TC05706

Appeal number: TC/2016/02526

INCOME TAX – Application for permission to give appeal late: granted - three alleged inaccuracies in tax return – Schedule 24 FA 2007 – whether inaccuracies at all: yes to two, no to other – whether careless: yes to two – whether appropriate reduction given: no – whether adjustment for overstatement made: no – whether potential lost revenue correct: no – whether reduction for special circumstances properly considered: no – whether suspension properly considered: no – penalty cancelled.

FIRST-TIER TRIBUNAL
TAX CHAMBER

DR RAGINI PANDEY **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS
WILLIAM HAARER

Sitting in public at Vintry House, Wine St, Bristol on 1 March 2017

Mr Dilip Patel FCA of Wormald & Partners for the Appellant

Mrs Gill Carwardine, Presenting Officer, for the Respondent

DECISION

1. "Well, here we go again".

2. That was the opening sentence of the decision of Judge Nicholas Wikeley in *NI v HMRC* [2015] UKUT 160 (AAC), a decision about tax credits which was the latest in a long list of such cases coming before the Upper Tribunal's Administrative Appeals Chamber where there had been a catalogue of errors committed by the Respondents in this case ("HMRC").

3. We have used the same phrase because this is by no means the first case to come before this chamber of this Tribunal where HMRC's approach to Schedule 24 to the Finance Act ("FA") 2007 has been severely criticised (as it will be in this decision). We mention only *Howells v HMRC* [2015] UKFTT 412 (TC) a decision of Judge Thomas, the judge in this case, sitting with Julian Stafford.

4. We make it clear that we exempt Mrs Carwardine, the presenting officer, from our strictures. It was clear to us that she came prepared to concede a number of the points we identified and quizzed her on before she had a chance to make any concessions. She put HMRC's case as well as it could be put.

5. This case was an appeal by Dr Pandey ("the appellant") against the imposition of a penalty under paragraph 1 of Schedule 24 FA 2007 ("Sch 24") for two alleged careless inaccuracies identified by HMRC in her tax return for the tax year 2009-10. The appeal was preceded by an application by the appellant under s 49(2)(b) Taxes Management Act 1970 ("TMA") to give HMRC notice of appeal after the time limit.

6. We had intended, and so informed the parties, to treat the hearing as a "rolled-up" one, ie to hear all the arguments on the appeal as well as the application before deciding whether to give permission. But after we had heard Mr Patel and Dr Pandey on the application we decided to give permission immediately, and then went on to hear the appeal. We announced our decision on the appeal at the end of the hearing which was in substance if not in form to quash the penalty. After further consideration in this written decision we slightly vary the reasons we gave the parties in our *ex tempore* decision, but the outcome is the same.

Late appeal permission application

7. We informed the parties that, whatever HMRC may say in their letters and guidance about the need to show a reasonable excuse in s 49 TMA late appeal cases, the Tribunal's jurisdiction is wider. We explained that we would adopt the three stage approach set out in *Denton v TH White Ltd* [2014] EWCA Civ 906 ("*Denton*") and what those stages were.

8. We add here that we appreciate that *Denton* and *BPP Holdings v HMRC* [2016] EWCA Civ 121 which followed it and which relates specifically to tribunals, as distinct from courts, were about sanctions applied for delay in meeting deadlines

imposed by, or as a result of case management decisions etc under, the Civil Procedure Rules (CPR) in the courts of England and Wales and the various Tribunal Procedure Rules made under powers in s 22 of the Tribunals, Courts and Enforcement Act 2007 including relevantly the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. This case is about a deadline imposed by statute, s 31A(1)(b) TMA. But the Upper Tribunal (in *Data Select v HMRC* [2012] UKUT 187 (TCC) ("*Data Select*") and the Court of Session in Scotland (*Advocate-General for Scotland v General Commissioners for Aberdeen City* [2006] STC 1218 ("*Aberdeen GCs*")) have stated that when considering statutory rules imposing time limits, the CPR (and their Scottish equivalent) are appropriate tools to be used by this Tribunal in considering whether to grant permission to bring an appeal.

9. *Denton* stage 1 requires us to identify and assess whether the delay is serious and significant. The date of expiry of the time limit for appealing against the penalty assessment was 30 days after the date of the notice of that assessment (s 31A(1)(b) and (4)(a) as applied by paragraph 13(2) Sch 24) which was 21 May 2015. The application was made to the Tribunal on 20 April 2016. That delay is serious and significant, although we accept that it was not serious enough to cause the kind of disruption to a litigation timetable that has been castigated in *Denton* and other cases. This is because the application for permission to bring an appeal is a threshold which the potential appellant must cross before any appeal proceedings can be started.

10. Even if we were to accept that time effectively began to run at the end of September 2015, when it appears that Wormald & Partners ("Wormalds") may first have become aware of the penalty assessment, the subsequent delay is itself serious and significant.

11. *Denton* stage 2 asks why the default occurred. Before we began to consider this stage we asked Dr Pandey if she would tell us about her tax affairs.

