TC02888

Appeal number: TC/2013/01598

Income Tax – penalty – inaccuracy in tax return leading to understatement of tax – whether inaccuracy "careless" – whether penalty should be suspended – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MR AVTTAR CHANNA **Appellant**

- and -

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

TRIBUNAL: DR K KHAN
MR LESLIE HOWARD

Sitting in public at Bedford Square, London on 11 July 2013

The Appellant represented himself

Gloria Orimoloye, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Appeal

1. This is an appeal against a penalty assessment of £461.52 made pursuant to Schedule 24 Finance Act 2007 for an inaccuracy in the completion of tax return. The penalty was levied at the rate of 15%. It relates to the tax year 2009/2010.

2. The Tribunal must consider whether the Appellant was "careless" in the completion of the relevant tax return and as such a penalty is payable.

3. A separate issue arises as to whether the penalty should be suspended subject to the understanding that future tax returns are completed correctly and submitted on time. HMRC have refused to suspend the penalty since the particular source of income (share-base payments made to an employee after cessation of employment) is unlikely to occur in the future. A penalty can only be suspended if the suspension would help the person avoid a similar error in the future.

Relevant legislation and cases

(1) Paragraph 1 of Schedule 24 states in relevant part as follows:

(2) A penalty is payable by a person (P) where –

(a) P gives HMRC a document, and

(b) Conditions 1 and 2 are satisfied.

(3) 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.

(4) Condition 2 is that the inaccuracy was careless (within the meaning of paragraph 3) or deliberate on P's part.

(5) Where a document contains more than one inaccuracy, a penalty is payable for each inaccuracy.

(2) Paragraph 3 of Schedule 24 outlines degrees of culpability:

(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 if (for example, by submitting gales 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.

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

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

(5) Paragraph 10(1) provided at the material time 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) provided 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".

(6) Paragraph 11 further provides that HMRC may reduce the penalty under paragraph 1 "If they think it right because of special circumstances". Paragraph 11(2) provides that special circumstances do not include ability to pay.

(7) Paragraph 14 also enables HMRC to suspend all or part of a penalty for a careless inaccuracy under paragraph 1 but only if it would help to avid becoming liable to further penalties for careless inaccuracy.

(8) Under paragraph 15, a person may appeal against a decision of HMRC that a penalty is payable, or as to the amount of a penalty payable, or a

decision not to suspend a penalty payable, or a decision as to the conditions of suspension.

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

Case Law

(1) *Yusuf Budaici* TC01098

(2) *Phillip Boughey* TC02082

(3) *Anthony Fane* TC01075

Background facts

(1) The Appellant was employed by Glaxo Smith Kline (GSK). His taxable pay for the year 2009/10 was £31,474.84 and the tax paid £5,107.00. These are the amounts shown on his P45 which is dated 28 February 2010.

(2) Upon leaving GSK he received a redundancy payment of £101,737 part of which he chose to invest in the company pension. The taxable amount of the redundancy payment received was £24,921.

(3) Employees receive at the end of the tax year a P60 form which provides information about the employment income for the previous year. If the employee was not in work at the end of the tax year, income from the employment can be found on their P45 form which they receive from their employers when they ceased work. The P45 would normally give detail of redundancy payment and payments for unused holiday payments, pension scheme and for share options and other share awards.

(4) Payment of redundancy payments made would normally be made under deduction of basic rate tax. The taxpayer would be liable to account for any higher rate tax.

(5) On 12 January 2011 the Appellant submitted a self-assessment return for the year ending 2009/2010. He was advised that he had understated his income for 2009/10.

(6) On 3 August 2011, the Appellant's accountant, Mr Chalmers of Robsons Accountants, wrote to HMRC explaining that he had in his possession two payslips both dated 31 March 2010 from GSK Services. One payslip showed the Appellant's net pay and deductions while the other showed taxable benefits of £7,536.00 which related to payments made as a result of share options.

