[2016] UKFTT 439 (TC)

TC05192

Appeal number: TC/2015/02085

INCOME TAX – overpayment by employer of amount paid on account of sums they should have deducted under PAYE-whether excess repayable to employee directly-no- Reg 185 Income Tax (PAYE) Regulations 2003

Penalty-whether penalty correctly applied for deliberate and concealed behaviour in relation to errors in appellant's self-assessment return-yes- Schedule 24 Finance Act 2007

FIRST-TIER TRIBUNAL
TAX CHAMBER

ROBERT WARD **Appellant**

- and -

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

TRIBUNAL: JUDGE TIMOTHY HERRINGTON
DEREK SPELLER FCA (MEMBER)

Sitting in public at Fox Court, 30 Brooke Street, London EC1N 7RS on 24 November 2015 and after considering further written submissions made on 13 May 2016

The Appellant in person

Lynne Gray, Presenting Officer, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. On 23 February 2016 we released our first decision in respect of this appeal (the "First Decision") in which we determined, inter-alia, the following:

(1) HMRC was entitled to make a discovery assessment against Mr Ward for the year 2009/2010; and

(2) Mr Ward was to be treated as resident but not ordinarily resident in the United Kingdom for tax purposes for the years 2009/2010 and 2010/2011.

2. In the light of our findings on these issues, it was necessary for there to be further findings as to the correct amount of income tax to be assessed on Mr Ward for the years 2009/2010 and 2010/2011 in respect of which we required further evidence. We made directions for the filing of further evidence and submissions on that evidence, following which we could also determine the other outstanding issue in respect of this appeal, namely whether an inaccuracy penalty should be imposed upon Mr Ward in respect of the two tax years mentioned above on the basis that Mr Ward incorrectly stated his residence position in his self- assessment returns for those years.

3. This decision deals with the outstanding matters, in the light of the further evidence and submissions that we have received. This decision should be read in conjunction with the First Decision. Words and phrases used in that decision and defined in it bear the same meanings in this decision as they bear in the First Decision. The relevant findings of fact that we made in the First Decision are applicable to this decision.

Liability for income tax for 2009/2010 and 2010/2011

4. We are grateful to both parties for cooperating and coming to an agreement on the correct amount of tax for which Mr Ward is liable in respect of each of these years, following an exchange of correspondence and evidence between them on this issue.

5. We have seen the evidence and correspondence concerned as a result of which it is now common ground that the revised self-assessment tax calculation for 2009/2010 demonstrates that there is tax overpaid of £5,495.20 for that year and that the revised self-assessment tax calculation for 2010/2011 demonstrates that there is tax due of £4,383.40 for that year.

6. We therefore find that Mr Ward has nothing to pay for 2009/2010 and the discovery assessment made by HMRC in respect of that year must be reduced to nil. As a consequence, there can be no inaccuracy penalty in respect of that year and Mr Ward's appeal against the penalty imposed by HMRC in respect of that year must be allowed.

7. A dispute remains between the parties as to how the overpayment for 2009/2010 is to be dealt with. As we found at [21] of the First Decision, as a consequence of Goodman UK not having made any PAYE deductions from Mr Ward's salary after 1

July 2009, notwithstanding that he was performing duties in the United Kingdom after that date, following an investigation by HMRC Goodman UK accounted to HMRC for the PAYE deductions which HMRC determined it should have made. The effect of Goodman UK having accounted to HMRC for those sums was to give Mr Ward a corresponding credit against his UK tax liability for the year in question.

8. Following our findings on the residence question HMRC now accept that in respect of 2009/2010 Goodman UK paid to HMRC an amount on account of PAYE that should have been deducted which was in excess of what was necessary to satisfy its liability in respect of the days in which Mr Ward worked for them in the UK.

9. Mr Ward contends that the overpayment should be credited to him and set off against the amount he is due to pay in respect of 2010/2011. That would result in a net payment being made to him personally to settle the position for the two tax years collectively. He contends that he has reimbursed Goodman UK for the amount that they had to pay HMRC and that the settlement made by Goodman UK with HMRC was intended to cover the expected liability in both years collectively.

