



TC05119

Appeal number: TC/2015/06624

Income tax - Schedule 24 Finance Act 2007 - inaccuracy in tax return - penalty assessment - whether error in income tax return was careless - whether penalty should be suspended - Paragraph 14 Schedule 24 Finance Act 2007 - whether HMRC's decision not to suspend penalty was flawed - no - Appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

DAVID ALAN WEBB

Appellant

- and -

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

**TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER JANE SHILLAKER**

Sitting in public at Fox Court, Brooke Street, London on 13 January 2016

The Appellant did not attend and was not represented

Ms Joanne Bartup, Officer of HM Revenue and Customs for the Respondents

DECISION

The Appeal

1. This is an appeal by Mr David Webb (“the Appellant”) against HMRC’s decision to impose a penalty of £2,807.63 under paragraph 1 of Schedule 24 to the Finance Act 2007 (“Schedule 24”), later reduced to £1,824.96 in respect of an inaccuracy in the Appellant’s self-assessment tax returns for the year ended 5 April 2013 resulting in an understatement of the Appellant’s liability to tax in the amount of £9,358.79.

The factual background

2. The Appellant is a director and shareholder of Arrow Chartering (UK) Limited (“Arrow”).

3. The penalty results from an inaccuracy in the Appellant’s 2012-13 Self-Assessment tax return. The inaccuracy was the omission, from the return, of pay (£366,456) and PAYE tax deducted (£159,644) from the Appellant’s employment with Arrow. This omission resulted in a tax underpayment of £9,358.79.

4. On 3 October 2014, following receipt of pay and tax information received from Arrow, HMRC wrote to the Appellant to say that they would be checking his return for the year ended 5 April 2013 under s 9A TMA 1970 and requested a copy of his P 60 end of year certificate for that year.

5. In the absence of a response, on 17 November 2014 HMRC issued a revised tax calculation in respect of the Appellant’s income which showed that additional tax of £9,358.79 was payable. HMRC advised that under Schedule 24 Finance Act 2007 a penalty can be charged when a tax return contains an inaccuracy as a result of careless or deliberate errors.

6. HMRC wrote a reminder letter to the Appellant on 7 January 2015 in the absence of a response.

7. On 16 February 2015, HMRC issued a penalty assessment for £2,807.63 representing a 30% penalty on the tax at risk, on the basis that the Appellant’s actions had been “careless”.

8. On 6 March 2015 the Appellant’s accountant, Mr Lane of Tish Press & Company, wrote to HMRC to say that they agreed HMRC’s computation of the additional tax and that the Appellant had been advised to pay the tax immediately.

9. Mr Lane said that Tish Press & Company completed the Appellant’s tax return and were aware of the employment income he received from Arrow. They had however failed to request the Appellant’s P 60 and the income was therefore omitted from his return. They accepted responsibility for the error. They explained that the Appellant for his part believed that the employment income did not need to be included in his return because he thought that the tax was “covered” via PAYE.

10. Mr Lane said that in his view the inaccuracy occurred purely as a result of an innocent error and that therefore a penalty was not applicable. It was at the most careless and therefore could be suspended on the basis that the necessary SMART conditions could be imposed.

11. [HMRC may suspend penalties for careless inaccuracies in returns or documents if they are able to set at least one suspension condition that will help the taxpayer avoid penalties for similar inaccuracies in the future. Each condition must be *Specific, Measurable, Achievable, Realistic* and *Time bound*.].

5 12. Mr Lane suggested that the conditions for suspension would include maintaining all documentation relating to PAYE employment, including payslips, his P60 and if applicable the P11D. In addition the Appellant would maintain a separate record of his annual pay and tax deductions. All documentation would be passed to his tax agent at the appropriate time in order to complete the self-assessment return. Finally, the Appellant would fully scrutinise his
10 return for errors prior to authorising submission.

13. HMRC replied on 23 March 2015 saying that whilst Tish Press & Company accepted responsibility of the error, the onus is on the individual to show that he took all reasonable care to avoid an inaccuracy in his return. Otherwise a penalty was payable. He had a duty to take reasonable care within his ability and competence. Whilst a taxpayer cannot be expected
15 to challenge specialist professional advice on a complex legal point they ought to be able to recognise the complete absence of employment income amounting to £366,456 which constituted the vast majority of the Appellant's income for the year ended 5 April 2013.

