



[2021] UKFTT 108 (TC)

TC08089

NCOME TAX - whether deposits and transfers into Appellant's bank accounts were income - penalties imposed on basis that behaviour was deliberate - appeal allowed in part - assessments to be reduced - penalties correctly imposed on basis of deliberate behaviour-

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2018/08247

BETWEEN

ERLINGA MILTINE

Appellant

-and-

**THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS**

Respondents

**TRIBUNAL: JUDGE ALEKSANDER
ELIZABETH BRIDGE**

Sitting in public at the Havant Justice Centre on 22 January 2020

Nathaniel Monk and Rhys Thomas of TM Sterling Limited for the Appellant

Stuart Macleod, Litigator of HM Revenue and Customs' Solicitor's Office for the Respondents

DECISION

INTRODUCTION

1. The tax under appeal relates to unexplained deposits made into Ms Miltine's bank accounts in the tax year 2013/14 and for the omission of income of £4,237 relating to Sussex Building Services/Sutton Management in her tax return.
2. This is an appeal by MS Miltine against:
 - (1) amendments made to her self-assessment made by a closure notice issued under s28A Taxes Management Act 1970 ("TMA 1970"); and
 - (2) a penalty issued under Schedule 24 Finance Act 2007 ("FA 2007") for a deliberate and concealed inaccuracy in a return.
3. At the hearing of this appeal, Mr Thomas and Mr Monk represented Ms Miltine, and Mr Macleod represented HMRC. We heard evidence from Ms Miltine. A bundle of documentary evidence, which include Ms Miltine's bank statements, was produced in evidence. A witness statement from Ms Miltine's mother was produced, but as she was not available for cross-examination, we have placed no reliance upon it.
4. The Tribunal panel gave its decision orally at the end of the hearing, and issued a summary written decision, which was released on 22 April 2020. On 26 June 2020, the Appellant's representatives applied for a written decision giving full facts and reasons. The application was out of time, but the representatives explained that they had been "furloughed" and had therefore not been able to apply earlier. As the application was out of time, HMRC were asked for representations, and on 28 October 2020 they stated that they had none. I directed that the application for full facts and reasons be allowed and have now produced this decision notice. The impact of the COVID pandemic has unfortunately delayed its production.
5. In addition, because of the time that elapsed between the release of the summary decision and the application for full facts and reasons, the Tribunal had, in accordance with its usual practice, destroyed its copies of the appeal bundles. For this reason, this decision notice is based solely on my manuscript notes of the hearing.
6. HMRC assert that the unexplained deposits represent undisclosed taxable income of Ms Miltine.
7. We found that Ms Miltine's explanations for the unexplained deposits were not credible. We did not believe her for the following reasons:
 - (1) £15,000 was deposited to open Ms Miltine's Santander bank account. We do not accept her explanation that this represented a loan from her mother. A close analysis of her mother's bank statements does not support there being any loan of this magnitude.
 - (2) We find that Ms Miltine was trading in used motor vehicles and did not declare the income from this trade in her tax return. We make this finding based on the frequency with which she bought cars and drove them to Lithuania to be sold. In particular there were at least two occasions on which she and her husband drove two cars to Lithuania, which suggests that she was not merely buying second-hand cars as a cheap means of transport to enable her family to visit her mother and other Lithuanian based relatives and friends. We found Ms Miltine's detailed knowledge of car models and values to be striking, and that she was prepared to travel from the south coast to Birmingham and Liverpool to buy these cars. These facts, together with the volume of cars purchased and sold in the tax year are indicative of a trade, and we so find.

8. But we recognise that not all the unexplained cash deposits into Ms Miltine's bank accounts would necessarily have come from trading in cars, but we find that the remainder would, on the balance of probabilities, have come from her construction business.

9. The onus of proof is on Ms Miltine to satisfy us that the adjustments by HMRC's closure notice are wrong, and she has not done so. We therefore dismiss the appeal against the closure notice.

10. As regards the penalties, the onus of proof is on HMRC.

11. The penalties legislation in relation to inaccuracies which are deliberate or careless is set out in Schedule 24 FA 2007, the relevant paragraphs of which are:

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,
- (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...

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...

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...

9(A1) Paragraph 10 provides for reductions in penalties -

(a) under paragraph 1 where a person discloses an inaccuracy that involves a domestic matter, ...

(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, 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%
70%	35%	20%
100%	50%	30%

11(1) If they think it right because of special circumstances, HMRC may reduce a penalty under paragraph 1, 1A or 2.

(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.

13(3) An assessment of a penalty under paragraph 1 or 1A 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.

(4) An assessment of a penalty under paragraph 2 must be made before the end of the period of 12 months beginning with -

- (a) the end of the appeal period for the assessment of tax which corrected the understatement, or
- (b) if there is no assessment within paragraph (a), the date on which the understatement 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.

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.

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.

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...
- (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.

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 or 2 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) ..."

12. Ms Miltine accepts that there was a failure to include income of £4,237 relating to Sussex Building Services/Sutton Management in her tax return. Although Ms Miltine submits that this omission was not her fault, we find that the omission of this income was careless. We agree with HMRC's calculation of the penalty (as set out in their letter of 5 September 2018) for this omission as being £193.52. We note that HMRC offered to suspend this penalty, and Ms Miltine accepted the offer of suspension at the hearing.

13. The conditions for the suspension are as follows:

- (1) Ms Miltine must meet all her notification and filing obligations (including, for example, that her future tax returns are filed on time); and
- (2) Ms Miltine must cross-check all income received with her bank statements, contractors' statements, and other forms of payment advice. Ms Miltine must keep a list of the sources and amounts of income to ensure that they are properly transferred onto future tax returns.
- (3) At the hearing we said that the period of suspension should be two years from the date of release of this decision. However, given the closeness of the release date to the end of the 2019/20 tax year, we have decided that the suspension period should end on 5 April 2022 (last day of the 2021/22 tax year) instead.

14. We find that the omission of the unexplained cash deposits was deliberate, but HMRC now accept that this omission was not concealed, and we agree.

15. We therefore reduce the penalty to £5990.19 (adopting the calculation put forward by HMRC at the hearing based on the potential lost revenue being £10,696.77 and 40% mitigation). As this is a penalty for deliberate conduct, it cannot be suspended.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

16. 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.

**NICHOLAS ALEKSANDER
TRIBUNAL JUDGE**

RELEASE DATE: 13 APRIL 2021