10. HMRC contend that a PAYE credit can only be given in an individual's self-assessment up to the maximum amount of PAYE that should have been deducted. They rely on Regulation 185 of The Income Tax (Pay As You Earn) Regulations 2003 ("Regulation 185") in this regard. Therefore, they submit, the actual PAYE credit that should be allowed in Mr Ward's self-assessment tax calculation for 2009/2010 is £41,720.80, which represents the maximum amount of PAYE that should have been deducted following our decision on the question of Mr Ward's residence position. Mr Ward personally has not paid any sums in excess of this amount and therefore cannot be given credit for it. Consequently, HMRC submit that any overpayment must be paid back to the person who made it, namely the employer.

11. HMRC appeared to be willing to accept that the overpayment could be made to Mr Ward rather than Goodman UK if he were to provide evidence of the amounts that he has reimbursed to Goodman UK in the form of bank statements showing the payments made and a confirmation from Goodman UK. Mr Ward has declined to provide this further information, as he says that if the Tribunal thought this additional information was relevant to the determination of his tax position it would have been specifically included in the Tribunal's directions.

12. Regulation 185 provides a mechanism for adjusting the figure of the total net tax deducted for the purposes of the calculations to be made pursuant to section 59 B of the Taxes Management Act 1970. The latter provision provides that the difference between the amount of tax contained in a person's self-assessment and the aggregate of any payments on account made by him in respect of a year and any income tax deducted at source shall be payable by or repayable to him as the case may be and that any amount deducted at source under the PAYE regulations is to be deducted from that aggregate.

13. Regulation 185 (2) states that for the purposes of section 59 B "the amount of income tax deducted at source under these Regulations is the total net tax deducted

during the relevant tax year ("A") after making any additions or subtractions required by paragraphs (3) to (5)."

14. Paragraph (5) of Regulation 185 requires there to be added to A "any tax treated as deducted…" but "only to a maximum of that amount". Paragraph (6) of the Regulation defines "tax treated as deducted" relevantly as "any tax which in relation to relevant payments made by an employer to the taxpayer in the relevant tax year… the employer was liable to deduct from payments but failed to do so."

15. In our view the combined effect of these provisions is that in his self-assessment for 2009/2010 Mr Ward can only be given credit for the maximum amount that Goodman UK were obliged to deduct from his income but failed to do so. This is the revised amount referred to at [10] above. We therefore accept HMRC's submissions on this point and it follows that any overpayment is not payable to Mr Ward directly but must be repaid by HMRC to Goodman UK.

16. Mr Ward is correct in his observation that the Tribunal's directions did not envisage us receiving any further evidence on whether or not he had reimbursed Goodman UK for all or any of the amounts that they accounted for to HMRC. However, in our view determining whether or not that is the case is not relevant to the matters which are the subject of this appeal in the light of our findings at [15] above and is not a matter that falls within the jurisdiction of this Tribunal. HMRC have indicated that they would be willing to pay the money concerned directly to Mr Ward were he to provide them with the necessary evidence and it seems to us that that is a matter that must be determined between the three parties concerned, namely Mr Ward, HMRC and Goodman UK without the intervention of the Tribunal.

17. As regards 2010/2011, there was only an obligation upon Goodman UK to deduct PAYE from Mr Ward's income in respect of his UK workdays. The payment made by Goodman UK to HMRC for having failed to deduct PAYE in relation to this tax year is, we are told, insufficient to cover the full self-assessment tax liability for this year which has resulted in the additional amount of £4,383.40 being payable by Mr Ward. Again, Mr Ward can only be given credit for the maximum amount that Goodman UK should have deducted from his salary in respect of UK workdays for this tax year and so he is liable to pay this amount personally. We agree with HMRC, and it follows from our findings in respect of how Regulation 185 operates and our jurisdiction in relation to the overpayment made by Goodman UK in respect of 2009/2010, that there is no basis on which the sum repayable to Goodman UK in respect of 2009/2010 can be set off against Mr Ward's own personal liability to settle his tax bill for 2010/2011.

18. Consequently, we must approach the question of whether a penalty should be imposed on Mr Ward in respect of 2010/2011 on the basis of his liability to make a payment of £4,383.40 in respect of his tax liability for that year.

