TC02050

Appeal number: TC/2012/00378

INCOME TAX – Penalty – Schedule 24 Finance Act 2007 - careless inaccuracy - prompted disclosure – whether inaccuracy careless - whether suspension of penalty appropriate – whether "special circumstances" – interpretation of "special circumstances" - whether HMRC's decision flawed because of failure to a) consider whether there were special circumstances until after penalty determination made or b) give reasons for refusing to exercise its discretion regarding special circumstances – appeal allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

PATSY BARBER WHITE **Appellant**

- and -

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

TRIBUNAL: JUDGE GUY BRANNAN
DAVID E WILLIAMS CTA

Sitting in public at Bedford Square, London W1 on 10 April 2012

The Appellant appeared in person

Ms Karen Weare, presenting officer, for the Respondents

DECISION

Introduction

1. This is an appeal against a penalty assessment issued on 1 March 2012 pursuant to Schedule 24 Finance Act 2007 in respect of the income tax year ended 5 April 2010.

2. There are two penalties involved in this appeal. First, a penalty of £58.29 for careless inaccuracy in respect of income paid to the Appellant by BSkyB in the sum of £388.91 (in respect of which a 15% penalty was levied). The Appellant accepts that this penalty was duly levied and was not contested in this appeal. Insofar as the appeal relates to that penalty, it is dismissed.

3. The second penalty was in respect of the taxable portion a termination payment paid to the Appellant on her redundancy by GMTV. The taxable element of the termination payment was £23,988, with tax deducted of £4793.60. The tax due on this taxable portion of the termination payment was £4235.49. A penalty of 15% for careless inaccuracy was imposed resulting in a penalty of £635.37.

The facts

4. The Appellant had been employed by GMTV for approximately 12 years in its advertising sales department. She was made redundant during the summer of 2009. The last day of her employment was 16 August 2009, although she did not go into the office after the end of July.

5. GMTV agreed to pay the Appellant a termination sum of £53,988 and various other payments (such as a payment in lieu of notice and in respect of car benefits). The Appellant was in dispute with GMTV concerning her severance package, an experience that she found unhappy and stressful. This was compounded by the fact that on or around the time at which her employment ended her father was diagnosed with a very serious illness.

6. There was an air of confusion concerning the circumstances of the termination of her employment and, although there was a compromise agreement (which was not produced in evidence) there was no single document which fully recorded all the terms of the severance. There was, however, the letter from GMTV dated 11 June 2009 which recorded that the first £30,000 of her redundancy payment was "tax and NI free, the remainder are subject to normal tax and NI deductions."

7. The Appellant, in her words, "parked" everything to do with GMTV until she came to do her tax return for the year ended 5 April 2010. When she opened the relevant documents she found that she had two payslips.

8. One of the payslips that the Appellant received showed gross pay of £60,760.03, taxable pay of £30,760.03 and tax of £8778.93 (all figures were for the year-to-date). It showed her usual "Employee Number". The "Pay Date" was shown as 31/08/2009.

9. The Payslip disclosed the following details:

Payments	Amounts (£)
SALARY	2312.50
RED NT	30,000.00
PILON	9,473.24
NET/GROSS PAY	24.75
PMI TAXABLE	568.48
CAR ALLOW	1381.79
NTG TAX & NI	16.82
TOTAL PAY	43,777.58

10. The Appellant knew that she had an entitlement to a redundancy payment of approximately £54,000 and the figure of £60,760.034 gross pay appeared approximately correct, when her normal salary from April to August was added to the redundancy payment. She knew that "PILON" meant a payment in lieu of notice, but did not recognise the amount of £9,473.24 as anything to which she had agreed.

11. The second payslip referred to the "Pay Date" of 04/09/2009. This showed (year-to-date) gross pay as £23,988.00, taxable pay as £23,988.00 and tax as £4797.60. The Form stated:

Payments	Amounts
REDUND TX	£23,988.00

12. The Appellant could not understand this second pay slip. It contained a different "Employee Number", a number with which the Appellant was not familiar. It also was headed, incorrectly, "GMTV FREELANCE." The Appellant had always been continuously employed by GMTV and had never been a freelance employee.

13. In addition, the Appellant received two Form P60s. The first Form P60 showed pay of £30,760.03 and tax deducted of £8778.93 (figures which reconciled with the first payslip). The second Form P60 showed pay of £23,988 and tax deducted of £4797.60 (figures which reconciled to the second payslip).

14. In addition, the Appellant received a Form P45, which is issued at the end of an employment, which showed total pay to date as £30,760.03 and total tax to date as £8778.93. The Form P45 was dated 31/08/2009. In other words, it was consistent with the first Form P60.

15. The Appellant was confused by the fact that she had been sent two Forms P60. Hitherto, she had only been sent one Form P60. She contacted ADP –the company to which GMTV had outsourced part of their payroll function. ADP also seemed surprised that she had received two Forms P60. The Appellant asked ADP to send her

what they had. ADP sent only one Form P60, which was one of which the Appellant already had a copy.

16. Around this time GMTV had been taken over by ITV. GMTV's finance department had been absorbed into that of ITV, although many of the finance department staff had been made redundant. The Appellant spoke to a lady in the finance department of ITV (although the person was not involved with payroll matters) whom she had previously dealt with and had what she described as an "informal chat." This lady said that she would speak to someone else (called Louise) who would call the Appellant. The Appellant, however, was never called back. The Appellant called back twice but was, as she put it, "fobbed off" by ITV.

