and their telephone note stated that AB had said she had not received any documents from Aviva regarding the completion of the gain. This was followed by an email of 17 November 2014 when AB attached the certificate which she had received that day from Aviva. The email stated "I do not recall seeing this before and it is not in my own paperwork file despite the date being September 2012. I apologise for any oversight which has been completely accidental. I have had not (*sic*) intention to evade or delay payment and having not had sight of the certificate was not aware that it should have been included in my last tax return. I had in fact mentally worked out that we would probably incur approx. £5000K (*sic*) by cashing in the bond and have made arrangements to have this amount available but had not given any thought as to how or when this might occur. I know it must sound naive but I think I expected a bill at some point".

13. Aviva say they sent both letters to AB's address. When AB received the letter and the actual Notice in October 2014 she did not ask Aviva why they had sent them late nor did she go back to Aviva when she realised there was a penalty for the late inclusion of the information in her tax return. AB stated that, following her husband's death, normal life was suspended and "everything just goes out the window".

14. HMRC became aware of the tax liability because they had been contacted by Aviva but this did not happen until some months after the date for the submission of AB's tax return. Accordingly, HMRC say this was a prompted error due to carelessness.

15. On 25 November 2014, AB wrote again to HMRC apologising for the mix up which "has been a complete oversight on my part…. The oversight was not in any way deliberate and there was never intention to defraud or evade any tax payments. I have cooperated in full since this came to light and sincerely regret this mistake. I

very quickly searched through the domestic paperwork and saw a letter from Aviva, after the payment was made, advising me of the notification of any chargeable amount would be sent to me. Despite a thorough search I have nothing from Aviva to alert me to the chargeable amount…. This has been a unique circumstance in cashing in a bond which originally was not intended to be cashed until retirement. I believe that had I received the notification as intended that would have alerted me to the need to include this in my routine return. As it was in the circumstances, this was entirely overlooked and forgotten about until your letter arrived which caused me genuine puzzlement as to what I owed or what had gone wrong. I do realise this was my responsibility and I have been remiss but this is not my usual behaviour and it was a genuine mistake."

16. As AB apologised and paid the tax and interest, the penalty for the inaccuracy was reduced from 30% to the minimum of 15% of the potential lost revenue and HMRC say that the penalty was made within the time limits set down in Schedule 24 of the Finance Act 2007.

17. HMRC considered the issue of suspension requested by AB if she obtained professional help to ensure her future returns were correct, under paragraph 14 of Schedule 24. Following the decision in *Anthony Fane*, HMRC said that they could not apply a suspension as this was a one-off error and they could not agree to any conditions of suspension that would be relevant and which could be measured to see if they were actually working. Accordingly, in HMRC's email dated 27 November 2014, HMRC refused to agree that the assistance of a professional agent/accountant would constitute a condition that HMRC were "willing to set" and refused suspension of the penalty.

Legislation

18. See Appendix 1

Cases Referred To

19. See Appendix 2

Submissions by the Parties

20. AB says that she was not careless but suffered from an exceptional set of circumstances which were unforeseen and beyond her control. AB referred to the *Anthony Fane* case where it was stated that HMRC "do not expect perfection" but felt in this case they were.

21. AB says that she was a prudent and reasonable taxpayer and feels she is in the position of David against Goliath. The amount involved does not, in AB's view, warrant the costs of legal representation and that there is a lack of flexibility in the system, especially in the year after bereavement; a year in which the State pays bereavement allowance.

22. AB said that she paid the tax and the interest and that a "rap over the knuckles" would suffice.

23. AB says that the case of *Jonathan Cobb*, is not strictly relevant to her circumstances; that the matter would have been sorted out if her husband had been alive; that she could not overlook a letter she did not receive and that there were a whole series of events which all lined up to cause an omission in the tax return.

24. AB confirmed that she thought there might be tax to pay and did put money aside but that there were extenuating circumstances in this particular year. AB says that it is an incorrect value judgement for HMRC to say she chose to put her husband's affairs before her own and although she was aware of the liability, that was before her husband's death.

25. AB says she is being penalised for being scrupulously honest; has no recollection of receiving the chargeable event certificate so she did not know for sure she had a gain and, because of the offset mortgage, did not receive an interest statement for the £5,000 that had been set aside which might otherwise have served as a reminder. The bookkeeper who completed the tax return knew that funds had been introduced to the business but did not know the source and, therefore, was not in turn prompted to ask AB if there was an accompanying tax liability when compiling her tax return.

