[2016] UKFTT 0412 (TC)

TC05166

Appeal number: TC/2016/00043

Income Tax – penalties for careless inaccuracies – failure to include income from previous employment – whether the penalty should be upheld – yes – whether the penalty should be suspended – yes – appeal allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

IAN HALL **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD CHAPMAN
MS ANN CHRISTIAN

Sitting in public in Manchester on 24 February 2016

The Appellant appeared in person

Mrs C Douglas, Presenting Officer, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an appeal by Mr Ian Hall against the imposition of a penalty in the sum of £461.82 by a notice issued on 30 October 2015 pursuant to Schedule 24 of the Finance Act 2007 and the refusal to suspend the same. The penalty arose out of a closure notice dated 28 October 2015 amending Mr Hall's self-assessment tax return to add further income of £17,582 and further tax of £3,954. It is HMRC's case that Mr Hall was careless in submitting a return that contained an inaccuracy which led to an understatement of tax.

The Evidence

2. We heard oral evidence from Mr Hall himself. HMRC did not adduce any written or oral witness evidence. We have also considered a bundle containing the documents provided by each party.

Findings of Fact

3. There were no substantial disputes of fact between the parties. Mr Hall gave his evidence in a frank and clearly genuine manner and was not cross-examined by Mrs Douglas. With this in mind, we make the following findings of fact.

4. Mr Hall was employed by Atkins Limited ("Atkins") until 28 June 2013. He then joined a company trading as Invensys. However, Mr Hall's employment was soon transferred to Siemens Rail Auto Holdings Limited ("Siemens") following their purchase of Invensys. It is not clear what the timeframe was between Mr Hall becoming an employee of Invensys and becoming an employee of Siemens, save that this was within the same tax year. We did not hear evidence upon whether this was a TUPE transfer or even whether Mr Hall was formally engaged by Invensys at all as opposed to Siemens. Neither party has suggested that anything turns upon this point and so for the purposes of this decision we treat Mr Hall's employment since 28 June 2013 as being with Siemens.

5. Mr Hall received his P45 from Atkins and sent it to the human resources department at Invensys. Siemens subsequently provided Mr Hall with a P60 end of year certificate for the tax tear to 5 April 2014 ("the P60"). The P60 correctly only included the income earned and tax deducted in the course of his employment with Siemens.

6. The time came for Mr Hall to submit a self-assessment tax return for the year 2013/2014 ("the Return"). This had been necessary whilst employed by Atkins because he received various taxable benefits and so remained necessary for 2013/2014. However, at that time Mr Hall's employment with Siemens would not itself have required him to submit a return as he did not receive any such benefits.

7. Mr Hall submitted the Return online on 5 December 2014. He did this with the assistance of his now ex-wife and relied only on the P60 in the same way that he had done for previous years. Mr Hall says, and we accept, that he thought all relevant figures were in the P60 and he did not consider whether or not his previous income from Atkins had been included.

8. The result was that Mr Hall only declared in the Return his income with Siemens in the sum of £45,372 and tax deducted of £10,511, producing a repayment of tax in the sum of £2,450.20.

9. By a letter dated 4 September 2015, HMRC opened an enquiry into the Return. Mr Hall responded to this letter as follows in a letter dated 18 October 2015:

> "I entered the details from my P60 (copy to follow) from Siemens Rail accurately. I assumed as I submitted my P45 from Atkins Rail to Siemens Rail when I moved employers that this figure included my Atkins earnings brought forward, however it would appear from your letter that it has not."

10. This resulted in the closure notice referred to in the introduction. Mr Hall accepts that the amendments to the return are accurate and we make a finding of fact to that effect.

11. The closure notice also stated as follows:

> "We cannot suspend this penalty as it is not likely that you will make this error in future tax returns."

12. A formal notice of penalty assessment was issued on 30 October 2015 in the sum of £461.82. Mr Hall appealed this to HMRC by a letter dated 9 November 2015. HMRC upheld the penalty by a letter dated 7 December 2015.

