[2015] UKFTT 0259 (TC)

TC04453

Appeal number: TC/2014/05786

INCOME TAX – penalty – Sch. 24, FA 2007 – whether omissions 'careless' – held, with one exception, 'yes' – whether penalties ought to be suspended on the condition proposed – held 'yes' – appeal allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

MARK JOYCE **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN WALTERS QC
JOHN WOODMAN

Sitting in public at North Shields on 9 February 2015

The Appellant in person

Ms Linda Shepherd, HM Revenue and Customs, for the Respondents

DECISION

1. Mr Mark Joyce appeals against penalties totalling £1,982.38 relating to the tax year 2011/2012. There are two penalties involved – a penalty of £1,967.54 and a penalty of £14.84. The penalty of £1,967.54 was charged in respect of potential lost revenue relating to Mr Joyce's returned employment income, which omitted £30,000 received in connection with redundancy from his employment with AkzoNobel and £3,743 received from his employment with Dow Chemicals. The penalty of £14.84 was charged in respect of potential lost revenue of £98.95 in relation to foreign dividend income. Mr Joyce accepts that there were these omissions and that they were incorrect. He has paid the additional tax of £13,216.59 arising from the amendments to his self-assessment tax return made by HMRC' closure notice dated 29 July 2014.

2. The penalties are inaccuracy penalties charged under Schedule 24, Finance Act 2007 ("FA 2007"). The Respondents ("HMRC") consider that Mr Joyce's behaviour was 'careless' within the meaning of paragraph 3, Schedule 24, FA 2007 (that is, that the inaccuracies were due to failure by Mr Joyce to take reasonable care), and have refused to suspend either penalty.

3. Mr Joyce denies that he failed to take reasonable care in submitting his self-assessment tax return for 2011/12, and, in any event, argues that the penalties should be suspended pursuant to paragraph 14, Schedule 24, FA 2007.

4. Mr Joyce gave oral evidence at the hearing of the appeal and was cross-examined by Ms Shepherd, for HMRC. We also had before us a bundle of documents produced by HMRC and a clip of documents produced by Mr Joyce.

5. From the evidence we find the following facts.

6. Mr Joyce completed a self-assessment tax return for the first time in respect of the tax year 2011/2012, because HMRC told him to do so. He completed the return on-line.

7. In that year Mr Joyce had successively three employments. The first was with Dow Chemicals, which was acquired by AkzoNobel and his employment was transferred to AkzoNobel in the course of the acquisition. Then he was made redundant by AkzoNobel and obtained a new employment with Aesica Limited ("Aesica").

8. The form P60 (End of Year Certificate) received by Mr Joyce from Aesica included the following information: his pay 'in previous employment(s)' was £136,331.75, with tax deducted of £46,716.16; his pay in 'this employment' (i.e. with Aesica) was £15,018.95 with tax deducted of £3,832.24.

9. The final payslip he received from AkzoNobel (which states the 'Pay Date' as '10/19 JAN 2012') shows total income in that period (before deduction of income tax

and national insurance contributions) of £109,506.25. This was made up of two amounts of '&REDUN'NT' and '&EX GRAT' totalling £30,000, another amount of 'EX GRAT' of £59,586, an amount of 'BONUS' of £2,986.20, an amount of 'HOLIDAY' of £2,182.22 and an amount of 'PILON' of £14,931. From these amounts an amount of 'PENSION' of £179.17 was deducted.

10. On the final payslip he received from AkzoNobel there were deductions of £31,479.76 on account of income tax and £381.54 on account of national insurance contributions noted. The total income tax deducted to date in the tax year was stated as £46,716.16, which agreed with the later form P60 noted above.

