



TC05225

Appeal number: TC/2016/02601

INCOME TAX – penalties for careless income tax return – suspension of penalties – flawed decision not to suspend – Paragraph 14, Schedule 24, Finance Act 2007 – Appeal allowed.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

PAUL RONALD STEADY

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE ALEKSANDER
JULIAN STAFFORD**

Sitting in public at Cambridge County Court on 22 June 2016

Mrs S Foyle FCA of Ballams Chartered Accountants for the Appellant

Mr J Kruyer, an officer of HM Revenue and Customs, for the Respondents

DECISION

1. Mr Steady appeals against HMRC's refusal to suspend penalties in respect of a careless error made on his 2013/14 tax return.

5 2. Mrs Foyle represented Mr Steady, and Mr Kruyer represented HMRC. A bundle of documents was placed before us in evidence, and in addition, we heard oral evidence from Mr Steady.

3. At the start of the hearing, both parties submitted that the hearing should be "stood over" in order for the parties to be able to pursue ADR. Although Rule 3 of the Tribunal's Rules states that the Tribunal should facilitate ADR – this is subject to the qualification "where appropriate". The sole issue in this appeal was whether HMRC were right to refuse to suspend penalties. This is a discrete matter, and we were of the view that it was capable of relatively speedy resolution by the Tribunal, and that (in the circumstances of this case) ADR did not offer material advantages to either party over a determination by the Tribunal in a relatively informal hearing. The amounts involved were modest, and (having taken account of the overriding objective in Rule 2) we considered that it was not in the interests of fairness and justice to defer resolution of the issues, which would inevitably involve additional costs for both parties. Given that the parties were present and ready to "go", we decided that it was in the interests of fairness and justice to proceed with the hearing, and refused the application to postpone. In the event, the time taken for the hearing (and we gave our decision orally at the conclusion of the hearing) was about an hour.

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4. This decision notice sets out the reasons for our decision in detail.

Background Facts

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5. The background facts are not in dispute.

6. Following the end of each tax year, Mr Steady visits or telephones the banks and building societies where he has savings accounts, and asks for certificates of the interest paid during the tax year just ended.

7. In May 2014, Mr Steady went into a branch of Lloyds Bank and asked for a certificate of the interest paid to him on his savings account for the previous year. However neither he nor his accountant noticed that the certificate that he was given in May 2014 was for interest paid in the current (that is 2014/15) tax year, and not 2013/14. In consequence, he declared the wrong amount of interest in his 2013/14 tax return. Following an enquiry by HMRC, he was found to have underpaid income tax for 2013/14 by £2457.73.

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8. It was also discovered that this had happened in the previous tax year – but although he had declared the wrong amount of tax in that year, it was an over-declaration (not an under-declaration), and Mr Steady was due a tax refund.

9. HMRC determined that the error in the 2013/14 return was due to carelessness, and assessed Mr Steady to penalties on the basis that the disclosure was prompted. Maximum abatement was given for the quality of his disclosure (“telling”, “helping” and “giving”). No reduction was given for special circumstances. The penalty was calculated at £368.65.

10. HMRC refused to suspend the penalty. The reason given in the “Penalty Explanation Schedule” was

We cannot suspend any of this penalty. As the error arose through lack of care no measurable suspension conditions can be set. There are no specific, time bound, measurable conditions that can be set to help you avoid careless inaccuracies in the future.

11. Mr Steady’s accountant, Mrs Foyle, wrote to HMRC on 19 October 2015 challenging both whether his behaviour was careless, and the decision by HMRC not to suspend penalties. Mrs Foyle said that it was possible for measurable conditions to be set which could help Mr Steady avoid penalties in future. She suggested as an example that Mr Steady could maintain a schedule of all investments held and monitor this annually to ensure that interest is accurately recorded and returned in each tax year.

12. In her submissions to us, Mrs Foyle gave greater detail of the form the schedule would take. It would be in the form of a spreadsheet which would include the name of each investment account, the account number, the date the account opened (and if it was for a fixed term, the date it would close), interest frequency, and the interest earned in each tax year.

13. In a letter dated 22 October 2015, HMRC replied confirming their view that Mr Steady’s behaviour was careless. They also stated that

As the inaccuracy arose simply due to a lack of sufficient care and attention from Mr Steady ... I do not consider that any SMART conditions can be put in place to prevent future occurrences of this.

14. HMRC issued a penalty assessment for £368.65 on 1 December 2015. The penalty was subsequently upheld on review. The review decision was made in a letter dated 13 April 2016. In it the reviewing officer states in relation to the suspension of the penalty:

The inaccuracy arose due to a lack of sufficient care and attention when completing the return as explained in the caseworker’s letter of 22 October 2015. Therefore it would not meet SMART conditions necessary for suspension.

15. On 6 May 2016, the appeal was notified to the Tribunal.

Relevant law

16. Schedule 24, Finance Act 2007 governs penalties chargeable for inaccurate tax returns. Paragraph 1 of Schedule 24 is 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).
.....

17. 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

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

18. Paragraph 4 sets out the penalty payable under paragraph 1. This case falls within “category 1” which is governed by paragraph 4(2). This provides that the penalty for careless action is 30% of the potential lost revenue. For deliberate but not
5 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.

19. 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”.

20. Paragraph 9 provides for reductions in the penalty for disclosure depending on whether it is prompted or unprompted, and paragraph 10 provides for further
10 reductions to reflect the quality of any disclosure. Paragraph 11 provides that HMRC may reduce the penalty because of special circumstances.