13. Mr Hall then appealed to this tribunal. His grounds of appeal have been treated by all parties as those set out in a letter dated 1 January 2016 as follows:

> "HMRC correctly identified an error in my Self-Assessment tax return whereby I had relied on the year end P60 from my employer at that time (Siemens) for my employment earnings total for the tax year in question. The P60 earnings did not account for earnings from an earlier employment during the year (Atkins) which I wrongly assumed would have been included and the P60 as I had presented Siemens with the P45 that I had received upon leaving Atkins.
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> This was an innocent mistake on my part for which I apologise and will learn from for the future.
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> In the circumstances, whilst I have no argument with HMRC's calculations and the resultant tax amount owed, I do fee that the 15% penalty that has been applied (amounting to £461.82) to the tax underpayment is very harsh and is disproportionate to the scale and circumstance of my innocent mistake and my previously blemish-free track record with respect to personal tax payments.

> Can I please ask that the penalty is reviewed and reduced, ideally to zero, as a fairer reflection of circumstances of this self-assessment error."

14. We note at this stage that Mrs Douglas has very fairly also treated the decision not to suspend and whether or not the penalty was proportionate as being in issue, even though they were not referred to in these grounds of appeal.

15. Taking all these matters into account, we find as a fact that Mr Hall acted in error, that his mistake was innocent and that it was based upon the mistaken assumption that all relevant earnings were included in his P60. Indeed, HMRC have themselves accepted throughout that there was no deliberate attempt by Mr Hall to gain a tax advantage.

The Legal Framework

16. The relevant statutory framework is found in schedule 24 of the Finance Act 2007 ("Schedule 24"). For present purposes, the most relevant paragraphs of Schedule 24 can be summarised as follows:

(1) Paragraph 1 provides for a penalty to be payable by a person ("P") in specified circumstances, which include where an inaccuracy was careless.

(2) Paragraph 3(a) provides that an inaccuracy is careless, "if the inaccuracy is due to failure by P to take reasonable care."

(3) Paragraph 4(1)(a) provides that the penalty for careless action is 30% of the potential lost revenue.

(4) Paragraph 9 provides that where a person who would otherwise be liable to a 30% penalty has made a prompted disclosure, HMRC shall reduce the penalty to a percentage not below 15% which reflects the quality of the disclosure.

(5) Paragraph 11 provides a discretion for HMRC to reduce the penalty further for special circumstances.

(6) Paragraph 14 allows HMRC to suspend all or part of a penalty for a careless inaccuracy but, pursuant to 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."

(7) Paragraph 17 allows the tribunal to order HMRC to suspend the penalty but, pursuant to paragraph 17(4)(a), "only if it thinks that HMRC's decision not to suspend was flawed."

17. The parties agree that the burden of proof is upon HMRC to establish that the penalty was properly imposed and that Mr Hall failed to take reasonable care when he submitted the inaccurate Return. However, the burden of proof is upon Mr Hall to establish that the penalty ought to have been suspended. In either event, the standard of proof is the balance of probabilities.

The Issues

18. We remind ourselves that the inaccuracy is not itself in issue, nor is the fact that there was a prompted disclosure. Further, there is no suggestion that the penalty should have been reduced for any special circumstances. The following issues therefore arise for determination:

(1) Whether or not Mr Hall acted carelessly.

(2) Whether or not the penalty was proportionate.

(3) Whether or not the penalty should be suspended.