Penalty

19. As a result of our findings above, we are only concerned as to whether it is appropriate to impose an inaccuracy penalty on Mr Ward in respect of the 2010/2011 tax year.

20. HMRC seek to impose an inaccuracy penalty charged under Schedule 24 Finance Act 2007 ("Schedule 24") on the basis that Mr Ward incorrectly stated his residence position for 2010/2011 in his self-assessment tax return, and that such a penalty should be calculated on the basis that Mr Ward's behaviour which led to the inaccuracy was "deliberate and concealed" and that the disclosure of the inaccuracy was prompted.

21. We set out in the Appendix to this decision the relevant provisions of Schedule 24.

22. HMRC rely on the following matters to justify the basis on which they have calculated the penalty:

(1) Mr Ward submitted an incorrect return, self-assessing as not resident in the UK, having 69 workdays and 105 total days in the UK, with no taxable UK income. As we found at [26] of the First Decision, the facts show that Mr Ward was resident in the UK for tax purposes for that year as he was in the United Kingdom for 234 days. This was established after Mr Ward submitted to HMRC on 9 August 2013 a detailed schedule showing where he was for every day during the 2010/2011 tax year. HMRC contended that Mr Ward had sufficient information available at the time the return was submitted on 31 October 2011 to enable the facts to be stated correctly, but that he deliberately chose to file an incorrect return.

(2) Mr Ward advised HMRC in a letter dated 29 October 2012 that he did not spend more than 183 days in the UK during the tax year ended 5 April 2011. That letter provided a monthly breakdown of the 166 total days he claimed to have spent in the UK during 2010/2011. Mr Ward's letter dated 21 February 2013 provided a correction to this breakdown, and claimed that he spent 136 total days in the UK in 2010/2011. Information obtained from the UK Border Agency and the later schedule provided by Mr Ward show that he spent 234 days in total in the UK in that year. HMRC therefore consider that the deliberate error made on the original return was followed by further deliberate attempts to resolve the situation on an incorrect basis, until the information was finally provided by him and the Border Agency.

(3) In a telephone conversation with HMRC on 11 July 2013 Mr Ward was asked who owned the property in which he was then living in the UK. Mr Ward replied that it was a "female friend". When asked if she had ever been a girlfriend in the period 16 April 2009 1 July 2009 he replied "no". In a further conversation on 5 December 2013, this question was revisited and Mr Ward confirmed the name of the person and again stated that she was a friend and was not a girlfriend in this period. He was then asked whether anything had

happened in his work or personal life around October 2010 and confirmed that he could not think of anything significant. Mr Ward was then asked about his work permit arrangements and how he could work in the UK from October 2010 to 22 January 2011 with no permit. He advised it was "a run off period". Mr Ward did not confirm whether some information HMRC already had was true, including whether he had married around October 2010, until it was fully explained to him what information HMRC already held.

(4) Later in the telephone conversation on 5 December 2013 Mr Ward was asked whether he went on holiday or honeymoon around October 2010. He replied it was a holiday. This led HMRC to ask whether he got married or not, which he did confirm. It was then established that it was the person who became his wife who owned the property in which he was living at the time and that she was the mother of his child who was born in January 2010. It was explained to Mr Ward that his child would have been conceived before July 2009, during the period when he stated that his now wife was a friend and had never been a girlfriend. HMRC consider this to be a further deliberate attempt on Mr Ward's part to conceal his personal reasons for remaining in the UK from HMRC.

23. Mr Ward does not dispute the primary facts which HMRC rely on as set out above. He does however dispute that he deliberately chose to file an incorrect return or deliberately attempted to mislead HMRC. At the time these matters were put to him in April 2014 his response was:

(1) He relied on his diary records to determine the number of days he was present in the UK which unfortunately were inaccurate and he self-assessed as non-resident on the basis that he was not physically present for more 183 days in the tax year. He contends that he relied on the information in his diary that was not accurate and did not deliberately choose to file an incorrect return.

(2) The breakdown in his letter of 29 October 2012 and in a further letter dated 21 February 2013, were both based on the same flawed diary records and he did not have access to his tax return work papers at the time, so re-created this information from his inaccurate diary records.