12. She told us that she was a paediatric heart surgeon. In accordance with the requirements of the NHS her training was organised centrally by a Deanery which involved her working a year at a time at one of the few hospitals dealing with her speciality. She had worked at successively the Liverpool Heart & Chest Hospital (from before 2007), County Durham & Darlington NHS Trust (Newcastle Freeman Hospital) ("CDD"), Birmingham Children's Hospital ("BCH"), Great Ormond Street Hospital ("GOS") and Alder Hey Childrens NHS Trust, these being consecutive employments ending on 5 June 2011. From June 2011 to February 2013 she worked in Australia, and from then on she worked at the UH Bristol NHS Trust.

13. Her only source of income was her NHS pay which was subject to PAYE and the only reliefs and allowances were the fees she paid to the BMA, GMC and the Medical Defence Union. These fees she said had to be paid as a condition of working in the NHS as a surgeon and to be kept on the Medical Register.

14. She did not know anything about tax except that her pay was taxed before she received it. At the time in question if she received anything from HMRC she passed it to an accountant. She did not know why she was required to complete tax returns.

Despite her seemingly simple affairs, when she was working in Australia she discovered in August 2012 from an urgent phone call from HMRC which she received at night that HMRC were after over £100,000 from her (and were seeking an attachment of earnings order). She had contacted two firms of accountants who told her that all she could do was sell her house or borrow and pay the bill. She then found on the internet MJH Accounting Ltd ("MJH") in Liverpool who said that there may be a way out of it, and that it would require as a minimum that she filed all outstanding tax returns.

15. From Australia she did what she could to help this process. She had no records such as P60s in Australia and wrote to all her previous employers for pay and tax details and told her accountants about her professional fees. They filed the 2009-10 and other returns in 2013.

16. In January 2015 she had received notice from HMRC about an attachment of earnings order they proposed to apply for and she approach Wormalds, taking with her a letter from HMRC of 7 January warning of the possibility of a penalty.

17. In response to questions from Mrs Carwardine she said that if she had problems about tax at work she would go to the payroll department or to her accountant. She could not recall whether she had received a letter from HMRC opening an enquiry in April 2014 nor any other correspondence from them.

18. We accept Dr Pandey's evidence. She was obviously somewhat hazy about exact dates and the order of things, but that does not detract from her account of her actions and we find that account as fact.

19. Mr Patel then addressed us. He told us that Dr Pandey approached him in January 2015 and gave him copies of the letter from HMRC of that date in which Mrs Barwood had started an enquiry into the 2009-10 return and a Notice of Application for an Attachment of Earnings Order for £53,108.40.

20. In the Notice of Appeal to the Tribunal Mr Patel had candidly admitted that his firm could not say that there was a reasonable excuse for their taking over six months to make an appeal, starting from the date (30 September 2015) on which they were clearly informed by Mr Alex MacFarlane, the then caseworker in HMRC, Local Compliance of the fact that a penalty assessment had been made in April 2015 until the date on which the notice of appeal was given.

21. We noted that the reasons for lateness in the notice of appeal are simply:

> "Due to circumstances mentioned in this appeal, our client was unable to make an appeal to HM Revenue & Customs against this penalty assessment within the time limit".

22. There was no explanation there of why an appeal could not have been made shortly after Wormalds were told by Mr MacFarlane that no appeal had been made against the penalty assessment (or indeed the closure notice that preceded it which is not before us). It is true that that letter gave no hint that an appeal could still be given

to HMRC, but that does not excuse the inaction of Wormalds who must be taken to know an elementary point of income tax law.

23. Mr Patel and his associate Mr Thomas David did suggest, when we brought a letter of theirs and the HMRC response to their attention, that there might in fact have been an appeal at an earlier date.

24. The letter is dated 9 July 2015 and is addressed to HMRC's Debt Management Unit in Worthing ("Enforcement Office") and is in form a claim for "special relief" (the special overpayment relief proved for by paragraph 3A Schedule 1AB TMA). The letter explains in detail why a number of tax debts that Enforcement Office were chasing had arisen, with particular reference to a determination under s 28C TMA for 2007-08 for over £50,000. In that letter Wormalds detailed Dr Pandey's earnings for (among other years) 2009/10 and referred to the tax liability for that year shown in the closure notice which exceeded their figures. They added "we request that these are reviewed by yourselves as soon as possible."

25. Later in the letter after the formal claim for special overpayment relief, they added:

> "We would also request that no interest or penalties should be charged in this case on the basis that our client has already incurred substantial fees in order to complete Tax returns which in our view were not at all necessary"

26. The response to that letter from Enforcement Office on 20 July 2015 simply referred to the "special relief" and granted it for 2007-08 (by concession, as the claim was out of time). It did not mention 2009-10.

27. We have considered whether it was reasonable for Wormalds to think that this letter amounted to an appeal against the 2009-10 penalty. We do not think it is. It may well be thought to be an appeal against the closure notice for the year. But we cannot accept that the reference to "no interest or penalties" included the Schedule 24 penalty – it clearly referred in our view to penalties for late returns and late payments which were included on the SA Statement dated 20 July 2015 attached to the HMRC letter: that list did not include the Sch 24 penalty (why it did not is a question that we could find no explanation for and Mrs Carwardine did not have one).