The Parties' Submissions

HMRC

Carelessness

19. Mrs Douglas defined carelessness as being an absence of reasonable care. She drew our attention to *Julie Ashton v HMRC* [2013] UKFTT 140 (TC) (Judge Staker and Mr Thomas) in which the First-tier Tribunal stated as follows at [35] and [37]:

> "[35] In the present case, it is argued that the Appellant was unaware of her obligation under tax law to return the additional payments and to pay tax on those additional payments. In effect, this is a plea of ignorance of the law. Consistently with what has been said above, the Tribunal considers that a prudent and reasonable taxpayer must at the very least be expected to take prudent and reasonable steps to ascertain what are his or her tax obligations. Only where a taxpayer has done so could it be said that the ignorance of the law is not due to a "failure to take reasonable care." The Tribunal does not accept the Appellant's argument, at paragraph 12 of her grounds of appeal, that "not other knowledge about tax is reasonably known by a non-specialist taxpayer," than that, "income tax is payable on income" and that "income tax from earnings is collected at source under the PAYE scheme." Even if a taxpayer genuinely had no other knowledge than that, a prudent and reasonable taxpayer would take steps to obtain whatever other knowledge is needed in order to complete their return. Ways in which such knowledge can be obtained would include contacting an HMRC helpline. Of course, a taxpayer could also seek professional advice, if the taxpayer so chose."
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> …
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> "[37] The Tribunal agrees with what was said in *Verma* at [13], "that An omission may be innocent, in the sense of not having been deliberate, but such an innocent omission may still be the result of a failure to take reasonable care." It is implicit in the wording of Schedule 24 that a careless inaccuracy will be innocent, since otherwise it would be characterised for purposes of paragraph 1 as a "deliberate" inaccuracy rather than a "careless" one."

20. Similarly, the First-tier Tribunal stated as follows in *Anthony Fane v HMRC* [2011] UKFTT (TC) (Judge Brannan and Mrs O'Neill) at [50]:

> "[50] In this case we consider that the Appellant failed to exercise reasonable care when he completed his 2008-2009 tax return. In particular, when he misunderstood his payslip and mist-stated the amount of tax deducted he failed to exercise the standard of care expected of a reasonable person. The transactions were unusual, particularly the refund of the advance by his employer, and this should have alerted the Appellant to the need to pay special attention and if necessary seek advice from his adviser or from HMRC. He failed to do this. The error was entirely innocent. It was, however, careless."

21. Mrs Douglas submitted that Mr Hall's actions were careless because he should have ensured that he had all available information when he completed the Return. The tax return itself highlights the need to include the pay and tax details of any earlier payment on another employment page and states in the notes that, "We need a separate Employment Page for each Employment". The fact that Mr Hall's ex-wife helped him is of no assistance as it was his obligation to ensure that the Return was correct. In any event, Mr Hall should have realised before the opening of the enquiry that he had received a repayment to which he was not entitled.

Proportionality

22. Mrs Douglas referred us to *David Collis v HMRC* [2011] UKFTT 588 (TC), in which the First-tier Tribunal (Judge Berner and Mr Adams) dealt with the question of proportionality as follows at [46] to [52]:

> "[46] The issue raised by Mr Collis must be seen in the context of the First Protocol to the European Convention on Human Rights, which reads as follows:
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> "Protection of Property
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> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and the general principles of international law.
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> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."
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> [47] The second paragraph introduces the concept of proportionality. An interference with the entitlement to peaceful enjoyment must achieve a fair balance between the demand of the general interest of the community and the protection of the individual's fundamental rights. There must therefore be a reasonable relationship between the means employed and the aims pursued (*Gasus Dosier und Fordertechnik v Netherlands* (1995) 20 ECHR 403 at [62]). But a contracting state, not least when framing policies in the area of taxation, enjoys a wide margin of appreciation. The European Court of

