[2016] UKFTT 755 (TC)

TC05482

Appeal number: TC/2014/06146

SELF-ASSESSMENT – estimated figures on returns – whether actions amounted to deliberate behaviour rather than careless – yes – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MATTHEW CHADBURN **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE FAIRPO

Sitting in public at Cambridge on 18 April 2016

Mr N Florence, accountant, for the Appellant

Mrs B Sanu, presenting officer, for the Respondents

© CROWN COPYRIGHT 2016

DECISION

Introduction

1. This is an appeal against penalties of £23,627.38 raised in respect of inaccuracies in the appellant's tax returns for the years 2006/7 to 2009/10. The tax assessments raised by the respondents (HMRC) for those years and the years 2010/11 and 2011/12 are not in dispute; the dispute is as to the basis on which the penalties were calculated. The appellant submits that the behaviour giving rise to the penalties should be regarded as careless rather than deliberate.

2. The penalties under appeal are as follows:

(1) 2006/7 and 2007/8: £10,699.90 charged under s95 Taxes Management Act (TMA) 1970

(2) 2008/9: £6,931.00 charged under s93(5) TMA 1970

(3) 2009/10: £5,996.48 charged under Schedule 24, Finance Act 2007

3. The penalties for 20067 and 2007/8 were abated by 60% to 40%, HMRC having allowed abatements of 15% (out of 20%) for disclosure, 25% (out of 50%) for co-operation, and 20% (out of 40%) for seriousness.

4. The penalties for 2008/9 and 2009/10 were abated by 75% of the penalty range (35% to70% for a prompted disclosure in respect of deliberate behaviour), to 43.75%, allowing abatements of 25% (out of 30%) for telling, 20% (out of 40%) for assistance, and 20% (out of 30%) for access to records.

Background

5. The appellant is a self-employed heating and plumbing engineer, and has been registered as self-employed since 1996.

6. On 26 January 2011, the appellant's self-assessment tax return for the 2009/10 year was submitted, showing estimated figures for business turnover of £20,000 and for net profits of £20,000.

7. On 7 December 2011, the appellant submitted his 2010/11 self-assessment return, showing turnover of £64,555 and taxable net profit of £22,637.

8. HMRC opened an enquiry into this tax return on 9 December 2011.

9. At that time, the appellant's earlier self-assessment tax returns for the periods were as follows (as relevant):

(1) 2006/7: business turnover of £15,000 and net profits of £15,000

(2) 2007/08: business turnover of £16,000 and net profits of £16,000

(3) 2008/09: return not submitted at 9 December 2011

10. On 7 March 2012, as the information requested in the opening enquiry letter had not been provided, HMRC issued a formal Notice to Provide Information and Documents under paragraph 1, Schedule 36, Finance Act 2008 (a 'Schedule 36 Notice').

5 11. Subsequently, the appellant's accountants prepared accounts for the 2009/10 year. These accounts showed turnover of £85,669 with net profit of £50,592.

12. At a meeting with HMRC on 30 April 2012, the appellant's accountant explained that the appellant did not invoice all of his work but banked all funds received. Accordingly, the accountants had relied upon information from the business
10 bank account statements to establish the appellant's turnover for 2009/10.

13. Following the meeting, and a review of records provided, HMRC requested further information and documents in a letter dated 3 May 2012. On 11 June 2012, as this information had not been provided, a Schedule 36 Notice was issued by HMRC in respect of the information requested. A further Schedule 36 Notice for the
15 information was issued on 30 July 2012 as the information had not been provided by that date. The information continued to remain outstanding and a penalty warning letter was issued by HMRC on 4 September 2012.

14. Following further correspondence, a subsequent meeting was held between HMRC, the appellant and the appellant's accountant on 25 February 2013.

20 15. At the meeting, the appellant confirmed that although he usually gave receipts for work done, payments from two letting agents were usually made by BACS to the business account without a receipt being issued. In the course of this meeting, it was established that the appellant would have banked some of his business income into his building society accounts as well as his business bank account and so would not have
25 been taken into account when his accounts were prepared for 2009/10.