(7) Mr Chalmers said he was not sure why the information on the two payslips was not completed at the same time as the P45 and why two payslips were dated the same date, which is March 2010.

(8) Mr Chalmers stated that he relied on the PAYE system to deduct the right amount of tax and he had assumed that the P45 correctly showed all the Appellant's income. He completed the tax returns for the Appellant.

(9) Mr Chalmers advised that the Appellant's employment income in relation to the shares was omitted from the Appellant's tax return because he thought that all income was shown on the P45 and the payslips showing the share income was not received until 31 March 2010.

(10) The Appellant left GSK on 28 February 2010. The shares were acquired by him after that date so the income could not have been shown on the P45.

(11) In a letter from GSK dated 29 January 2010 the Appellant was advised that the award of shares in the GSK Share Value Plan would be subject to the usual tax (basic rate) and national insurance deduction.

(12) It appears that the Appellant did not contact GSK after he left their employment in February 2010.

(13) The facts which emerge are as follows:

(a) A P45 was issued at the date of leaving which is 28 February 2010. It showed pay of £31,474.84 and tax of £5,107.00. A payslip was issued on 31 March showing taxable pay of £48,860.64 and tax of £8,584. A second payslip dated 31 March 2010 showed taxable pay of £56,396.64 and tax of £10,031.

(b) The taxable amount of the redundancy payment the Appellant received was £24,921 (after payment to company pension) and the taxable pay declared by the Appellant on his return was £31,474.84; this being the amount shown on his P45 which was dated 28 February 2010.

(14) In his Compromise Agreement dated 29 January 2010, the Appellant was informed of the following:

(a) He would receive a gross redundancy payment of £101,737;

(b) He would be paid for any outstanding accrued holiday, bonus and grants under the share option plan;

(c) The first £30,000 of the payment made would be tax free. The remaining amounts would be subject to basic rate and national insurance which should be deducted at source.

(15) The Appellant was advised on 20 December 2011 that he would be liable for a potential penalty of 15% of the potential loss revenue of £3,076.84 due to the fact that he did not take sufficient care in completing his tax return and in not accounting for tax on payments made to him.

(16) He asked that the payment be suspended but this was declined by HMRC.

(17) On 1 February 2012 he asked for a review but the decision not to suspend was upheld on review.

(18) On 12 June 2012 he appealed.

The Appellant's submissions

(1) The Appellant says that since he was a PAYE employee in 2009/10 he replied on the PAYE system to collect the appropriate amount of tax at source;

(2) The Appellant believed that the P45 would contain all the relevant information needed to complete his self-assessment returns and he signed those forms believing the return to be true and accurate.

(3) The information in the payslip received on 31 March 2010 showing a taxable benefit of £7,365 was not shown on the P45 form and the receipt of this payslip in March 2010 has caused some confusion which resulted in the taxpayer not declaring that amount on his tax return. He felt it is unfair to pay any further tax on these amounts and the correct amount of tax should have been deducted at source.

(4) The Appellant says that it is reasonable to assume that the correct amount of tax would have been deducted by GSK and they would not have expected further payslips which were not included in the P45 return.

Respondents' submissions

(1) The Appellant was responsible for submitting and completing accurate self-assessment returns for the year 2009/10 and this was not done.

(2) The employer is only obliged to deduct tax at the basis rate from any payment made after the employee's date of departure. The employee is liable to account for any higher rate tax on payments made after that date. HMRC employment page and other guidelines are clear on this point and therefore the additional payments received after the Appellant left GSK should have been included in the Additional Information page. HMRC decided not to suspend the penalty since it is unlikely that this error would occur in the future and therefore the condition for suspension was not fulfilled.

(3) HMRC believe the case law supports their position.

Conclusion

(1) Schedule 3(1)(a) of Schedule 24 defines "carelessness" to mean a failure to take reasonable care. There is an obligation on taxpayers to exercise a standard of care required of a reasonable person. It is accepted that an omission by a taxpayer may be innocent but may nevertheless be treated as a failure to take reasonable care. This is because a careless inaccuracy may be innocent inaccuracy.