> Human Rights will respect the legislature's assessment in such matters unless it is devoid of reasonable foundation (*National and Provincial Building Society v United Kingdom* [1997] STC 1466 at [80]).
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> [48] It has nonetheless been recognised that it is implicit in the concept of proportionality that, not merely must the impairment of the individual's rights be no more than necessary for the attainment of the public policy objective sought, but also that it must not impose an excessive burden on the individual concerned (*International Transport Roth GmbH v Home Secretary* [2002] 3 WLR 344 at [52]). In *Roth* Simon Brown LJ formulated the relevant question (at [26]) as: "Is the scheme not merely harsh but plainly unfair so that, however effectively that unfairness may assist in achieving the social goal it simply cannot be permitted?
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> [49] Applying these principles we conclude that the application of a penalty under Schedule 24 on each occasion of a careless or other relevant inaccuracy, even if it is the first occasion on which the taxpayer has submitted an inaccurate return, is well within the margin of appreciation which Parliament has in this respect. In our view such an application of the penalty regime is neither harsh nor plainly unfair.
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> [50] In reaching this conclusion we take into account the protections afforded by the statutory provisions to a taxpayer. The inaccuracy must be careless or deliberate. The maximum penalty is lower for lesser culpability (careless) than for greater degrees (deliberate but not concealed, and deliberate and concealed). In each case HMRC must reduce the maximum penalty to reflect the quality of disclosure, potentially down to a minimum percentage depending on the nature of the inaccuracy. A further reduction may be made by reason of special circumstances. A penalty may, in appropriate circumstances, be suspended subject to conditions. Finally, a taxpayer has a number of avenues to appeal to the tribunal.
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> [51] There are many ways in which a state may choose to impose penalties for failure to comply with tax obligations, and many ways in which those provisions may seek to protect the fundamental rights of a taxpayer subject to those provisions. The choice of such protections and the way in which the fair balance is maintained between those fundamental rights and the general interest of the community is for the state to determine, within its margin of appreciation. It would of course have been open to Parliament to have provided for a warning for a first occasion on which a penalty might otherwise have been levied, but in the context of the overall protections available under Schedule 24 it was well within its margin of appreciation not to have done so.
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> [52] Accordingly, in the context of the provisions of Schedule 24 taken as a whole we do not consider that the penalty imposed on Mr Collis was over-penal or disproportionate."

23. In the light of *Collis*, Mrs Douglas maintains that the system of penalties within Schedule 24 is proportionate. Further, given the modesty of the amounts involved, there is nothing to suggest that the penalty imposed on Mr Hall is disproportionate on an individual level.

Suspension

24. Mrs Douglas noted that suspension could only be ordered if the decision not to suspend was flawed in the light of the principles applicable to judicial review.

25. Mrs Douglas quoted from HMRC's Handbook CH83160 to the effect that, "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." Mrs Douglas submitted that the First-tier Tribunal in *Anthony Fane*, above, endorsed this policy at [52] to [69].

26. In applying this to the present case, Mrs Douglas submitted that Mr Hall was required to submit tax returns prior to 2013/14 because he received benefits and claimed expenses against his employment income from Atkins. However, Mr Hall's tax affairs became, as she put it, more straightforward with Siemens as he received only employment income and was not required to submit annual tax returns. As such, the inaccuracy on the Return was a one off mistake which was unlikely to recur as there was no need for a further annual return to be made at all and so was unsuitable for suspension as no conditions could be set to avoid non-compliance in the future. On HMRC's case, it could not be said that the decision to suspend was flawed in a judicial review sense.

27. In the course of submissions, we asked Mrs Douglas whether there was any consideration as to whether or not a return would be needed to be filed in the future. Mrs Douglas said that the decision-maker was aware that no future tax returns were to be issued and was aware that HMRC did not treat Mr Hall as being in the self-assessment regime. However, she frankly and helpfully accepted that she could not say whether or not the decision-maker specifically considered whether or not a return would or might be required in the following two years.

Mr Hall

Carelessness

28. Mr Hall maintained that he had not been careless because he had made an honest mistake in assuming that the contents of his P45 from Atkins had been incorporated into his P60 from Siemens.

Proportionality

29. Mr Hall said that the penalty was not a fair reflection of the fact that this was an honest mistake. He said that £461 is a lot of money to him.