16. Additional turnover of £8,119 for the 2009/10 year was identified from the appellant's building society accounts.

17. The appellant was asked to provide outstanding information and documents; on 14 May 2013, a further Schedule 36 Notice was issued as the information remained
30 outstanding.

18. Following further correspondence and a further meeting between HMRC and the appellant's accountant, HMRC issued a closure notice for the enquiry into the 2009/10 year on 11 March 2014, raising assessments for the years 2006/7 to 2009/10.

19. A presumption of continuity was made by HMRC in respect of the earlier years
35 and, in addition to the amended assessment for the 2009/10 year, additional profits were assessed for 2006/7, 2007/8 and 2008/9 by taking the 2009/10 revised profit figure and adjusting that figure in accordance with the Retail Prices Index to assess likely omitted profits for those years. Tax assessments for omitted profits were also made for 2010/11 and 2011/12.

20. In addition to the assessments for omitted profits for the years 2006/7 to 2011/12, HMRC raised penalty assessments for the years 2006/7 to 2009/10.

21. Following a review of the decision by HMRC, dated 3 October 2014, a number of the tax assessments were revised and the penalty assessments for the years 2006/7 to 2008/9 were also revised. The tax assessment and penalty assessment for 2009/10 were upheld.

22. The appellant appealed the tax and penalty assessments on 13 November 2014. The appellant's representative has confirmed that the tax assessments are no longer in dispute and I was not addressed in respect of these.

23. Following attempts to resolve the dispute by Alternative Dispute Resolution, the penalty assessment for 2008/9 was revised. The amendment was confirmed by HMRC by letter on 23 June 2015.

24. On 17 July 2015, the appellant appealed the amended penalty assessment for 2008/09.

Relevant law

25. Section 93 TMA 1970 provides (as relevant) that:

> 93 Failure to make return for income tax and capital gains tax
>
> (1) This section applies where—
>
> (a) any person (the taxpayer) has been required by a notice served under or for the purposes of section 8 or 8A of this Act to deliver any return, and
>
> (b) he fails to comply with the notice.
>
> (2) The taxpayer shall be liable to a penalty which shall be £100.
>
> (3) If, on an application made to it by an officer of the Board, [the tribunal so directs, the taxpayer shall be liable to a further penalty or penalties not exceeding £60 for each day on which the failure continues after the day on which he is notified of the direction (but excluding any day for which a penalty under this subsection has already been imposed).
>
> (4) If—
>
> (a) the failure by the taxpayer to comply with the notice continues after the end of the period of six months beginning with the filing date, and
>
> (b) no application is made under subsection (3) above before the end of that period,
>
> the taxpayer shall be liable to a further penalty which shall be £100.
>
> (5) Without prejudice to any penalties under subsections (2) to (4) above, if—

(a) the failure by the taxpayer to comply with the notice continues after the anniversary of the filing date, and

(b) there would have been a liability to tax shown in the return,

5 the taxpayer shall be liable to a penalty of an amount not exceeding the liability to tax which would have been so shown…

26. Section 95 TMA 1970 provides that:

95 Incorrect return or accounts for income tax or capital gains tax

(1) Where a person fraudulently or negligently—

10 (a) delivers any incorrect return of a kind mentioned in section 8 or 8A of this Act (or either of those sections as extended by section 12 of this Act), or

(b) makes any incorrect return, statement or declaration in connection with any claim for any allowance, deduction or relief in 15 respect of income tax or capital gains tax, or

(c) submits to an inspector or the Board or any Commissioners any incorrect accounts in connection with the ascertainment of his liability to income tax or capital gains tax,

he shall be liable to a penalty not exceeding the amount of the 20 difference specified in subsection (2) below.

(2) The difference is that between—

(a) the amount of income tax and capital gains tax payable for the relevant years of assessment by the said person (including any amount of income tax deducted at source and not 25 repayable), and

(b) the amount which would have been the amount so payable if the return, statement, declaration or accounts as made or submitted by him had been correct.

(3) The relevant years of assessment for the purposes of this section 30 are, in relation to anything delivered, made or submitted in any year of assessment, that, the next following, and any preceding year of assessment; …

27. Schedule 24, Finance Act 2007 provides (as relevant, for the relevant years) that:

35 1—

(1) A penalty is payable by a person (P) where—

(*a*) P gives HMRC a [self-assessment return], and

(*b*) Conditions 1 and 2 are satisfied.