28. And in any case Mr MacFarlane's letter of 30 September should have quashed any lingering doubts about this matter.

29. From all this material we find that the first period of the default occurred because Wormalds did not know of the penalty assessment notified on 21 April 2015 until some time after the time limit for appealing against it expired, possibly not until the end of September. Dr Pandey did not tell them about the penalty assessment even if she had received notification of it, and the agent's copy was sent to the previous accountants, MJH, despite the fact that Wormalds' 64-8 (authority to receive correspondence) had been registered by HMRC *before* the issue of the penalty.

30. We do not know when MJH's papers were transferred to Wormalds, but it may have been shortly before 18 September 2015 when Wormalds wrote to Local Compliance (Mr MacFarlane) about 2009-10.

31. For the period after 30 September 2015 we find that the default arose as a result of the inaction of Wormalds until 11 April 2016 when Mr Patel and Mr David both spoke to Mr MacFarlane.

32. *Denton* stage 3 requires us to consider all the circumstances of the case, but in doing so we must give particular weight to the need to conduct the litigation (or other litigation) efficiently and at proportionate cost and the importance of complying with the any relevant rules – here with the statute.

33. Relevant circumstances include (as we see from *Data Select* and *Aberdeen GCs*) the prejudice to either party should our decision go against them.

34. Here the prejudice to Dr Pandey is clear: she will have no chance to contest the penalty imposed on her. As for HMRC Mrs Carwardine admitted there was little or no prejudice should the application succeed. HMRC came ready to argue the appeal, and would still have the opportunity to support the penalty imposed on Dr Pandey.

35. We must also consider the purpose of the rule concerned, here s 31A(1)(b) TMA. There was no dispute that its purpose is to allow appellants a reasonable time to decide whether to appeal, but also to allow HMRC to put away their files and move on to other cases if no appeal is made within a reasonably short time after the limit expires. Observing the limit therefore is of particular importance given the two factors (§28) which must be given special weight. The time limit contributes to the first, and the need to obey it is part of the second. In this case the length of time after the time limit is substantial even if we disregard the period up to the end of September 2015. On the other hand there is no suggestion that it caused the caseworker, Mr MacFarlane, any particular difficulty in responding to Wormalds in September 2015 or April 2016 or caused the appeals function of HMRC or this tribunal any great problems.

36. Questions of the merits of the appeal may be considered, but will rarely be decisive (*Hysaj, R (on the Application of) v Secretary of State for the Home Department* [2014] EWCA Civ 1633), unless success or failure of the appeal is clear and obvious without the need to conduct a mini-trial of the appeal. In this case, for reasons that will become clear, we formed the view that Dr Pandey was bound to succeed on at least three issues affecting the amount of the penalty (all three issues were ones that Mrs Carwardine agreed with the Tribunal about).

37. We also considered it was relevant that (a) Dr Pandey appeared to have been treated unconscionably by HMRC but HMRC had recognised this and given her relief outside the time limit (b) HMRC had agreed with Wormalds that Dr Pandey did not meet HMRC's own criteria for when a person should be required to make a return (ie be within self-assessment, as HMRC put it) and (c) (following on from (b)) HMRC

had removed all penalties for failures to make returns or payments in all other years and had in fact removed the obligation to make returns.

38. Taking all these circumstances into account we decided that permission should be given to Dr Pandey to give a late notice of appeal.

The appeal against the penalty

39. Mrs Carwardine's Statement of Case recognised that in the case of any penalty the onus is on HMRC to show that it had been properly imposed. We noted that Dr Pandey had been given a Factsheet informing her of her rights under Article 6 of the European Convention on Human Rights ("ECHR") and we explained to her that the penalty imposed on her was regarded by the European Court of Human Rights as a "criminal offence" for the purposes of the ECHR which meant that she had certain rights such as the presumption of innocence which did not apply to ordinary tax appeals. We stressed that our hearing was not into any allegation by HMRC of any actual crime.

40. We further noted that although HMRC had given the ECHR Factsheet to Dr Pandey, the Factsheet itself proclaimed HMRC's view that it only applied if the penalty could be 70% or more of the tax. Yet it was clear that HMRC had never had any intention of imposing a penalty which carried more than a 30% maximum penalty.

41. Mrs Carwardine therefore took us through the bundle in order to show how the penalty had come about and been imposed. The relevant parts of Sch 24, the law by which we considered her case and the documents relating to the penalty is in an Appendix.

The return in question

42. This process did not get off to a good start. We asked Mrs Carwardine if we could see a copy of the return in question as the only thing in our bundle was a sheet showing the date of issue, the date of receipt and the date of capture of the data. After searching her papers she said she did not have it, but could get it sent over from her office, also in Bristol. We declined her offer.

43. Fortunately Mr Patel was able to produce a copy from his files which we examined after it was shown to Mrs Carwardine.

44. We noted that the address on the return was shown as being in Brisbane, Australia.

45. The only figure entries were in the employment pages (SA102) which showed employment income from CDD of £12,179, tax deducted from that pay of £2,590 and fees and subscriptions in box 19 of £1250. The self assessment showed tax repayable of £1699.20.