14. HMRC said that the purpose of a suspension condition was to help the taxpayer address the specific systemic failure or record keeping weakness that had led to the careless
20 inaccuracy. The inaccuracy on this occasion arose as a result of the Appellant's failure to check his return for errors prior to submission, which is a basic obligation when submitting a return. Therefore suspension conditions were inappropriate and the penalty could not be suspended.

15. HMRC referred Mr Lane to HMRC's compliance Handbook section CH83133 which
25 states:

“You can only suspend the penalty for a careless inaccuracy where you can set at least one specific suspension condition that if met would help the person avoid a further penalty for a careless inaccuracy. The legislation requires HMRC to be able to identify any future careless inaccuracies that would result from the underlying cause if it is not
30 corrected.”

HMRC explained that the error arose because of the Appellant's incorrect belief that employment income did not need to be included on his return. He was now aware that such income had to be included and his future responsibility. Therefore HMRC could not identify any future careless inaccuracies that would result from the same underlying cause.

35 16. Because HMRC had received a response to their enquiries they reviewed the penalty to 19.5% of the additional tax due, reducing the penalty to £1,824.96, the penalty range under Schedule 24 FA 2007, being 30% to 15%. HMRC explained that the difference between the maximum and minimum penalty of 15% had been reduced by 70% (10.5%) to reflect the fact the Appellant had assisted in agreeing liability for the additional tax, albeit after a long delay.

40 17. On 7 August 2015 Tish Press & Company requested a review of the decision.

18. On 18 September 2015 Officer N J Smith who had not previously been involved in the decision undertook an independent review, but concluded that the decision was upheld.

19. Officer Smith said that he was not persuaded that the measures proposed by Tish Press & Company were any more than the basic minimum required for the Appellant to complete future returns. The Appellant was now aware that pay and tax from his employment(s) should be included in his return. This was the only inaccuracy in the return. It was not therefore apparent what future careless inaccuracy could be identified from the underlying cause and remedied by the measures suggested.

20. On 5 November 2015, Tish Press & Company lodged a Notice of Appeal (dated 5 October 2015) with the Tribunal on behalf of the Appellant. The Notice of Appeal was received by the Tribunal outside the 30 day limit, but HMRC have no objection to the Appellant's application to appeal out of time.

Relevant legislation

21. Paragraph 1 of Schedule 24 states in relevant part as follows:

- (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-
 - (a) an understatement of a liability to tax,
 - (b) a false or inflated statement of a loss, or
 - (c) a false or inflated claim to repayment of tax.
- (3) Condition 2 is that the inaccuracy was careless (within the meaning of paragraph 3) or deliberate on P's part.
- (4) Where a document contains more than one inaccuracy, a penalty is payable for each inaccuracy.

<i>Tax</i>	<i>Document</i>
Income tax or capital gains tax	Return under section 8 of TMA 1970 (personal return).
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22. Paragraph 3 of Schedule 24 provides for degrees of culpability as follows:

- (1) For the purposes of a penalty under paragraph 1, inaccuracy in a document given by P to HMRC is-
 - (a) "careless" if the inaccuracy is due to failure by P to take reasonable care,
 - (b) "deliberate but not concealed" if the inaccuracy is deliberate on P's part but P does not make arrangements to conceal it, and
 - (c) "deliberate and concealed" if the inaccuracy is deliberate on P's part and P makes arrangements to conceal it (for example, by submitting false evidence in support of an inaccurate figure).

(2) An inaccuracy in a document given by P to HMRC, which was neither careless nor deliberate on P's part when the document was given, is to be treated as careless if P--

(a) discovered the inaccuracy at some later time, and

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(b) did not take reasonable steps to inform HMRC.

Paragraph 4 sets out the penalty payable under paragraph 1. Paragraph 4(1)(a) provides that the penalty, for careless action, is 30% of the potential lost revenue. For deliberate but not concealed action, the penalty is 70% of the potential lost revenue, and for deliberate and concealed action, the penalty is 100% of the potential lost revenue.

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Paragraph 5 defines "potential lost revenue" as "the additional amount due or payable in respect of tax as a result of correcting the inaccuracy or assessment".

Paragraph 9 provides for reductions in the penalty for disclosure depending on whether it is prompted or unprompted.

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Paragraph 10(1) provides that "Where a person who would otherwise be liable to a 30% penalty has made an unprompted disclosure, HMRC shall reduce the 30% penalty to a percentage (which may be 0%) which reflects the quality of the disclosure". Paragraph 10(2) provides that "Where a person who would otherwise be liable to a 30% penalty has made a prompted disclosure, HMRC shall reduce the 30% penalty to a percentage, not below 15%, which reflects the quality of the disclosure".