(2) Condition 1 is that the document contains an inaccuracy which 40 amounts to, or leads to—

(*a*) an understatement of a liability to tax,

(*b*) a false or inflated statement of a loss, or

(*c*) a false or inflated claim to repayment of tax.

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

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).

(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.

4—

(1) The penalty payable under paragraph 1 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.

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)][1] 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.

(2) The reference in sub-paragraph (1) to the additional amount due or payable includes a reference to—

(*a*) an amount payable to HMRC having been erroneously paid by way of repayment of tax, and

(*b*) an amount which would have been repayable by HMRC had the inaccuracy or assessment not been corrected.

(3) In sub-paragraph (1) “tax” includes national insurance contributions.

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]

(1) A person discloses an inaccuracy[, a supply of false information or withholding of information,][1] or a failure to disclose an under-assessment by—

(*a*) telling HMRC about it,

(*b*) giving HMRC reasonable help in quantifying the inaccuracy[, the inaccuracy attributable to the [supply of false information][2] or withholding of information, or the][1] 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][2] or withholding of information, or the][1] 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][1], and

(*b*) otherwise, is “prompted”.

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

10—

(1) Where a person who would otherwise be liable to a 30% penalty has made an unprompted disclosure, HMRC shall reduce the 30% to a percentage (which may be 0%) which reflects the quality of the disclosure.

(2) Where a person who would otherwise be liable to a 30% penalty has made a prompted disclosure, HMRC shall reduce the 30% to a percentage, not below 15%, which reflects the quality of the disclosure.

(3) Where a person who would otherwise be liable to a 70% penalty has made an unprompted disclosure, HMRC shall reduce the 70% to a percentage, not below 20%, which reflects the quality of the disclosure.

(4) Where a person who would otherwise be liable to a 70% penalty has made a prompted disclosure, HMRC shall reduce the 70% to a percentage, not below 35%, which reflects the quality of the disclosure.

> (5) Where a person who would otherwise be liable to a 100% penalty has made an unprompted disclosure, HMRC shall reduce the 100% to a percentage, not below 30%, which reflects the quality of the disclosure.
>
> (6) Where a person who would otherwise be liable to a 100% penalty has made a prompted disclosure, HMRC shall reduce the 100% to a percentage, not below 50%, which reflects the quality of the disclosure.

Appellant's evidence and submissions

28. The appellant's accountant confirmed that the penalty assessments were the only matters now under appeal and that the assessments to tax for the relevant years were no longer in dispute. The appellant was seeking to have the penalties suspended, on the basis that the behaviour which led to the assessments was not deliberate.

29. The appellant's accountant agreed the general background but submitted that HMRC had misinterpreted information which had been provided. For example, HMRC's statement that the appellant had agreed at their meeting in February 2013 that the behaviour was deliberate was incorrect, and the appellant had said no such thing.

30. The appellant's bank account had been overdrawn for almost the entire 2009/10 tax year, and the position had been the same in earlier years. Accordingly, it was submitted that the appellant had no reason to believe that he had made substantial profits in the tax years under appeal.

31. The appellant's accountant also disputed HMRC's view that the appellant had been 'reactive' and had provided information 'piecemeal' throughout the process; it was agreed that Schedule 36 Notices had been issued, but the appellant had not refused to respond or refused to attend meetings.

32. It was accepted that the appellant's record-keeping was very poor, and he had also been in poor health with back problems. It was also accepted that the difference between the estimated returns and the assessed profits could be regarded as negligent.

33. For the appellant, however, it was submitted that an action was "deliberate" if it was something done consciously or intentionally. However, this was not a case of the appellant acting consciously or intentionally: the appellant did not know that the documents submitted had contained an inaccuracy, as alleged by HMRC.

34. The HMRC review of the penalty assessments had recommended that a penalty which had initially been raised for the 2010/11 period on the basis of deliberate behaviour should be removed because the reviewer considered that the evidence did not support a finding that the behaviour was deliberate.