46. There was also a "white space" entry on page TR6 which was to the effect that Dr Pandey did not realise she was in SA until 2012 and she had been frantically

obtaining P45s and P60s. The return was based, the entry said, on the information the accountants currently held and would be amended if other information became available. The return was filed by MJH.

47. The return was noted in the "Return Summary" as received on 7 March 2013 but captured on 26 March 2015. We asked Mrs Carwardine why this latter date was shown, two years after receipt. She did not know, but later suggested that the capture date was in fact the date on which the return had been amended after closure of the s 9A TMA enquiry. This seems plausible but yet inexplicable.

The s 9A enquiry & Sch 36 notice

48. Mrs Carwardine then showed us the opening of the s 9A enquiry which, although opened more than 12 months after the date of receipt was she said in time by virtue of s 9A(2)(b) TMA. We agree.

49. We did not actually have the schedule of enquiries made of MJH attached to the opening letter by Mrs Barwood of HMRC Local Compliance (a copy of which was sent to Dr Pandey without the request for information). But since HMRC had issued a precursor letter about, and then imposed a penalty under, Schedule 36 FA 2008 we were able to see what it was that the opening letter required.

50. The Schedule 36 schedule was somewhat bizarre. It contains two boxes, one headed "Statutory records or information that we need" and one "Other documents or information that we need". The content of each box was identical:

> "My records show that during the income tax year ended 5 April 2010 your client was in receipt of the following:
>
> a) Pay £68,630 Tax £13,726.00 in respect of [BCH]
>
> b) Pay £20,059 Tax £4,011.80 in respect of [GOS]
>
> However no corresponding entries appear on the return. In the circumstances will you please let me have your agreement or alternatively forward copies of the P60s
>
> 2. Can you please let me have a breakdown together with supporting receipts of your clients claim for £1,250 for professional subs."

51. While the text was identical the formatting was not. In item 1 in the "Statutory records" box, the words after agreement are emboldened, as are the words after "together with" in item 2.

52. Conversely on the "Other documents etc" box in item 1 all the words not emboldened in the Statutory records box *are* emboldened, as are the other words in item 2 as well as the words after "receipts".

53. We can only assume that it is only the words in bold in each box that constitute the request for each category. We mention here that there is a distinction between the two boxes in that there can be no right of appeal against a Box 1 "statutory records" request (paragraph 29(2) Schedule 36 FA 2008).

54. It is also somewhat bizarre to include in a notice under Schedule 36 a request for the appellant's agreement (presumably) to the figures shown by HMRC. Such a request is not a request for documents or information. It is even more bizarre to make the provision of what are indeed documents an alternative to that agreement. Either HMRC want the documents or they do not. Mr Patel had quite rightly pointed out that HMRC must have taken the details from forms P14 (and indeed they were exhibited in the bundle as Mrs Carwardine showed us) when a P60 is simply the "public face" of a P14.

55. As to the "breakdown" and the "receipts" for "professional subs" ("subs"), HMRC must also have known that these subs had been included in a code number in earlier years and they certainly should have known that NHS doctors are not permitted to practice without payments to professional bodies and medical insurers and that all such payments are on List 3 published by HMRC and that their own guidance, the Employment Income Manual, says that they should not normally be queried. We note that Item 1(h) and Item 1A in the Table in s 343 Income Tax (Earnings and Pensions) Act 2003 ("ITEPA") seems to list some at least of the fees payable by a doctor in Dr Pandey's position.

56. HMRC have more of an excuse for not knowing, at operational level anyway, that professional fees, indeed all employment expenses do not need to be claimed, they are an entitlement (see s 328 ITEPA).

57. The s 9A enquiry was complete by the issue by Mr MacFarlane of a closure notice under s 28A TMA on 30 March 2015 showing additional tax of £11,567.20. The calculation attached to the notice shows that it includes the omitted employment income from BCH and GOS in addition to the £12,179 from CDD that had been shown on the original return.

Warning of and imposing the penalty

58. In the absence of any reply to the Schedule 36 FA 2008 notice, even after the imposition of a penalty for non-compliance, Mrs Barwood issued a letter to MJH and to Dr Pandey on 7 January 2015 informing them that she was contemplating imposing a penalty under Schedule 24 FA 2007 which can apply "when an individual has been careless in the submission of an incorrect tax return resulting in a tax discrepancy". She asked for Dr Pandey's comments on the circumstances leading to the "inaccuracy/inaccuracies". She enclosed a tax calculation showing revised figures which included three employments, the one returned (CDD) plus the two omitted (GOS and BCH) and without a deduction for subs.

59. On 13 February 2015 Mr Alex MacFarlane, who had replaced Mrs Barwood, wrote to Dr Pandey (but not apparently MJH) with his view that her 2009-10 return contained the following inaccuracies:

> (1) You omitted your employment income and PAYE tax deducted from [the two employments not on the return].

(2) You claimed for Professional Subscriptions (HMRC's capitalisation) but have provided no information as to the names of the bodies to which you paid subscriptions nor have you provided evidence of the amounts paid. In these circumstances relief must be refused.

60. On 5 March 2015 Mr MacFarlane sent Dr Pandey a "Penalty Explanation". Among the points we noted on this letter were:

(1) Dr Pandey was told she cannot appeal the letter, but if an assessment is notified to her she can "appeal or ask for a review then". In fact she could do both.