Suspension

30. Mr Hall accepted that HMRC would not have known about the share save scheme at the time of the decision not to suspend. However, he made the point that HMRC did not investigate whether or not a return would be needed in the future. In

any event, as he put it, HMRC, "could not predict the future," by saying that no return would be necessary in the following two years.

Discussion

Carelessness

31. In our judgment, Mr Hall was careless in the completion of the Return. As we have already said, we entirely accept that this was a genuine and honest mistake. However, a genuine and honest mistake can still be careless if it is not reasonably made. We find that a reasonable and prudent taxpayer would have been aware that all employment income should be included, whether by reading the notes accompanying the Return or by obtaining assistance from HMRC's documents available on line or HMRC's helpline. In any event, it ought to have been obvious to Mr Hall that the Return related to all his earnings during the year and that the amount in his P60 did not reflect that.

Proportionality

32. Although *Collis* is a First-tier Tribunal decision and so is not binding on us, we respectfully agree with Judge Berner and Mr Adams' reasoning and adopt it as an accurate analysis of the law. In our view, this is reinforced by the Upper Tribunal's decision in *Revenue & Customs Commissioners v Total Technology (Engineering) Ltd* [2012] UKUT 418 (TCC) (Warren J and Judge Bishopp) ("*Total*"). Although *Total* related to the VAT default surcharge regime and so is not directly applicable, we note the following at [67] to [73]:

> "[67] We have dealt with (some at least) of the authorities, and with *Enersys*, at some length because they assist in resolving what we see as a tension between the margin of appreciation afforded to a State in cases concerning Convention rights and the discretion afforded to Member States in relation to the imposition of penalties or the exercise or rights of derogation on the one hand, and the principle of proportionality on the other hand. The former, at one extreme, can be said to give the State or Member State a licence to do anything in furtherance of a legitimate objective provided that it is not devoid of rational foundation or, to use different language to similar effect, that it is not found to be not only harsh but plainly unfair. The latter, at the other extreme, can be said to preclude any furtherance of a legitimate objective other than by the imposition of measures which are strictly necessary as those words would ordinarily be understood.
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> [68] Although there is a tension, we do not consider that there is an inconsistency. The tension is simply a reflection of the competition between the public interest and the individual entitlement. In this context, we would mention that the discussion in the judgment of Laws LJ in *Roth* is illuminating, although we do not think it appropriate to consider it further in this already long decision. And although the Master of the Rolls in *Lindsay* considered that the doctrine of proportionality under EU law had nothing significant to add to the Strasbourg jurisprudence, that was said in the context of the particular

issues which arose in that case. What is more, the Master of the Rolls himself referred to *Louloudakis* with approval and quoted the passage in which the ECJ in that case stated that the penalties "must not go beyond what is strictly necessary for the objectives pursued" and a penalty "must not be so disproportionate to the gravity of the infringement that it becomes an obstacle to the freedoms enshrined in the Treaty". It cannot be said that the Master of the Rolls saw any inconsistency between "what is strictly necessary" on the one hand and the margin of appreciation which is afforded to States in relation to Convention rights on the other hand.

[69] Quite apart from that, the judgment in *Urbán* sets out the current state of EU law whatever, if any, divergence there may be from the Strasbourg jurisprudence: see [23] and [24] of the judgment of the ECJ referred to at paragraph 34 and 36 above. In the absence of harmonisation, Member States are empowered to choose the penalties which seem to them to be appropriate but that power must be exercised in accordance with the principle of proportionality. However wide the scope of the margin of appreciation as applied to Convention rights may be (and, as we have seen, that scope will vary depending on the particular right at issue), penalties in a case such as *Urbán* must not exceed the limits of what is "appropriate and necessary" in order to obtain the objectives legitimately pursued.

[70] Moreover, where there is a choice of appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued. That is not to say that the least onerous measure must always be adopted. It is true that where there is a choice of measure each of which is equally appropriate in the sense of being (or anticipated to be) equally efficacious in achieving the aim pursued, then the least onerous should be adopted.