11. Mr Joyce was confused as to how he should complete his self-assessment tax return. He appears to have completed his return and later amended it. The return as originally submitted generated a repayment of tax to Mr Joyce of £8,959. The letter (dated 21 February 2014) from HMRC to Mr Joyce initiating the enquiry under section 9A Taxes Management Act 1970 into his return states that his amendment was received (by HMRC) on 16 February 2013. Mr Joyce had not understood the online guidance put out by HMRC and had telephoned the HMRC Contact Centre on 8 February 2013 and again, after receiving the repayment, which made his suspicious that the return as originally submitted had been incorrect, 4 times in the morning of 15 February 2013. Although he obtained transcripts of those calls from HMRC, they were not put in evidence and Ms Shepherd told us that she had not read or listened to them. We therefore accept Mr Joyce's evidence that the final call was with a person at a tax office rather than the Contact Centre. We also accept that no one during these calls asked Mr Joyce for his National Insurance number or his self-assessment reference to help check whether the information he had entered on his return (as originally submitted) was correct.

12. We also accept that Mr Joyce was advised that if he had received a redundancy payment of £40,000, £30,000 would be tax free and £10,000 should be put in the 'taxable box' and 'those figures would be reduced from his P45'.

13. In the event, under the part of his return dealing with 'Share schemes and employment lump sums, compensation …' he entered £79,506 in box 5: 'Redundancy and other lump sums and compensation payments'. This was the total income from his final payslip from AkzoNobel (£109,506) less £30,000. He also entered £30,000 in box 8 ('Exemptions for amounts entered in box 4') – in which no amount had been entered) and he did not enter any amount in box 9 ('Compensation and lump sum £30,000 exemption'). He entered £31,480 – being the income tax deducted from the payment recorded in his final payslip from AkzoNobel – in box 6 ('Tax taken off boxes 3 to 5').

14. Mr Joyce entered the figure of £26,826 in box 1 of the Employment page for his employment with AkzoNobel ('Pay from this employment – enter the total from your P45 or P60'). He calculated this amount by deducting £109,506 (the total income from his final payslip with AkzoNobel) from the figure of £136,332 given as his pay from previous employments on the form P60 received from Aesica (as mentioned above). He also entered £15,236 in box 2 of that Employment page as 'Tax taken off

pay in box 1'. This was calculated by deducting £31,480 (see: above) from the figure of £46,716 given as tax deducted from his pay in previous employment(s) on the form P60.

15. Mr Joyce and Ms Shepherd agreed before us that the figure of £26,826 entered in box 1 of the Employment page for his employment with AkzoNobel had been incorrect and the correct figure ought to have been £56,826. He had effectively claimed the £30,000 exemption twice – both in box 1 of the Employment page and box 5 'Share schemes and employment lump sums, compensation …'.

16. Ms Shepherd suggested that Mr Joyce had not taken reasonable care in putting down the figure of £26,826 in box 1, in the context that his salary from AkzoNobel in 2012 was in the region of £58,000 a year and the figure noted in box 2 as tax taken off the pay inserted in box 1 was £15,236 – which would appear obviously too high in relation to income of £26,826.

17. Mr Joyce denied that that he had not taken reasonable care, saying that it was simply a mistake made following advice given by the tax office.

18. Ms Shepherd told us that there were in fact 3 mistakes made in Mr Joyce's return. Apart from the double counting of the £30,000 exemption referred to above, there should have been 3 Employment pages submitted (one for each of Mr Joyce's employments with Dow Chemicals, AkzoNobel and Aesica) and only 2 had been submitted. He had also received £3,743 from his employment with Dow Chemicals and had not separately returned it. Mr Joyce thought that his income from Dow Chemicals had been included in the figure of £136,331.75 recorded as pay 'in previous employment(s)' in the form P60 received from Aesica (as mentioned above). In fact it was not included in that amount - £136,631.75 was the total figure received from AkzoNobel. Mr Joyce said that he did not recall receiving a form P45 or P46 from Dow Chemicals on the transfer of his employment to AkzoNobel as a result of the acquisition referred to above.

19. The third mistake was that Mr Joyce omitted to return dividend income on foreign (US) shareholdings, which he had held since March 2010. The sterling equivalent figures for the tax years 2010/2011 and 2011/2012 totalled £476.29 from which £71.45 US tax had been deducted. Mr Joyce informed HMRC of this omission in a letter dated 10 March 2014, in which he stated that he had not been aware that he had to declare this income because he had paid tax on them when he first purchased them and had been suffering 15% foreign tax deduction from the dividends. He asked that HMRC should check whether he owed further tax on this income and whether he should complete a self-assessment for this income. This letter was, of course, written after HMRC had opened the enquiry into his self-assessment tax return for the tax year 2011/2012 on 21 February 2014. Mr Joyce had taken advice from Chartered Accountants in connection with the enquiry and they had told him that the income from foreign shares should have been declared.