26. HMRC say that AB did receive the letter of 7 September 2012 and its term should have prompted her to enquire from Aviva if there was a tax liability if she did not receive a subsequent notice. In addition, HMRC say that AB knew there was a liability and put funds aside for this purpose.

27. HMRC refer to the telephone conversations and correspondence with AB which they say is a clear admission of her carelessness and that she chose to put attending to her husband's affairs before her own in the period following his death and prior to 31 January 2014.

28. HMRC say that AB could have noted an estimate of the gain or the amount received in her self assessment tax return but did not.

29. HMRC say that AB was careless in that she failed to take reasonable care in completing a tax return whilst acknowledging that there was no question of an intention not to pay tax. They just examine what she did or failed to do and consider what a reasonable person would have done in those circumstances.

30. HMRC referred to the decision of *Jonathan Cobb* and consider that AB's conduct was similar in that it was not deliberate but careless and, even if, in the last minute rush to complete a tax return, AB did not have the exact details of the gain, she could have estimated it in terms of the amount she had set aside.

31. HMRC consider that there was no deliberate inaccuracy or dishonesty in how AB completed her tax return but that the standard by which failing to take reasonable care is judged is that of the prudent and reasonable taxpayer and that AB did not meet this test.

32. HMRC appreciated that this was a difficult time for AB but that this did not alter their decision and they could find no reason to suspend the penalty because they consider this to be a one-off event.

33. HMRC say that the terms of *Clark of Hove v Bakers Union* [1978] 1 WLR 1207 when they considered whether there were any special circumstances but concluded that special circumstances must be out of the ordinary and that the circumstances in which AB found herself were unexceptional. HMRC looked at the timing of the events and, whilst sympathetic, consider that there was nothing in AB's circumstances that was out of the ordinary. AB had nine months after her husband's death in which to complete a tax return and, accordingly, acting as she did, AB was careless.

Decision

34. The Tribunal were sympathetic and mindful of AB's circumstances in the period immediately following her husband's death and in the nine month period thereafter when she was dealing with her husband's business which had required the injection of capital which required the surrender of the bond and her own personal affairs.

35. By AB's own admission, however, she had knowledge of the potential tax liability, confirmed this to HMRC in a scrupulously honest way when she was reminded of the liability and paid the amount and the interest due.

36. It is clear that there was neither deliberate inaccuracy nor any dishonesty on how AB completed a tax return but the fact was that the tax liability was omitted and it was only when Aviva had told HMRC of its existence that the matter was raised.

37. AB clearly forgot about the tax liability and, accordingly, there was no element of confusion as to what amount to put in the tax return. It was simply a matter of forgetting it and not mentioning it at all. If the actual amount had been unclear, in circumstance where AB had not received the 19 September 2012 notice from Aviva, then a note could have been put in the tax return to say that there was a liability but that the actual amount was unknown.

38. The standard by which failing to take reasonable care is judged is that of the prudent and reasonable taxpayer.

39. Applying that test, the Tribunal concludes that AB, knowing that she had a tax liability, should have included it in her tax return and not overlooking its inclusion. The Tribunal carefully considered the circumstances of AB's husband's death which in certain circumstances might have mitigated the penalty but felt given the period of nearly nine months from the date of AB's husband's death to the date the tax return had to be submitted the gap was too long and that this remedy was not an option open to the Tribunal.

40. The Tribunal considered that the reduction of the penalty in the circumstances to 15% was proportionate in all the circumstances and consider that the issue of

suspension was correctly considered by HMRC on the basis that this was, as AB said herself, a tragic but nonetheless one-off event.

41. The Appeal is dismissed.

42. 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.

W RUTHVEN GEMMELL WS
TRIBUNAL JUDGE

RELEASE DATE: 17 FEBRUARY 2016

Appendix 1

Legislation

Schedule 24 Finance Act 2007

Section 114 Taxes Management Act 1970

Appendix 2

Cases Referred To

Anthony Fane v HMRC [2011] UKFTT 210 (TC)

Jonathan Paul Lindsay Cobb v HMRC [2011] UKFTT 1738 (TC)