(2) She was told that for each "penalty or grouped penalty" the penalty explanation schedule sets out the relevant information.

61. We asked Mrs Carwardine what a "grouped penalty" was. She did not know. We had been puzzled by during pre-reading and had researched it. From HMRC's Compliance Handbook Manual (*sic*) paragraph 82200 we see that HMRC officers may treat a number of inaccuracies with the same underlying behaviour (careless or deliberate etc) the same type of disclosure (prompted or unprompted) as a single inaccuracy (for the purposes of calculating the potential lost revenue (and thus the maximum penalty) as a single "grouped" inaccuracy and the amounts of the reduction for disclosure will be calculated by reference to this single inaccuracy. This then is what HMRC have done: they have treated the omission of income and of tax deducted and the failure to verify the deduction for subs as a single "grouped" inaccuracy.

62. Following the 5 March 2015 letter to which no response was received Mr MacFarlane Mr MacFarlane issued the penalty assessment on 21 April 2015 to Dr Pandey charging £3,470.16.

63. We think that the best way of examining whether HMRC have met the hurdle of showing on the balance of probabilities (which we agree is the standard of proof to be applied) is to examine what HMRC said in the Penalty Explanation Schedule attached to Mr MacFarlane's letter of 5 March 2015. The assessment itself we only need to consider in relation to the question whether it met the requirements of Part 3 Schedule 24. To this end Mrs Carwardine took us through the Penalty Explanation Schedule.

The description of the inaccuracies

64. The Schedule stated that it was an explanation of the "Grouped Inaccuracy penalty". In the rubric "Description of the inaccuracy" the Schedule reproduced §60(1) and (2). We asked Mrs Carwardine what was it in §60(2) that demonstrated an inaccuracy. She admitted that there was no inaccuracy in what was described and said that had been prepared to drop any claim for a penalty on this aspect. The remaining inaccuracy therefore related to the omission of employment income and the tax deducted from it.

Characterisation of the inaccuracies & agency

65. The Schedule characterised the actions of Dr Pandey as careless (there has been no suggestion by HMRC that her actions were deliberate). As can be seen from §46 it

was MJH who prepared and filed the returns for this and other years at the same time. The question therefore is whether MJH's actions in so doing were careless and if they were whether they can be attributed to Dr Pandey.

66. We agree that by omitting her only income of the year, her employment income, and the tax deducted from it, MJH were careless. We do not know precisely what information they had from Dr Pandey or from her employers. To return income of £12,179 and tax deducted of £2,590 from CDD was not in itself careless as that is what CDD had (erroneously) told Dr Pandey (see §65) and through her them. But they must have realised, on the basis of what Dr Pandey had told them that £12,179 could not possible be a year's earnings of a heart surgeon in the NHS. They should have asked themselves whether this could be right and made enquiries if they had no other information about this year. We do not think it is good enough to simply add what they said in the white space on the return. The figure of £12,179 stands out in contrast to all information available about the level of Dr Pandey's earnings in previous and subsequent years.

67. But of itself that does not make Dr Pandey's actions careless. It was MJH who "gave" the document containing inaccuracies to HMRC within the meaning of paragraph 1 Sch 24, not Dr Pandey. We do not have to consider the law of agency here as Sch 24 contains its own self-contained code on agency in paragraph 18, at least in relation to careless behaviour.

68. Paragraph 18(1) glosses "P gives a document" in paragraph 1(1)(a) Sch 24 to include the case where the document in question is given to HMRC on P's behalf. This is the case here, so Dr Pandey is treated as having given the document (her tax return for 2009-10) to HMRC. "Giving" here includes any method by which information is communicated (paragraph 28(h) Sch 24) so the filing of a return online on P's behalf counts as her giving the document to HMRC.

69. Paragraph 3(1)(a) Sch 24 as glossed by paragraph 18(4) has the effect that MJH's failure to take reasonable care is attributed to Dr Pandey. But that is not the end of the matter. An escape is available to Dr Pandey under paragraph 18(3) if she can show that she herself "took reasonable care to avoid inaccuracy". We had no convincing evidence that she did. Had she seen the returns MJH submitted and examined them with care, whether before or after they were submitted, she must have realised they were wrong. If she didn't see them she should have ensured that she saw them at some time. We conclude that the omission was due to the carelessness of MJH which is attributable to Dr Pandey and that Dr Pandey was careless in not checking what they had done for her.

Reductions from the maximum

70. In the Penalty Explanation Schedule the percentage reductions from the maximum penalty allowed for each of the three aspects of disclosure, what HMRC call "telling, helping and giving", was 0%. Under "giving" the explanation for this was "you have provided no substantive response to any requests for information or documents". "Giving" is somewhat odd shorthand for paragraph 9(1)(c) Sch 24 which refers to "allowing HMRC access to records" (it is odd especially in the light of

the use of "giving" in the "helping" paragraph, 9(1)(b)). We asked Mrs Carwardine what "access" Mrs Barwood had sought, and she agreed that there was none. She also agreed that in circumstances where HMRC do not require helping or giving, the full reduction, in this case 40% is given. Mrs Carwardine said she had been ready to suggest this and proved it by immediately telling us the revised percentage penalty (24%).

