TC01574

Appeal number: TC/2011/5291

Penalty – inaccuracies in self assessment return – whether careless – argument that penalties were too harsh and unjustified – human rights

FIRST-TIER TRIBUNAL

TAX

SANJEEV VERMA **Appellant**

- and -

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

TRIBUNAL: JUDGE ROGER BERNER
JOHN WHITING (Member)

Sitting in public at 45 Bedford Square, London WC1 on 13 October 2011

The Appellant did not appear and was not represented

Mrs Eleanor Gardiner, HM Revenue and Customs, for the Respondents

DECISION

Hearing in a party's absence

The Appellant failed to attend the hearing and was not represented. The Tribunal was satisfied that reasonable steps had been taken to notify the Appellant of the hearing and that it was in the interests of justice to proceed with the hearing.

Mr Verma's appeal

1. Mr Verma has appealed against a penalty assessment made under Schedule 24 of the Finance Act 2007 issued on 16 June 2007 in respect of the year 5 April 2009. The basis for the penalty assessment is that Mr Verma's self assessment return contained inaccuracies, and that those inaccuracies were careless on the part of Mr Verma.

2. Mr Verma's appeal sets out the following grounds:

(1) The penalty was too harsh and unjustified.

(2) The inaccuracy was the result of an innocent omission, the appellant had no intention to defraud and has been fully transparent.

(3) The appellant responded promptly and provided access to records that support all enquiries e.g. payslips and P60s.

(4) The appellant provided a reconciliation between the original tax return and what HMRC have stated.

(5) The appellant agreed immediately to the discrepancy once made aware of it and then paid promptly the outstanding tax.

(6) The appellant had fully complied with instructions and such is noted by the Assessment Officer.

The facts

3. Mr Verma was employed by Goldman Sachs for a period up to June 2007, when he left that employment. He was thereafter employed by Deutsche Bank until his employment with that company ceased on 31 October 2011.

4. It is accepted by Mr Verma that he failed to return certain amounts of taxable income on his self assessment return for the tax year ended 5 April 2009. In relation to Goldman Sachs, the amount not declared was £2,567. This amount was received by Mr Verma well after his employment with Goldman Sachs had come to an end. From what he has said in correspondence, Mr Verma is himself not entirely clear to what this amount relates, but it might have been in relation to stock options.

5. In relation to Deutsche Bank, a number of items were omitted. These were (i) notice period pay of £28,269, (ii) a payment in respect of a confidentiality agreement of £200, and (iii) an amount of £6 in relation to "taxable shares".

6. The total under-declaration was therefore £31,042. As tax had been deducted at source at the rate of 20%, the balance of the tax unpaid (at the higher rate of 40%) amounted to £6,208.40. The "potential lost revenue", which by Sch 24, para 5 is the additional amount due or payable in respect of tax as a result of correcting the inaccuracy, is therefore £6,208. The penalty has been applied to this figure.

7. On 6 August 2010 HMRC wrote to Mr Verma giving him notice of their intention to check his self assessment return for the year ended 5 April 2009. HMRC said that information they held indicated that Mr Verma's declaration of pay and tax from Deutsche Bank might be understated, and that Mr Verma also had an employment with Goldman Sachs. The letter requested certain information. Following that letter, on 29 September 2010, Mrs Quirk of HMRC telephoned Mr Verma. Mr Verma at that time said that he had not opened the 6 August letter. He expressed surprise at Goldman Sachs having reported pay for 2008/09, and speculated that this might relate to stock options. He undertook to check the position regarding the Deutsche Bank shortfall.

8. Mr Verma wrote to Mrs Quirk on 12 October 2010 to say that he had managed to reconcile the Deutsche Bank numbers, but that he needed to investigate the Goldman Sachs payment further by running through his bank statements. He again surmised that this might relate to some form of taxable shares.