(3), (4) He expressed concern during the telephone call on 11 July 2013 that the information he had previously provided as to the number of days he was in the UK was not accurate and undertook to investigate further and on 9 August 2013 he emailed HMRC confirming that he had in fact been physically present in the UK for 234 days in the year ended 5 April 2011. Given that he was physically present in the UK for more than 183 days he contended that his personal circumstances were completely irrelevant to the determination of his residence status and his tax position and HMRC continued to investigate his personal circumstances when it was clear that this line of investigation would have no bearing on the determination of his tax position.

24. In relation to the 2009/2010 tax return in the context of our determination on the discovery assessment point in the First Decision, we found at [38] of that decision, that Mr Ward was careless at least in the manner in which he prepared his 2009/2010 tax return in not checking the number of days he spent in the UK to ensure that it was

accurate. Mr Ward accepted at the hearing that he could have taken more care to check the position. The same must be true of 2010/2011 because he followed the same approach as he did in respect of 2009/2010.

25. However, in our view Mr Ward's behaviour must be characterised as deliberate. We found at [27] of the First Decision that Mr Ward completed the pages in his tax return regarding his residence status the way he did because he had taken the view that he had ceased to be resident in the UK after 1 July 2009 so that the disclosures as to the number of days he spent in the UK would be in the context of him regarding himself as working full-time in Australia. As we found at [19] of the First Decision, in relation to the 2009/2010 tax return Mr Ward answered the question differently to what the form actually called for, the form simply asking the taxpayer, if he had disclosed in his earlier answers that he was not resident in the UK, how many days he had spent in the UK during the tax year in question. In our view Mr Ward chose to answer this question in a manner which suited his own theory as to why he was not resident and in so doing he concealed from HMRC the true situation. He had a duty simply to state the number of days in which he was present in the UK and he did not do that. As we found in the First Decision, Mr Ward gave no explanation as to why the information that he finally provided when prompted by HMRC following the information they obtained from the Border Agency could not have been provided earlier.

26. In characterising Mr Ward's behaviour as deliberate we do not say that he was dishonest. He may have genuinely believed at the time that he was non-resident, but he cannot escape the fact that he deliberately gave an answer to a simple question that was incorrect. He must have known from his own working pattern that the number of days that he declared as being in the UK was incorrect. There was a large discrepancy between the days he originally declared as being in the UK (105) and the true figure (234).

27. We therefore find that Mr Ward's behaviour in relation to the manner in which he completed the 2010/2011 tax return was deliberate for the purposes of Schedule 24. In our view it was also concealed for the purposes of that Schedule in that Mr Ward made arrangements to conceal it by submitting false evidence in support of his contention that he was non-resident, namely an incorrect answer to the question as to the number of days he spent in the United Kingdom.

28. We also find that the eventual disclosure that Mr Ward made as to the true position regarding the number of days he spent in the United Kingdom was prompted, because at the time he made the disclosure he had reason to believe that HMRC had discovered the inaccuracy; this necessarily follows from the conversation held on 11 July 2013 and Mr Ward's realisation at that stage at least that the information he had provided was inaccurate.

29. We also find that Mr Ward was uncooperative with HMRC to a significant extent. The questions that he was asked in July and December 2013 as to his personal circumstances were highly relevant to the determination of his residency position, in particular whether he was living in the UK with his wife and son. He also still had a

UK work permit, notwithstanding his earlier representations that he had left for Australia in 2009. He sought to conceal that information during the July conversation which took place prior to him having submitted evidence as to the true position regarding the number of days he had spent in the UK during the tax year.

30. HMRC had calculated the penalty on the following basis. They characterised the inaccuracy in Mr Ward's return as being deliberate and concealed: see paragraph 4 (2) (c) of Part 2 of Schedule 24. Consequently, the penalty payable was 100% of the potential lost revenue as a result of the inaccuracy in Mr Ward's return.

31. HMRC then applied a percentage reduction to the amount of the penalty for disclosure in accordance with paragraphs 9 and 10 of Part 2 of Schedule 24. They did so on the basis that the disclosure was prompted. The percentage reduction was 30%, calculated as being the difference between the minimum and maximum penalty percentages of potential lost revenue chargeable for a prompted deliberate and concealed disclosure (50% in this case) which was then applied to the reduction given for quality, determined at 60%. This gave rise to a figure of 30% to be deducted from the maximum penalty of 100% of the potential lost revenue, resulting in the penalty to be charged being 70% of the potential lost revenue.