(2) The Appellant essentially argues that the correct amount of tax should have been deducted under the PAYE system. Since this was not done he is not at fault for any non-payment of tax. This is not an acceptable argument. The taxpayer had a professional adviser who, together with the Appellant, should have realised that his return contained errors. They knew from the Compromise Agreement that there were certain post termination payments which would not have been included in the P45. A prudent taxpayer would have made the necessary enquiries of the employer to establish whether the information in the tax return was correct and was fully contained in the P45.

(3) It is accepted that the taxpayer is a non-specialist and has limited knowledge of taxation matters. However, the information provided on the notes to the tax return clearly states that lump sum payments and termination payments together with sums received as payments for shares and other benefits which were received after the employment had ceased should have been included as additional information on the return.

(4) It is reasonable to expect a person who completes his tax return to ensure that the documents relied upon for information include all details of their income for the year. The omission of certain payments from the return meant that the Appellant did not exercise the reasonable care required or made the necessary enquiries to find out about those payments.

(5) It is accepted that the circumstances in 2009/10 were unusual in that the taxpayer received payments after leaving his employment with GSK which were not included in the P45. It is not unreasonable however to expect the Appellant to have discussed the termination payments with his accountant and to have checked the returns before he had signed them off. This is not a difficult matter. The Compromise Agreement taken together with the figures provided by GSK would have revealed an inaccuracy.

(6) The new tax penalty regime is aimed at encouraging taxpayers to take reasonable care in the completion of their returns. The onus is on the taxpayer.

(7) HMRC have made out a *prima facie* case that the taxpayer has been careless and there are no submissions made by the taxpayer to show that this was not the case.

(8) The question which must be asked is would a taxpayer in similar circumstances have done or omitted to do what the taxpayer did and it is quite clear that a taxpayer in similar circumstances would have made the necessary enquiries to ensure that all the figures provided were correct. A person cannot appoint an agent to complete their return and then deny responsibilities for their tax affairs. They will still have a residual duty to exercise reasonable care within their ability and competence to do so.

(9) The Tribunal does not have issue with the facts that there are no special circumstances under paragraph 11, Schedule 24 FA 2007 allowing HMRC to reduce the penalty. The term is not defined in the legislation. There is nothing uncommon or out of the ordinary in this case. It is not unusual to receive payments from an employer after an employment has ended. This is especially the case where the Compromise Agreement draws the Appellant's attention to the payments which were to be made.

(10) There is also nothing to suggest that penalty should be suspended since it is unlikely that these inaccuracies will arise in the future. The Appellant is not likely to leave his employment with a lump sum payment in the near future. Therefore similar circumstances will not occur such that suspension of the penalty will be appropriate.

(11) The Tribunal does have sympathy with the Appellant in that receiving payslips after the end of employment can be confusing. However, the employer, GSK clearly advised on 29 January 2010 that the award of shares in the GSK Share Value Plan will be subject to the usual tax and national insurance deductions. As the share payments were received after leaving, GSK would only be required to deduct basic rate tax from the income.

(12) One would have expected the Appellant to take action to find out the gross amount of the award and the amount of tax deducted and to have included those figures in their 2009/10 return. If he had contacted GSK they would have been able to provide a copy of the 31 March 2010 payslips which would have provided the correct figures for inclusion in the return. The fact that the payslips were provided in March 2010 after he had left employment could have been an administrator's slip up by GSK. However, the taxpayer must take responsibly for their own tax affairs and act in a reasonable manner. He knew payments were to be made post termination and an administrative error does not excuse his primary responsibility to submit accurate returns.

(13) In this case the Tribunal would dismiss the appeal since the taxpayer failed to act in a way which a prudent and reasonable personal would have acted in completing their self-assessment return.

4. Appeal dismissed.

5. 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.

DR K KHAN
TRIBUNAL JUDGE

RELEASE DATE: 13 August 2013