[71] But if there is a choice of, say two, measures, one of which is likely to be significantly more efficacious than the other in achieving the aim pursued, then the Member State may, we consider, adopt the former. Faced with the choice between those two measures, the Member State is entitled, in our view, to consider that the former is an appropriate measure but that the latter is not. The latter may be capable of having some effect in relation to the aim pursued but it not an appropriate measure if a significantly more efficacious alternative exists. That is subject, of course, to the proviso that the disadvantages caused are not disproportionate to the aim pursued.

[72] The decisions in *Louloudakis* and *Urbán* each state that Member States are empowered to choose the penalties which seem appropriate to them but must exercise the power in accordance with the principle of proportionality. In [67] of *Louloudakis* it was said (i) that penalties must not go beyond what is strictly necessary for the objectives pursued and (ii) that a penalty must not be so disproportionate to the gravity of the infringement that it becomes an obstacle to the freedoms enshrined in the Treaty (as to which see paragraph 34 above). Transposing the reference to the Treaty to the present case, we would say that the penalty must not become an obstacle to the underlying

> aims of the Directive: an excessive penalty would impose a disproportionate burden on a defaulting trader and distort the VAT system as it applies to him, for the reasons we develop at paragraph *77ff* below.
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> [73] It is thus possible to envisage a penalty regime the architecture of which is unobjectionable, but which nevertheless leads occasionally to the imposition of a penalty so high as to be disproportionate. One might, however, expect UK courts and tribunals to be cautious in the extreme in saying that national legislation has overstepped the mark in setting the level of penalty. That is consistent with our analysis in paragraph 68 above. A smaller penalty will always be less interventionist than a larger one; but it cannot sensibly be argued that the State must therefore impose the minimum penalty which might have some deterrent effect. The State must be entitled to impose the penalty which it considers to be the most efficacious for achieving the aim pursued constrained only by the requirement that the penalty is not disproportionate to the gravity of the infringement. And here we would accept that, to use the words of the Convention jurisprudence, a wide margin of appreciation should be afforded to the State."

33. We find that there is nothing disproportionate in the way in which the penalty regime has been applied to Mr Hall. He received the full reduction possible and did not (and still does not) put forward any special circumstances to reduce it further. Whilst we understand that the sum of £461 is significant to Mr Hall, it is still modest in comparison to the inaccuracy. Finally, the capacity to suspend the penalty (with which we deal next) also in our view prevents it from being disproportionate.

Suspension

34. We have carefully considered the case of *Anthony Fane* as it appears to endorse the policy espoused by HMRC in the present case that one off events cannot give rise to suspension.

35. However, *Anthony Fane* was analysed by the First-tier Tribunal (Judge Poole and Mrs Debell) in *David Testa v HMRC* [2013] UKFTT 151 (TC). The point was made that in *Anthony Fane* the condition being considered was simply a condition not to be careless in the future as opposed to, for example, a requirement that accountancy advice be taken when submitting a return. The First-tier Tribunal stated as follows at [25] and [31] to [36]:

> "[25] We respectfully agree fully with the comments made in paragraphs [60] to [64] above. As to paragraph [65] however, we feel that as a general statement it must be treated with care. It was made in the context of the particular condition suggested by the appellant in that case, which amounted (in the Tribunal's view) to little more than "a condition not to submit careless inaccuracies in future tax returns". There is no indication that any suggestion was made to the Tribunal in *Fane* along the lines of the condition that is being proposed in this appeal."
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> …

"[31] The apparent underlying purpose of the legislation is not simply to allow a taxpayer the opportunity of "a last chance" if he mends his ways (akin to a suspended sentence in the criminal sphere) but only to allow him that last chance if he takes some specific and observable action which is specifically designed to improve his compliance.

[32] Although the legislation does not specify the nature or extent of the required linkage between the earlier default and the action required by the suspensive condition, the use of the word "further" in paragraph 14(3) seems to us to imply that there must be some such linkage.