The potential lost revenue ("PLR")

71. The Penalty Explanation Schedule states that "The PLR for *each* inaccuracy is shown in the penalty table at the end of the schedule" (our emphasis). That table shows a single figure of £11,567.20". This is presumably because the schedule is a grouped penalty schedule, but in such a case the reference to "each" inaccuracy is misleading. In a grouped schedule there can be no more than one (grouped) inaccuracy.

72. Mrs Carwardine agreed that as a result of withdrawing the accusation of inaccuracy in relation to subs the potential lost revenue would need recalculation. We referred her to paragraph 6(2) Sch 24 and asked if the employment income that was shown on the return was overstated. We had noted that Mr MacFarlane had agreed, grudgingly, that this was so after being shown a letter from Wormalds which contained a document from CDD clearly showing that they had incorrectly allocated the figures on the return to 2009-10 when they actually belonged to 2008-09 (not surprising given that must have been clear from HMRC's records that Dr Pandey had no earnings from CDD in 2009-10).

73. Mrs Carwardine readily agreed that the overstatement of income and tax deducted had to be taken into account in the PLR calculation, contrary to Mr MacFarlane's view.

74. This still left some net tax in the PLR calculation. This tax was an underpayment arising from the fact, repeatedly pointed out by Mr Patel, that throughout the whole of 2009-10 where there were two consecutive employments, code BR had been used. Although this code does not show a personal allowance, it also does not collect higher rate tax. In Dr Pandey's case the higher rate tax uncollected exceeds the tax value of the personal allowance.

75. Mr Patel said that this must be the result of either the employer not operating PAYE properly or HMRC not providing a correct code. We asked Dr Pandey if she recalled giving P45s or P46 information to GOS when she moved there or indeed in any move before or since. She said she did not get P45s. The Tribunal can say from other cases it has seen that the operation of PAYE by NHS bodies is often unorthodox. Dr Pandey said that she thought that during these years which were academic training years she was employed throughout by the Deanery.

76. In our view it is more likely than not that one or both of the employers in 2009-10 failed to deduct the amount of tax they should have done. In these circumstances Dr Pandey would be entitled to a credit for the tax not so deducted by virtue of regulation 185(5) of the Income Tax (Pay As You Earn) Regulations 2003

(SI 2003/2682). And in these circumstances the PLR becomes nil or negative (because the subs were not in the code either).

Special reduction for special circumstances & suspension

77. Mr MacFarlane had stated in the Schedule that there were no special circumstances. Mrs Carwardine said that there was no audit trail of his reasoning or what he took into account. We therefore consider whether there were any matters which he should have taken into account.

78. Our list is:

(1) He did not take into account that the SA criteria were not met

(2) He did not take into account the white space entry on the return

(3) He did not consider whether PAYE had been operated correctly.

(4) He did not take into account that when the return was filed Dr Pandey was in Australia (as was apparent from the return)

(5) He did not take into account that MJH were no longer authorised and that Wormalds were.

79. We also point out that there is no bar to HMRC reconsidering special circumstances if more information comes to light after the assessment to a penalty (or indeed after our decision). This would include all the documentation sent by Wormalds during the preparation for the hearing in response to directions, especially the incorrect information from the CDD and the details of the subs.

80. Had we not already decided that there was no PLR, and in case we are wrong about the operation of PAYE, we would have found Mr MacFarlane's consideration of special circumstances flawed in the judicial review sense and we would have reduced the penalty to nil on that account.

Suspension of penalty

81. As to suspension the point is now moot, but we note that Mr MacFarlane, no doubt following guidance, gave an incorrect reason for not suspending the penalty.

Other procedural matters

82. The notice of penalty assessment complies with the requirements of paragraph 13(1) and (3) Sch 24 and s 30A(3) TMA (as applied by paragraph 13(2)(a) Sch 24).

Decision

83. Under paragraph 17(1) Schedule 24 FA 2007 we cancel HMRC's decision that Dr Pandey is liable to a penalty. This is because paragraph 1 of that Schedule requires the condition in paragraph (2) to be met before a penalty is payable and that condition is (relevantly here) that the inaccuracies amount to, or lead to, an understatement of a liability to tax, and there is no such understatement.

84. If it were shown that we were wrong to say that there is no understatement, ie that the PLR is nil, then under paragraph 17(2) we would remake the decision by first reducing the penalty to 24% of the (reduced) PLR and then giving a special reduction of 24% of the PLR to reduce the penalty to nil.

Observations

85. As in *Howells* we consider that this appeal should never have reached the Tribunal. We do not blame Mrs Carwardine for the fact that it did.

86. We have criticised Mr Patel for inaction after the letter of 30 September and he has readily accepted that he was at fault. This should not however overshadow the excellent work that he has done on Dr Pandey's behalf to bring order to her chaotic tax affairs. In particular Wormalds succeeded in getting HMRC to remedy out of time the unconscionable treatment they must have meted out to Dr Pandey. Mr Patel said it was "astonishing" that a s 28C determination charging over £50,000 could be made in a case where a person is clearly a PAYE only employee earning in the region of £60,000 with PAYE fully deducted in that year as shown on records that HMRC possessed, and we agree with him. That determination cannot have been made to the best of the officer's information and belief (s 28C(1A) TMA).