21. Paragraph 14 enables HMRC to suspend all or part of a penalty for a careless inaccuracy:

15 14(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
- 20 (c) conditions of suspension to be complied with by P.

(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—

- 25 (a) action to be taken, and
- (b) a period within which it must be taken.

(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
- 30 (b) otherwise, the suspended penalty or part becomes payable.

(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.

22. Under paragraph 15, a person may appeal against a decision of HMRC that a
35 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)).

23. Paragraph 17 deals with the powers of the Tribunal in any such appeal. Paragraphs 17(4) and (5) deal with the Tribunal's powers in the case of appeals relating to suspension of penalties:

(4) On an appeal under paragraph 15(3)

5 (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

10 (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

15 (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.

20 (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.

24. We were referred to the First-tier Tribunal's decisions in *Collis* [2011] UKFTT 588 (TC) and *Webb* [2016] UKFTT 0364 (TC). Both cases refer to and follow the FTT's decision in *Fane* [2011] UKFTT 201 (TC).

25. Mr Fane made an error in returning the amount of a payment made to him on the termination of his employment (he confused a deduction made to repay a loan from his employer with a deduction on account of PAYE). The tribunal held that the error was careless. As regards suspension of the penalties, it was submitted on behalf of Mr Fane that an appropriate suspension condition would be that Mr Fane would file accurate self-assessment tax returns for the following two years. The Tribunal held that such a condition did not satisfy the requirements of paragraph 14 of Schedule 24:

35 59. [the HMRC assessing officer] explained how he applied HMRC's guidance [...]. In particular he considered that a condition of suspension could not properly apply to a "one-off event."

40 60. 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."

5 61. 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.

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

15 63. For these reasons we do not agree with Mr Lever's suggestion that a suitable condition of suspension would be a requirement that the Appellant correctly returned other income (e.g. rental income) on his tax return for the next two years.

20 64. 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 i.e. the tax returns should be free from errors caused by a failure to exercise reasonable care.

25 **HMRC's case**

26. HMRC submit that Mr Steady's case is on all fours with that of Mr Fane – Mr Steady had made a "one off" error, and it was not possible to establish conditions that would help Mr Steady avoid careless inaccuracies in the future. HMRC further submitted that maintaining a spreadsheet of the sort suggested by Mrs Fane was no more than HMRC would expect of a prudent taxpayer in any event.

Discussion

27. We find that HMRC's decision to refuse to suspend penalties is flawed, as they have reached a decision that is *Wednesbury* unreasonable. In essence, HMRC have fundamentally misinterpreted the operation of paragraph 14 of Schedule 24. They say that because Mr Steady was careless in filing his returns, it is impossible to set SMART conditions. But penalties only arise in the case of careless or deliberate behaviour. And those penalties can only be suspended in the case of careless behaviour. The fact that Mr Steady was careless does not mean that it is impossible to establish suspension conditions – to the contrary, it is only because he was careless that he may become entitled to have his penalty suspended. Further, the mere fact

that Mr Steady was careless does not mean that it is impossible to establish conditions to suspension that meet the requirements of paragraph 14.

28. Mr Steady's case is not on all fours with *Fane*. In *Fane*, the suspension condition being considered was merely that Mr Fane file accurate self-assessment returns in future. In Mr Steady's case, it is proposed that a detailed schedule of his savings accounts is kept, and that this will help him to ensure that his tax returns are accurate in future. It matters not that a prudent taxpayer might keep such a schedule (although we would question whether a typical prudent taxpayer would keep such a schedule) – indeed it could be argued that the purpose of the suspension conditions is to bring the standard of compliance of the careless taxpayer up to the standard of a prudent taxpayer. We are satisfied (and find) that a requirement to maintain a schedule of the sort described by Mrs Foyle, would be a practical and measurable condition (e.g. improvement to systems) which would help Mr Steady to achieve the statutory objective that his tax returns should be free from errors caused by a failure to exercise reasonable care.

29. We find HMRC's decision not to suspend penalties to be flawed, we allow Mr Steady's appeal, and we order HMRC to suspend the penalty.

30. We do not have powers to set conditions for suspension, but in order to avoid further appeals in this case, we would recommend that HMRC give consideration to the following conditions as to suspension:

(1) That Mr Steady instructs a firm of chartered accountants, chartered certified accountants or chartered tax advisors to prepare a draft of his tax return for 2015/16.

(2) That the firm so instructed maintains a spreadsheet setting out for each investment account held by Mr Steady, the account name and number, the date opened, the closing date (if the account is for a fixed term), the interest frequency, and the amounts of interest paid in each tax year.

(3) That Mr Steady files his 2015/16 tax return and pays the tax due by the due date.

(4) That the condition has effect until 31 January 2017.

31. Mr Steady did not appeal against the penalty, only its suspension. Therefore, we did not consider in any detail Mr Steady's actions, and whether they amounted to carelessness. But the mere fact that there is an error in a tax return does not mean that a taxpayer has been careless. Moreover, on the basis of the material we have seen, we consider that Mr Steady would have had a strong arguable case that his behaviour was not careless. To levy a penalty of £368.65 on a taxpayer who heretofore has had a good compliance record over many years, and then to refuse to consider suspension of those penalties, does not reflect well on HMRC.

Conclusion

5 32. We find HMRC's decision not to suspend penalties to be flawed, we allow Mr Steady's appeal, and we order HMRC to suspend the penalty.

10 33. 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.

15 **NICHOLAS ALEKSANDER**
TRIBUNAL JUDGE

RELEASE DATE: 5 July 2016