[33] It therefore seems unlikely that paragraph 14(3) is intended to cover a situation where, for example, a taxpayer carelessly gives inaccurate information in a Construction Industry Scheme return and then seeks to have the penalty suspended on the basis of a promised improvement in his PAYE record keeping processes.

[34] On the other hand, consider a case in which the original inaccuracy had arisen, say, because of a particular weakness in the taxpayer's system for distinguishing between CIS payments for materials and construction services in certain unique circumstances. Let us assume the taxpayer, alarmed by the problem, had instructed an external professional firm to carry out a full review of its whole CIS reporting process and obtained a report giving recommendations for its improvement (including the elimination of the weakness that gave rise to the particular error, even though it was unlikely to recur). If the taxpayer offered to agree a condition requiring it to implement those recommendations, that would surely meet the underlying purpose of the legislation and fall within paragraph 14(3), even if the circumstances giving rise to the particular error were a "one off" and unlikely ever to be repeated.

[35] HMRC's policy (as referred to in their letters referred to at [11] and [13] above) sits uneasily with the above example. If their stance were correct that "one-off" inaccuracies (or inaccuracies arising from "one off" events) could never benefit from the suspension regime, then they would refuse to allow the suspension. This must in our view be wrong. Instead in such a case they should simply consider whether the implementation of the external report would help the taxpayer to avoid future inaccuracies in its CIS returns.

[36] This example highlights the danger of taking too narrow a view of the legislation. It has been drafted deliberately broadly and HMRC should not be placing unwarranted limits on it by reference to general policies which exclude whole classes of case which, in our view, would have been intended to be covered by it."

36. Similarly, in *Bharat Patel v HMRC* [2015] UKFTT 445 (TC), the First-tier Tribunal (Judge Aleksandr and Mr Speller) dealt with a situation in which HMRC had wrongly suggested that there would be no future compliance upon which conditions could be based so as to justify a suspension. The First-tier Tribunal stated as follows at [21] and [22]:

> "[21] Under the ADR process, HMRC agreed to suspend the company's penalties on conditions, but not the penalties levied against Mr Patel personally. This is because Mr Patel would in future conduct his locum pharmacist business through the company. The company would therefore continue to file tax returns – and the conditions imposed under the penalty suspension regime could and would be directed at Mr Patel's company's continued good tax compliance. Paragraph 14(3) of Schedule 24 allows HMRC to suspend penalties "only if compliance with a condition of suspension would help [the taxpayer] to avoid becoming liable to further penalties […] for careless inaccuracy". As Mr Patel would cease to trade personally, he would no longer submit personal tax returns, and therefore, submit HMRC, it would not be possible to impose conditions that would address his continuing personal tax compliance, and so HMRC had no power to suspend penalties against Mr Patel personally.
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> [22] However, Mr Patel will derive income from his company in the form of salary (or deemed salary as a result of the application of "IR35") or dividends. Mr Patel can be required to file a self-assessment tax return in respect of this income. It is therefore possible for HMRC to impose conditions on Mr Patel personally which address his continued tax compliance. We therefore find that HMRC's decision that it could not suspend penalties to be "flawed" for the purposes of Schedule 24, as an HMRC officer acting reasonably (in a "judicial review" sense) would have appreciated that it was possible to impose conditions that would address Mr Patel's continuing compliance with his personal income tax and CGT obligations."

37. These First-tier Tribunal cases are of course not binding on us and in any event each case turns upon its own facts. However, they do illustrate the point (with which we agree) that consideration of whether or not compliance with a condition of suspension would help a person to avoid becoming liable to further penalties for careless inaccuracies requires some consideration of whether self-assessment returns will need to be made in the future and what conditions might be applied over and above simply requiring accuracy.

38. In our judgment, the decision not to suspend the penalty was flawed when considered in the light of the principles applicable to judicial review. This is for the following reasons.