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Paragraph 11 further provides that HMRC may reduce the penalty under paragraph 1 "If they think it right because of special circumstances".

Paragraph 14 also enables HMRC to suspend all or part of a penalty for a careless inaccuracy under paragraph 1, but (under paragraph 14(3)) "only if compliance with a condition of suspension would help P to avoid becoming liable to further penalties under paragraph 1 for careless inaccuracy".

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Under paragraph 15, a person may appeal against a decision of HMRC that a penalty is payable (sub paragraph (1)), or as to the amount of a penalty payable, (subparagraph (2)) or a decision not to suspend a penalty payable, (subparagraph (3)) or a decision as to the conditions of suspension (subparagraph (4)).

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Paragraph 17 deals with the powers of the Tribunal in any such appeal.

"17 (1) On an appeal under paragraph 15(1) the appellate tribunal may affirm or cancel HMRC's decision.

(2) On an appeal under paragraph 15(2) the appellate tribunal may

(a) affirm HMRC's decision, or

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(b) substitute for HMRC's decision another decision that HMRC had power to make.

(3) If the appellate tribunal substitutes its decision for HMRC's, the appellate tribunal may rely on paragraph 11

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(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 appellate tribunal thinks that HMRC's decision in respect of the application of paragraph 11 was flawed.

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(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

(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) On an appeal under paragraph 15(4) the appellate tribunal

(a) may affirm the conditions of suspension, or

(b) may vary the conditions of suspension, but only if the appellate tribunal thinks that HMRC's decision in respect of the conditions was flawed.

(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."

23. HMRC's Compliance Handbook ("Manual") provides guidance on its powers of suspension of penalties as follows:

CH 83130:

'In certain circumstances it will not be possible to set suspension conditions to avoid future penalties. This may be because of the nature of the tax that the penalties related to, or because of the capacity in which the person has incurred the penalties.'

CH 83150:

'Penalties will not be suspended where the circumstances mean that the inaccuracy is a one off. For instance an inaccuracy in an Inheritance Tax account for a deceased person...However, certain types of settlement may have a continuing requirement to make returns. This means that it may be possible to set suspension conditions.'

CH 83160:

'Penalties for inaccuracies that are not likely to recur, whether because of the nature of the tax or the nature of the understatement, are generally not suitable for suspension because it is not usually possible to set conditions that will avoid careless inaccuracies in the future, or during a period of suspension.'

The Appellant's submissions

24. The Appellant did not attend but Tish Press & Company wrote to the Tribunal prior to the hearing to say that the basis of the dispute was not the charging of a penalty but whether that penalty could be suspended.

25. They argue that there is a misapprehension by HMRC in that they have interpreted the fact that the Appellant did not believe that PAYE income needed to be declared on the tax return (and now he does) as a reason not to allow suspension of the penalty. They say that the Appellant believed, when advised of the omission, that the omission would have made no

difference to his tax liability, believing it had already been taxed at source. He did not deliberately omit his PAYE income from the return. He was aware that Tish Press & Company knew he had PAYE income.

26. The amount of the penalty far outweighs the offence committed and is therefore in the nature of a punishment. The penalty legislation was not intended to act as a punishment, rather it was intended to encourage cooperation and compliance. The Appellant has been a compliant taxpayer for more than thirty years and the imposition of the penalty without suspension is anti-productive and too severe a punishment.

27. The Grounds of appeal as stated in the Notice of Appeal were:

1. HM Revenue and Customs Factsheet CC/FS10 relates to *Suspending Penalties for Careless Inaccuracies in Returns or Documents*. HMRC say that the inaccuracy in this case is careless CC/FS10 advises:

“When we can suspend a penalty

We can only suspend penalties for careless inaccuracies in returns or documents if we are able to set at least one suspension condition that will help you avoid penalties for similar inaccuracies in the future.

Each condition must be:

Specific - which means it must be directly related to the cause of inaccuracy.

Measurable - which means you will need to be able to show us whether you have met the condition.

Achievable - which means you will need to show us that you are able to meet that condition.

Realistic - which means we can realistically expect that you will meet the condition

Time Bound - which means you must meet the condition by the end of the suspension period.

We call these SMART conditions

The SMART conditions are in addition the condition that you must file all your returns on time during the suspension period.”