9. A notice of penalty assessment was issued to Mr Verma on 16 June 2011 in the sum of £931.20. This was calculated at the rate of 15% of the potential lost revenue of £6,208. The 15% rate reflected the minimum percentage permitted under Sch 24, para 10 in the case of a careless inaccuracy where the relevant person has made a prompted disclosure. (The standard amount of the penalty for careless action is 30% of the potential lost revenue (para 4); para 10 provides that the standard percentage in such a case cannot be reduced for a prompted disclosure to a percentage below 15%.) In Mr Verma's case, HMRC made the maximum reduction allowed in the case of prompted disclosure.

Discussion

10. We have to decide whether in the circumstances of this case the inaccuracies which it is accepted were contained in Mr Verma's self assessment return were careless. As, in accordance with Sch 24, para 1(4) a penalty is payable for each inaccuracy, we must consider this in turn in respect of each of the Deutsche Bank and Goldman Sachs understatements.

Were the inaccuracies "careless"?

11. The starting point is to consider what is meant by "careless". Para 3(1) contains a definition: an inaccuracy in a document given by a person (P) to HMRC is careless if the inaccuracy is due to a failure by P to take reasonable care. Mrs Gardiner referred us to a case on negligence dating back to 1858, namely *Blyth v The Company of Proprietors of the Birmingham Waterworks* [1856] EWHC Exch J65. In that case the issue was whether damage sustained was by reason of the negligence of the

waterworks company in not keeping their water pipes and the apparatus connected therewith in proper order.

12. We have to say that reliance on a 19th century authority on negligence in a civil claim can hardly be regarded as authoritative in the context of the interpretation of a statutory provision for tax penalties enacted by the Finance Act 2007. The *Birmingham Waterworks* case is not binding on us as it concerns a different legal issue and wholly different factual circumstances. The approach to penalty appeals under Sch 24 can be derived from more relevant case law, most recently from *David Collis v Revenue and Customs Commissioners* [2011] UKFTT 588 (TC), where the tribunal found that the standard by which reasonable care fell to be judged is that of a prudent and reasonable taxpayer in the position of the taxpayer in question. Furthermore, the tribunal in that case went on to say that it is of the essence of the reasonable care test that in normal circumstances this should avoid simple errors of omission, or mere oversights.

13. Mr Verma says that his inaccuracies were the result of innocent omissions and that he had no intention to defraud. An omission may be innocent, in the sense of not having been deliberate, but such an innocent omission may still be the result of a failure to take reasonable care. The penalty reflects the fact that HMRC have accepted that the inaccuracies were not deliberate, and no question of fraud has been alleged.

14. In this case we did not have the benefit of hearing from Mr Verma in person. The facts in relation to both the Deutsche Bank income and the Goldman Sachs income are that those amounts were paid into Mr Verma's bank account. Mr Verma says that he received no notification of these payments. We do not consider that a reasonable taxpayer in Mr Verma's position, when completing his tax return for the relevant period, would have ignored any of the sums which he had received in the relevant period, even if he had not been notified of the nature of the payments. If the reasonable taxpayer did not have information to enable him properly to identify the nature of payments from former employers, the reasonable taxpayer would have made enquiries of each of his former employers to obtain an explanation in order to make a proper return.

15. We conclude therefore that each of the inaccuracies in Mr Verma's return was careless.

The amount of the penalties

16. We are satisfied that the appropriate standard amount of the penalty is that for careless action, namely 30% of the potential lost revenue. We also conclude that the disclosures made by Mr Verma were not "unprompted", as they were not made by him at a time when he had no reason to believe that HMRC had discovered or were about to discover the inaccuracies (para 9(2)). On the contrary, HMRC's letter of 6 August 2010 clearly identifies the potential inaccuracies in relation to both Deutsche Bank and Goldman Sachs. Accordingly the disclosures were "prompted" (para 9(2)(b)). The penalty was reduced to the minimum applicable percentage for a

prompted disclosure, namely 15%. On this basis, full credit has been given to Mr Verma for the cooperation and disclosures that he refers to in his grounds of appeal.