20. The penalty raised in respect of the omission of the income from foreign shares was on the basis that the disclosure was 'prompted' for the purposes of Schedule 24,

FA 2007, because he had not informed HMRC before he had reason to believe that HMRC were about to discover the omission – although Mr Joyce maintains it was unprompted.

21. Two issues arise for our decision. The first is whether Mr Joyce failed to take reasonable care in submitting his amended self-assessment tax return, and the second is, if so, whether HMRC ought not to have refused to suspend any of the penalties charged.

22. We consider that Mr Joyce failed to take reasonable care in reporting his income from AkzoNobel. He effectively claimed the £30,000 exemption twice, and although we accept that he did take advice from HMRC which was unclear, we consider that it ought to have been obvious to him that the tax liability from the return as submitted was too low and a person taking reasonable care would have taken further steps to check the position. Mr Joyce did not take such steps.

23. As to the omission of the income of £3,743 from Dow Chemicals, we accept that Mr Joyce's assumption that that income was included in the amount of pay 'in previous employment(s)' in the form P60 received from Aesica was reasonable, and the amount of the Dow Chemicals income was not so much as to raise obvious suspicion that there had been an underdeclaration of income, particularly given the direct transfer of his employment from Dow Chemicals to AkzoNobel as part of the acquisition. We therefore, on balance, conclude that Mr Joyce did not fail to take reasonable care in relation to this omission.

24. As to the omission of the foreign dividend income. We conclude that Mr Joyce's disclosure was prompted because in our view the enquiry into his return was the reason for the disclosure being made. It was not made at a time when Mr Joyce had no reason to believe that HMRC were about to discover the inaccuracy (cf. paragraph 9(2), Schedule 24, FA 2007).

25. Suspension of the penalty was refused on the basis that there were no specific conditions that HMRC could set that would prevent Mr Joyce making a similar error in future. The Chartered Accountants retained by Mr Joyce proposed conditions for suspension of the penalties being the setting up by them of a checklist on an excel spreadsheet of all Mr Joyce's sources of income, which would be updated as required and reviewed before Mr Joyce's tax returns were submitted in future. Further, any discussions or decisions taken with or by Mr Joyce would be recorded in file notes and the spreadsheet and any file notes would be available to HMRC for examination at any time. However, these conditions were rejected by HMRC on the basis that they were 'only what any prudent man would do when completing a return'.

26. HMRC may suspend a penalty only if compliance with a condition of suspension would help the taxpayer concerned to avoid becoming liable to further penalties for careless inaccuracy (paragraph 14, Schedule 24 FA 2007). Further, on appeal, we have jurisdiction to order HMRC to suspend a penalty only if we think that HMRC's decision not to suspend was flawed when considered in the light of the

principles applicable in proceedings for judicial review (paragraph 17(3),(6), Schedule 24, FA 2007).

27. We take the view that a condition requiring Mr Joyce to retain Chartered Accountants to advise on the completion and submission of his self-assessment tax returns for a period of 2 years including the setting up by them of a checklist as proposed and the availability for examination by HMRC of the checklist and file notes as proposed, would be a condition which would help Mr Joyce to avoid becoming liable to further penalties for careless inaccuracy. We also consider that HMRC's refusal to suspend the penalties on this condition was unreasonable because it failed to take account of the fact that such a condition would help Mr Joyce to avoid becoming liable to further penalties for careless inaccuracy.

28. Our conclusion on the appeal therefore is to allow the appeal insofar only as it relates to the penalty charged for the omission of Mr Joyce's income from Dow Chemicals from his self-assessment tax return for the tax year 2011/2012 but to order HMRC to suspend the remaining penalties for a period of 2 years on the condition set out above.

29. 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.

JOHN WALTERS QC

TRIBUNAL JUDGE
RELEASE DATE: 2 June 2015