87. We have mentioned that there was no appeal before us against the closure notice ending the enquiry into Dr Pandey's tax return for 2009-10. As far as we can see there was no appeal at all, though Wormalds have made numerous representations that the tax charged was wrong.

88. In our decision we have established that the PLR was wrong. There is no automatic way of having our decision reflected in the return and self-assessment. But we expect HMRC to examine the figure of tax charged by the closure notice by reference to this decision and to write off or repay the excess of that tax over the revised PLR.

Costs

89. We can only order that the losing party (in this case HMRC) pay the winning party's costs if the losing party's actions in "bringing, defending or conducting the proceedings" were unreasonable.

90. We are of the view that HMRC's actions were unreasonable. Under Rule 10(5) of the Procedure Rules of this Chamber we may not make an order without giving HMRC the opportunity to make representations. We therefore direct that HMRC have 30 days from the date of release of this decision to make representations to explain why we should not order them to pay Dr Pandey's costs. Dr Pandey told us that she had flown from India, where she now works, to attend the hearing in Bristol. If we order her costs to be paid we expect that her costs of travel to and from the UK will be included.

91. 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 THOMAS

TRIBUNAL JUDGE
RELEASE DATE: 8 MARCH 2017

APPENDIX

Schedule 24

Penalties for Errors

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 liability to tax,

…

(3) Condition 2 is that the inaccuracy was careless (within the meaning of paragraph 3) 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 TMA 1970 (personal return).
Any of the taxes mentioned above	Any document which is likely to be relied upon by HMRC to determine, without further inquiry, a question about-- (a) P's liability to tax, (b) payments by P by way of or in connection with tax, (c) any other payment by P (including penalties), or (d) repayments, or any other kind of payment or credit, to P.

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,

…

(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.

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,

…

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.

(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.

Potential lost revenue: multiple errors

6— …

(2) In calculating potential lost revenue where P is liable to a penalty under paragraph 1 in respect of one or more understatements in one or more documents relating to a tax period, account shall be taken of any overstatement in any document given by P which relates to the same tax period.

(3) In sub-paragraph (2)--

(a) "understatement" means an inaccuracy that satisfies Condition 1 of paragraph 1, and

(b) "overstatement" means an inaccuracy that does not satisfy that condition.

Potential lost revenue: delayed tax

8—(1) Where an inaccuracy resulted in an amount of tax being declared later than it should have been ("the delayed tax"), the potential lost revenue is--

(a) 5% of the delayed tax for each year of the delay, or

(b) a percentage of the delayed tax, for each separate period of delay of less than a year, equating to 5% per year.

(2) This paragraph does not apply to a case to which paragraph 7 applies.

Reductions for disclosure

9—(A1) Paragraph 10 provides for reductions in penalties under paragraph[ ] 1 … 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 under-assessment by—

(a) telling HMRC about it,

(b) giving HMRC reasonable help in quantifying the inaccuracy…, and

(c) allowing HMRC access to records for the purpose of ensuring that the inaccuracy… 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…, 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, ..

Standard %	Minimum % for prompted disclosure
30%	15%

Special reduction

11—(1) If they think it right because of special circumstances, HMRC may reduce a penalty under paragraph 1 ….

(2) In sub-paragraph (1) "special circumstances" does not include—

(a) ability to pay, or

(b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

(3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to—

(a) staying a penalty, and

(b) agreeing a compromise in relation to proceedings for a penalty.

Interaction with other penalties and late payment surcharges

12— …

(2) The amount of a penalty for which P is liable under paragraph 1 … in respect of a document relating to a tax period shall be reduced by the amount of any other penalty incurred by P, or any surcharge for late payment of tax imposed on P, if the amount of the penalty or surcharge is determined by reference to the same tax liability.

(4) Where penalties are imposed under paragraph[ ] 1 … in respect of the same inaccuracy, the aggregate of the amounts of the penalties must not exceed the relevant percentage of the potential lost revenue.

(5) The relevant percentage is--

(a) if the penalty imposed under paragraph 1 is for an inaccuracy in category 1, 100%,

Part 3

Procedure

Assessment

13—(1) Where a person becomes liable for a penalty under paragraph 1, 1A or 2 HMRC shall—

(a) assess the penalty,

(b) notify the person, and

(c) state in the notice a tax period in respect of which the penalty is assessed…

(1A) A penalty under paragraph 1 … must be paid before the end of the period of 30 days beginning with the day on which notification of the penalty is issued.

(2) An assessment—

(a) shall be treated for procedural purposes in the same way as an assessment to tax (except in respect of a matter expressly provided for by this Act),

(b) may be enforced as if it were an assessment to tax, and

(c) may be combined with an assessment to tax.

(3) An assessment of a penalty under paragraph 1 … must be made before the end of the period of 12 months beginning with—

(a) the end of the appeal period for the decision correcting the inaccuracy, or

(b) if there is no assessment to the tax concerned within paragraph (a), the date on which the inaccuracy is corrected.