Reduction of amount of penalties

17. Mr Verma also says that the penalty is too harsh and unjustified. On an appeal against the amount of a penalty the tribunal may either affirm HMRC's decision or substitute for HMRC's decision another decision, but only another decision that HMRC had power to make. Under Sch 24, para 13, HMRC are obliged to assess a penalty for which a person has become liable under a relevant provision. That does not give HMRC any discretion in the matter. HMRC must also reduce the standard percentage to one that reflects the quality of the disclosure. But it is only if HMRC fail to reduce it to the minimum percentage that the tribunal will be able to substitute its own view of the quality of disclosure and make a further reduction. In this case the penalty was reduced to the minimum percentage, so the tribunal has no power to reduce it further on this basis.

18. Where HMRC does have a discretion is in the ability to reduce a penalty (including one levied at the minimum percentage based on the quality of the disclosure) if they think it right because of special circumstances (para 11). The tribunal may also rely on para 11, including to a different extent than HMRC, but only in that case if the tribunal thinks that HMRC's decision on the application of para 11 was flawed when considered in the light of principles applicable in proceedings for judicial review (para 17).

19. In this case nothing in the nature of special circumstances has been put forward. Accordingly, as the penalty fully reflects a reduction to the minimum percentage on account of Mr Verma's prompted disclosure, the Tribunal is unable to interfere with the amount of the penalty.

Human rights

20. As a final matter, we consider whether Mr Verma's complaint that the penalty was too harsh and unjustified can be upheld on the basis of any infringement of his human rights. In order to found such an argument Mr Verma would need to show that there had been an unjustified interference of a possession for the purpose of the European Convention on Human Rights. Here there is no doubt that the penalty would interfere with a possession. The question is whether that interference is justified. The hurdle is a high one. The test to be applied is that in *National and Provincial Society v United Kingdom* [1997] STC 1466, 25 EHRR 127, where the European Court of Human Rights said (at para 80):

> "According to the court's well-established case law ... an interference, including one resulting from a measure to secure the payment of taxes, must strike a 'fair balance' between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The concern to achieve this balance is reflected in the structure of art 1 as a whole, including the second

> paragraph: there must therefore be a reasonable relationship of proportionality between the means employed and the aims pursued.
>
> Furthermore, in determining whether this requirement has been met, it is recognised that a contracting state, not least when framing and implementing policies in the area of taxation, enjoys a wide margin of appreciation and the court will respect the legislature's assessment in such matters unless it is devoid of reasonable foundation …"

21. It has equally been recognised that it is implicit in the concept of proportionality that, not merely must the impairment of the individual's rights be no more than is necessary for the attainment of the public policy objective sought, but also that it must not impose an excessive burden on the individual concerned (*International Transport Roth GmbH v Home Secretary* [2002] 3 WLR 344 at [52]). In *Roth* Simon Brown LJ formulated the relevant question (at [26]) as: Is the scheme not merely harsh but plainly unfair so that, however effectively that unfairness may assist in achieving the social goal it simply cannot be permitted?

22. Applying these principles to the penalties in Sch 24, we are unable to find that, in seeking to provide both an incentive for taxpayers to comply, and a harsh (but in our view not a plainly unfair) consequence of not complying, with obligations to make accurate returns, the legislature's assessment of the relationship between these aims and the penalties prescribed, could in any sense be described as devoid of reasonable foundation. The penalties are graduated according to the seriousness of the conduct leading to the inaccuracy, they can be mitigated according to whether prompted or unprompted disclosure is given, and according to the quality of that disclosure, and they can be reduced to take account of special circumstances. A penalty may, in certain circumstances, be suspended subject to conditions. Finally, a taxpayer has a number of avenues of appeal to the tribunal. Accordingly, we find that no Convention right has been infringed, and the appeal cannot succeed on that basis.

Decision

23. For the reasons we have given, we dismiss this appeal.

Application for set aside and right of appeal

The hearing having taken place in the absence of the Appellant, the Appellant has a right to apply for this decision to be set aside pursuant to Rule 38 of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009.

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

ROGER BERNER

TRIBUNAL JUDGE
RELEASE DATE: 14 NOVEMBER 2011