35. It was submitted that the appellant's behaviour had not changed throughout the whole period and so the behaviour could not be regarded as deliberate, as HMRC

themselves had accepted that an underassessment in the 2010/11 self-assessment return was not made deliberately.

36. It was, therefore, submitted that the penalties should not be assessed on the basis that the behaviour leading to the penalties was deliberate.

5 **HMRC evidence and submissions**

37. For HMRC, it was submitted that there was a substantial disparity between the information originally submitted on the appellant's tax return for the 2009/10 year, being business turnover of £20,000 and net profit of £20,000, and the final amounts assessed of business turnover of approximately £85,000 and net profits of
10 approximately £50,000.

38. It was submitted that deliberate behaviour, in this context, includes giving HMRC a document which is known to be inaccurate. There is no requirement that the person providing the document knows the extent of the inaccuracy.

39. HMRC submitted that, in this matter, the disparity between the figures
15 submitted in the return and the final figures assessed was such that the appellant was not merely careless in completing the return but, instead, knew that the return was inaccurate and so the behaviour leading to the understatement of tax was deliberate.

Discussion

40. s50(6) TMA 1970 provides (as relevant): "If, on an appeal, it appears to the
20 [Tribunal] … that the appellant is overcharged by an assessment … the assessment … shall be reduced accordingly, but otherwise the assessment … shall stand good."

41. The burden of proof is therefore on the appellant to show that the penalty assessments are incorrect. The applicable standard of proof is the usual civil standard, the balance of probabilities.

25 *2006/7 and 2007/8*

42. The penalties for the tax years 2006/7 and 2007/8 have been raised under s95 TA 1970, and the relevant test for these years is whether the appellant's behaviour which led to the underassessment was negligence. It was accepted by the appellant's accountant that the disparity between the submitted returns (showing equal amounts
30 of turnover and profit) and the assessed profits looks like negligence.

43. I find that the appellant's behaviour for these tax years was clearly negligent; submitting the same round figure amount for turnover and profit in a business that clearly involves expenses indicates that the appellant did not attempt to establish what the accurate figures for the return should be.

2008/9

44. The penalty assessment for 2008/9 is raised under s93 TMA 1970 on the basis of failure to submit a return due. This is a question of fact which has not been disputed rather than a question of degrees of behaviour..

2009/10

45. The penalty for 2009/10 is raised under paragraph 1, Schedule 24, Finance Act 2007. The amount of this penalty does depend on the behaviour leading to the understatement of tax, as paragraph 4 sets different levels of penalty according to behaviour: if the behaviour is careless, the maximum penalty is 30% of the tax due. If the behaviour is deliberate but unconcealed, the maximum penalty is 70% of the tax due.

46. Considering the information provided in the original tax return for the 2009/10, and in particular the equal turnover and profit, it is clear that the appellant could not have considered that the return was accurate, as he knew that he had business expenses which would have had to mean that turnover and profit could not be the same. Further, the disparity between the figures in the return and the eventually established figures is substantial. The difference in the turnover figures is more than £65,000, and profits were understated by over £38,000.

47. Such a disparity in figures means that the appellant's behaviour in submitting the return must be regarded as more than a failure to take reasonable care and poor record-keeping. I do not accept that his overdraft status means that the appellant could not have known that his return was substantially incorrect. Accordingly, I find that the appellant knew the figures in his tax return were incorrect although he did not know the correct figures and that the appellant submitted them anyway; I agree with HMRC that this is deliberate behaviour and not carelessness. It should be noted that HMRC have made no accusation of fraud and this tribunal makes no such finding.

48. Having considered the evidence, and noting the various Schedule 36 Notices which were issued as a result of repeated failure to provide information, I find that the penalty abatements given by HMRC are reasonable in the circumstances.

49. The appeal is therefore dismissed and the penalties set out above are upheld as correctly assessed. As noted above, the relevant tax assessments were agreed not to be in dispute by the appellant's representative and, for the avoidance of doubt as they were originally appealed, those tax assessments are also therefore found to have been correctly assessed.

50. 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.

ANNE FAIRPO
TRIBUNAL JUDGE

RELEASE DATE: 10 NOVEMBER 2016