39. First, there was no evidence as to what the decision-maker actually considered. We note that the letter dated 28 October 2015 stated that, "we cannot suspend this penalty as it is not likely that you will make this error in future tax returns." The letter dated 7 December 2015 says as follows:

> "The penalty cannot be suspended.
>
> We may suspend a penalty for a careless error in a return if conditions can be set to help avoid errors in future returns. However there are no such conditions we can set in your circumstances, and so the penalty cannot be suspended. There is more information about suspended penalties in factsheet CC/FS10, available on our website."

40. Secondly, Mrs Douglas fairly accepted that she could not say whether or not the decision-maker had considered whether or not a return would be necessary within the following two years. If this was not considered at all, then it was something which HMRC ought to have investigated and taken into account but failed to do so. If this was considered, then such consideration was flawed as it was only upon the basis of HMRC's own assumptions rather than by asking Mr Hall (as we have found as a fact that HMRC did not investigate the matter with Mr Hall). We consider that this is not affected by Mr Hall's failure to suggest any conditions. On one level, the decision was made without any invitation for conditions or comments about suspension. On another level, HMRC was actively saying that, "there are no such conditions we can set in your circumstances," (which we take to mean no conditions are possible) as opposed to saying that no acceptable conditions have been suggested.

41. Thirdly, there is no evidence that any conditions were considered. Again, HMRC should have considered possible conditions and so the decision was flawed in that they did not do so. If potential conditions were considered, such consideration was flawed because they were not raised with Mr Hall.

42. Fourthly, as a matter of fact, Mr Hall will have to file a self-assessment return in the future because of his share save scheme. Even if this would not have been known at the time of the decision, HMRC could not (as they effectively tried to do) "predict the future" as Mr Hall put it and so were wrong to discount the possibility of future returns.

43. Fifthly, insofar as HMRC's point is that the particular inaccuracy of not taking into account a P45 is unlikely to recur, it is our view that this takes too narrow a view of what is meant by avoiding liability for further penalties for careless inaccuracy. Paragraph 14(3) of Schedule 24 does not restrict the conditions to preventing *the same* careless inaccuracy. In our view, the problem was a lack of understanding as to what needs to be included in a self-assessment tax return. Any condition which guards against that lack of understanding will in principle (and if complied with) avoid liability for further penalties for careless inaccuracy.

44. Sixthly, bearing in mind the previous points, we find that HMRC ought to have considered (and did not consider) the possibility of a condition that Mr Hall take professional accountancy advice before submitting any required tax return in the following two years. This would help to avoid Mr Hall becoming liable to further penalties as it would provide him with the expertise which he clearly lacked when submitting the Return.

45. It is of note that paragraph 17(4)(a) of Schedule 24 provides a power for the Tribunal to order HMRC to suspend the penalty under (4)(b) and, if it does so, "(i) P may appeal against a provision of the notice of suspension and (ii) the tribunal may order HMRC to amend the notice." We take the view that this does not entitle us to define the appropriate conditions at this stage but instead to order HMRC to suspend upon conditions that it either agrees with Mr Hall or imposes (subject to an appeal at which point the tribunal may affirm the conditions or vary them if it thinks HMRC's decision in respect of the conditions was flawed). It might be that HMRC wishes to

take on board our suggested condition as to requiring Mr Hall to take professional accountancy advice before submitting any required tax return. However, we cannot at this stage order such a condition. We are fortified in our view that the regime is operated in this way by the comments of the First-tier Tribunal in *David Testa*, above.

46. Finally, we note that the two year timeframe is from the date of the notice in writing of the decision to suspend rather than the date of the penalty.

Disposition

47. It follows that we allow the appeal to the limited extent of ordering HMRC to suspend the penalty upon such conditions as shall be agreed with Mr Hall or in default of agreement upon such conditions as HMRC shall impose (subject to Mr Hall's right of appeal against those conditions).

48. 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.

RICHARD CHAPMAN
TRIBUNAL JUDGE

RELEASE DATE: 14 June 2016