32. We find that an inaccuracy penalty of 70% of the potential lost revenue in respect of 2010/2011 is appropriate. "Potential lost revenue" is defined in paragraph 5 (1) of Part 2 of Schedule 24 and in relation to an inaccuracy in a document is the additional amount due or payable in respect of tax as a result of correcting the inaccuracy. In this case the potential lost revenue was therefore £4,383.40, being the amount agreed as underpaid by Mr Ward for 2010/2011. The penalty to be imposed is therefore 70% of this figure, namely £3,068.38.

Disposition

33. We therefore determine the outstanding issues in this appeal as follows:

(1) The discovery assessment made by HMRC in respect of 2009/2010 is reduced to nil.

(2) No penalty is imposed on Mr Ward in respect of the inaccuracy in his 2009/2010 self-assessment return.

(3) Mr Ward's self-assessment return for 2010/2011 is to be amended so as to show a liability of £4,383.40 to tax.

(4) A penalty of £3,068.38 is imposed on Mr Ward in respect of the inaccuracy in his 2010/2011 self-assessment return.

34. 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.

TIMOTHY HERRINGTON
TRIBUNAL JUDGE

RELEASE DATE: 20 JUNE 2016

APPENDIX

Relevant provisions of Schedule 24 Finance Act 2007

Part 1 LIABILITY FOR PENALTY

Error in taxpayer's document

1- (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] [1]

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 …or deliberate on P's part

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

Tax	***Document***
Income Tax or capital gains tax	Return under section 8 of TMA1970(personal return)

Degrees of culpability

3- (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).

…

Part 2 AMOUNT OF PENALTY

Standard amount

4 -(1) This paragraph sets out the penalty payable under paragraph 1.

(2) If the inaccuracy is in category 1, the penalty is—

(a) for careless action, 30% of the potential lost revenue,

(b) for deliberate but not concealed action, 70% of the potential lost revenue, and

(c) for deliberate and concealed action, 100% of the potential lost revenue.

…

Potential lost revenue: normal rule

5-(1) "The potential lost revenue" in respect of an inaccuracy in a document (including an inaccuracy attributable to a supply of false information or withholding of information) or a failure to notify an under-assessment is the additional amount due or payable in respect of tax as a result of correcting the inaccuracy or assessment.

…

Reductions for disclosure

9- (A1) Paragraph 10 provides for reductions in penalties under paragraphs 1, 1A and 2 where a person discloses an inaccuracy, a supply of false information or withholding of information, or a failure to disclose an under-assessment.

(1) A person discloses an inaccuracy, a supply of false information or withholding of information, or a failure to disclose an underassessment by–

(a) telling HMRC about it,

(b) giving HMRC reasonable help in quantifying the inaccuracy, the inaccuracy attributable to the supply of false information or withholding of information, or the under-assessment, and

(c) allowing HMRC access to records for the purpose of ensuring that the inaccuracy, the inaccuracy attributable to the supply of false information or withholding of information, or the under-assessment is fully corrected.

(2) Disclosure–

(a) is "unprompted" if made at a time when the person making it has no reason to believe that HMRC have discovered or are about to discover the inaccuracy, the supply of false information or withholding of information, or the under-assessment, and

(b) otherwise, is "prompted".

(3) In relation to disclosure "quality" includes timing, nature and extent.

10-(1) If a person who would otherwise be liable to a penalty of a percentage shown in column 1 of the Table (a "standard percentage") has made a disclosure, HMRC must reduce the standard percentage to one that reflects the quality of the disclosure.
(2) But the standard percentage may not be reduced to a percentage that is below the minimum shown for it—
(a) in the case of a prompted disclosure, in column 2 of the Table, and
(b) in the case of an unprompted disclosure, in column 3 of the Table.

Standard %	*Minimum % for prompted disclosure*	*Minimum % for unprompted disclosure*
30%	15%	0%
45%	22.5%	0%
60%	30%	0%
70%	35%	20%
105%	52.5%	30%
140%	70%	40%
100%	50%	30%
150%	75%	45%
200%	100%	60%