(5) For the purpose of sub-paragraphs (3) and (4) a reference to an appeal period is a reference to the period during which—

(a) an appeal could be brought, or

(b) an appeal that has been brought has not been determined or withdrawn.

(6) Subject to sub-paragraphs (3) and (4), a supplementary assessment may be made in respect of a penalty if an earlier assessment operated by reference to an underestimate of potential lost revenue.

Suspension

14—(1) HMRC may suspend all or part of a penalty for a careless inaccuracy under paragraph 1 by notice in writing to P.

(2) A notice must specify—

(a) what part of the penalty is to be suspended,

(b) a period of suspension not exceeding two years, and

(c) conditions of suspension to be complied with by P.

(3) HMRC may suspend all or part of a penalty only if compliance with a condition of suspension would help P to avoid becoming liable to further penalties under paragraph 1 for careless inaccuracy.

(4) A condition of suspension may specify—

(a) action to be taken, and

(b) a period within which it must be taken.

(5) On the expiry of the period of suspension—

(a) if P satisfies HMRC that the conditions of suspension have been complied with, the suspended penalty or part is cancelled, and

(b) otherwise, the suspended penalty or part becomes payable.

(6) If, during the period of suspension of all or part of a penalty under paragraph 1, P becomes liable for another penalty under that paragraph, the suspended penalty or part becomes payable.

Appeal

15—(1) A person may appeal against a decision of HMRC that a penalty is payable by the person.

(2) A person may appeal against a decision of HMRC as to the amount of a penalty payable by the person.

(3) A person may appeal against a decision of HMRC not to suspend a penalty payable by the person.

(4) A person may appeal against a decision of HMRC setting conditions of suspension of a penalty payable by the person.

16—(1) An appeal under this Part of this Schedule shall be treated in the same way as an appeal against an assessment to the tax concerned (including by the application of any provision about bringing the appeal by notice to HMRC, about HMRC review of the decision or about determination of the appeal by the First-tier Tribunal or Upper Tribunal).

(2) Sub-paragraph (1) does not apply—

(a) so as to require P to pay a penalty before an appeal against the assessment of the penalty is determined, or

(b) in respect of any other matter expressly provided for by this Act.

17—(1) On an appeal under paragraph 15(1) the ... tribunal may affirm or cancel HMRC's decision.

(2) On an appeal under paragraph 15(2) the ... tribunal may—

(a) affirm HMRC's decision, or

(b) substitute for HMRC's decision another decision that HMRC had power to make.

(3) If the ... tribunal substitutes its decision for HMRC's, the ... tribunal may rely on paragraph 11--

(a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or

(b) to a different extent, but only if the ... tribunal thinks that HMRC's decision in respect of the application of paragraph 11 was flawed.

(4) On an appeal under paragraph 15(3)—

(a) the ... tribunal may order HMRC to suspend the penalty only if it thinks that HMRC's decision not to suspend was flawed, and

(b) if the ... tribunal orders HMRC to suspend the penalty—

(i) P may appeal against a provision of the notice of suspension, and

(ii) the ... tribunal may order HMRC to amend the notice.

(5) On an appeal under paragraph 15(4) the ... tribunal—

(a) may affirm the conditions of suspension, or

(b) may vary the conditions of suspension, but only if the ... tribunal thinks that HMRC's decision in respect of the conditions was flawed.

(5A) In this paragraph "tribunal" means the First-tier Tribunal or Upper Tribunal (as appropriate by virtue of paragraph 16(1)).

(6) In sub-paragraphs (3)(b), (4)(a) and (5)(b) "flawed" means flawed when considered in the light of the principles applicable in proceedings for judicial review.

(7) Paragraph 14 (see in particular paragraph 14(3)) is subject to the possibility of an order under this paragraph.

Part 4

Miscellaneous

Agency

18—(1) P is liable under paragraph 1(1)(a) where a document which contains a careless inaccuracy (within the meaning of paragraph 3) is given to HMRC on P's behalf.

(3) Despite sub-paragraphs (1) and (2), P is not liable to a penalty under paragraph 1 … in respect of anything done or omitted by P's agent where P satisfies HMRC that P took reasonable care to avoid inaccuracy (in relation to paragraph 1) ….

(4) In paragraph 3(1)(a) (whether in its application to a document given by P or, by virtue of sub-paragraph (1) above, in its application to a document given on P's behalf) a reference to P includes a reference to a person who acts on P's behalf in relation to tax.

(5) In paragraph 3(2) a reference to P includes a reference to a person who acts on P's behalf in relation to tax.

Part 5

General

Interpretation

24 An expression used in relation to income tax has the same meaning as in the Income Tax Acts.

28 In this Schedule--

(g) "tax period" means a tax year, accounting period or other period in respect of which tax is charged,

(h) a reference to giving a document to HMRC includes a reference to communicating information to HMRC in any form and by any method (whether by post, fax, email, telephone or otherwise),

(i) a reference to giving a document to HMRC includes a reference to making a statement or declaration in a document,

(j) a reference to making a return or doing anything in relation to a return includes a reference to amending a return or doing anything in relation to an amended return, and

(k) a reference to action includes a reference to omission.