SMART conditions as below can be set and therefore the penalty is capable of being suspended.

Specific - Maintain all documentation relating to PAYE employment, including payslips, end of year forms P60 and if applicable P11D. This is directly related to the cause of the inaccuracy.

Measurable - Maintain a separate record of pay and tax deducted on a monthly basis. This along with the above will show HM Revenue and Customs that Mr Webb has met the condition.

Achievable - All PAYE documents including monthly separate record of pay and tax deducted is to be supplied to the tax agent preparing future returns. This is an achievable requirement in order to ensure that future returns include PAYE income.

Realistic - the Appellant will be expected to fully scrutinize his tax return, if necessary by referring to the notes or contacting his tax agent, in order to ensure that no future omissions occur. He can realistically be expected to comply with this condition.

Time Bound - It is suggested that the suspension period be set at 31 January 2017 which will involve the submission of the tax returns for year ended 5 April 2015 and also 5 April 2016.

2. It is accepted that all future tax returns must be submitted on time. This has not been an issue in the past.

3. The amount of the penalty far outweighs the offence committed.

4. The penalty should be suspended until 31 January 2017.

HMRC's submissions

28. Ms Bartup for HMRC said that the legislation and HMRC's guidance on when a penalty can be suspended is quite clear and does not include a case where a careless inaccuracy had occurred and there is no longer an underlying cause for the inaccuracy for which HMRC could set a specific suspension condition. There is no condition that could be imposed to prevent a further similar inaccuracy as the Appellant and his advisors are now aware that the taxpayer's employed income must be included in his return.

Conclusion

29. Section 14 of Schedule 24 FA 2007 states that HMRC *may* suspend all or part of a penalty for a careless inaccuracy. The legislation allows HMRC to use their discretionary powers to suspend the penalty, but there is no legislation which imposes an obligation on HMRC to do so. Section 14(3) says that HMRC may suspend all or part of a penalty if compliance with a condition of suspension would help P to avoid becoming liable to further penalties.

30. The legislation is silent as to what actual conditions should apply in order for HMRC to suspend a penalty. HMRC Officers therefore rely on internal guidance and the policy is that a penalty arising from a one-off event cannot be suspended, as no condition can be set to prevent a reoccurrence of the error.

31. Section 17(4)(a) gives a limited power to a Tribunal to order HMRC to suspend the penalty only where the Tribunal considers HMRC's decision to be flawed.

32. In *Anthony Fane* [2011 UKFTT 201 TC 01075] Judge Brannan suggested that a Tribunal should look at the issue of suspension and flawed decisions in the judicial sense of the expression, and it is necessary to consider if HMRC, in exercising their discretion, had correctly directed themselves in law.

Judge Brannan goes on to state:

"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.

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:

'If, during the period of suspension of all or part of a penalty under paragraph 1,

the taxpayer becomes liable for another penalty under that paragraph, the suspended penalty or part becomes payable’.

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.

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 their tax returns had been satisfied as required by paragraph 14(6). This would, effectively, require the taxpayer to prove a negative and will require HMRC to conduct a detailed review of the taxpayer's tax returns.

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. The tax returns should be free from errors caused by a failure to exercise reasonable care.

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.

We are fortified in this view by reference to the Explanatory Notes published together with the Finance Bill 2007 in respect of the provisions which were eventually enacted as Schedule 24 Finance Act 2007. The relevant extract from the explanatory Note reads as follows:

‘Suspended penalties will not be appropriate for one off inaccuracies in returns such as a capital gain or a one off transaction. They are more likely to be appropriate for accounting system or record keeping weaknesses, where the money that may have been spent on the penalty could be used to remedy the defective processes ensuring future returns are accurate.’”

33. In our view due diligence was given by HMRC to consideration as to whether the penalty should be suspended. The decision making process was not flawed and there are no grounds under statute for HMRC’s decision not to suspend the penalty to be set aside.

34. As Judge Brannan said in *Anthony Fane*, a condition of suspension must contain something more than just a basic requirement that tax returns should be free from careless inaccuracies. The condition must contain a more practical and measurable condition (e.g. improvement to systems) which would help the taxpayer to achieve the statutory objective. HMRC’s guidance indicating that a one off error would not normally be suitable for a suspended penalty is justified, understandable and, in our view applicable in this case.

35. For the above reasons the appeal is disallowed.

36. 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.

MICHAEL CONNELL
TRIBUNAL JUDGE

RELEASE DATE: 24 MAY 2016