17. At this point the Appellant thought that the second Form P60 was erroneous and entered the figures from the first Form P60 on her tax return. Accordingly, on her tax return for the year ended 5 April 2010 the Appellant entered £30,760.00 as "Pay from this employment – enter the total from your P45 or P60" and in the next box £8778.00 as "Tax taken of pay in Box 1." Her tax return was filed online on 27 July 2012. The self-assessment return calculated that the Appellant was due a repayment of £5229.80 (from her employments with GMTV and BSkyB).

18. The Appellant did not contact HMRC to clarify her confusion.

19. HMRC opened an enquiry under section 9A Taxes Management Act 1970 on 28 September 2010. The officer (Mrs Woodman) noted in her letter that approximately £23,988.00 in respect of pay appeared to have been omitted from the return. Mrs Woodman suggested a telephone conversation and this took place on 1 October 2010.

20. In the conversation the Appellant explained that she had been made redundant from GMTV and had received a redundancy package and that the first £30,000 was tax-free. She explained that she had used the figures from the Form P60. Mrs Woodman agreed to confirm the details with GMTV.

21. Mrs Woodman contacted GMTV for clarification of the two Forms P60 in order to confirm which related to the redundancy payment. GMTV failed to reply. At this point, Mrs Woodman's HMRC office in Worcester was closed and the file referred to another officer, Mr Bains. Mr Bains wrote to the Appellant on 9 February 2011 informing her that £23,988 of taxable redundancy payment had been omitted from the return.

22. Subsequently, the Appellant was assessed to a penalty in respect of under-declarations in respect of an excessive claim for an income tax overpayment in respect of income from BSkyB (£388.91) and in respect of GMTV (£4235.49), totalling £4624.40. The penalties were assessed at the rate of 15% resulting in penalties of £58.29 (BSkyB) and £635.37 (GMTV). It was common ground between the parties that the Appellant had not, in fact, actually received the excessive repayment claimed in the return.

23. As already noted, the Appellant accepts that the penalty in respect of BSkyB is correctly calculated and is due. The following discussion focuses on the disputed penalty in respect of the GMTV termination payment.

24. The penalty was reduced from 30% to 15% to reflect the quality of the Appellant's disclosure and the fact that the disclosure was prompted by HMRC's enquiry.

Penalty calculation

25. The penalty was calculated on the basis that the Appellant's return contained a careless inaccuracy – an inflated claim to repayment of tax (paragraph 1 (1), (2) and (3) Schedule 24 Finance Act 2007). Unless otherwise stated, the following statutory references are to provisions contained in Schedule 24 Finance Act 2007.

26. Paragraph 4(1)(a) fixes the penalty for careless inaccuracy at 30% of the potential lost revenue (i.e. the overstated repayment claim of £4235.49), see: paragraph 5 (1).

27. Paragraph 10(2) allows HMRC to reduce the 30% penalty for careless inaccuracy in the case of a prompted disclosure to a percentage, not below 15%, which reflects the quality of the taxpayer's disclosure. In this case, the Appellant was given a full reduction reflecting the quality of her disclosure so that the penalty, as noted above, was reduced from 30% to 15%.

28. In a letter dated 8 March 2012, after the penalty determination had been made, Mr Bains refused to suspend the penalty, pursuant to paragraph 14, explaining that, because the type of occurrence leading to the inaccuracy was unlikely to be repeated, there were no measurable conditions which could be set to justify the suspension of penalty.

29. In the same letter, Mr Bains also considered whether a "special reduction" could be applied to the penalty. Paragraph 11 allows HMRC to reduce the penalty, "[I] f they think it right, because of special circumstances." Paragraph 11 (2) states that "special circumstances" do not include the ability to pay or the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another. Mr Bains said in his letter:

> "I have also considered whether a special reduction can be applied to the penalty for the two offences, and can advise that there are no special circumstances and the reduction is not applicable."

The Legislation

30. Schedule 24 provides for liability for penalties for errors in certain types of document given to HMRC, including a self-assessment return. The penalty in this case was charged under paragraph 1, Schedule 24, which provides as follows:

31. The liability to penalties for errors in various types of document given to HMRC, including a self-assessment return, arises under Schedule 24. The penalty in this appeal was assessed under paragraph 1 Schedule 24, which provides as follows:

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

32. An issue in this appeal is whether the Appellant was careless. There is no suggestion that the inaccuracy was deliberate or dishonest.

33. "Careless" in this context is defined by paragraph 3(1)(a), which provides that inaccuracy in a document is careless if the inaccuracy is due to failure by P (the person giving the document to HMRC) to take reasonable care.

34. Paragraph 4 prescribes the amounts of penalty for the behaviours that are the subject of the Schedule 24 penalty regime. The present appeal concerns only paragraph 4(1)(a), which imposes a penalty for careless inaccuracy of 30% of the potential lost revenue. In this case there is no dispute that the potential lost revenue was £4235.49 i.e. the excessive repayment claim.

35. Paragraphs 9 and 10 provide for reductions in the penalty that would otherwise be assessed, where a person discloses, *inter alia*, an inaccuracy, a supply of false information or withholding of information, or a failure to disclose an under-assessment. A person discloses an inaccuracy by (paragraph 9(1)-(3)):

> "(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.

36. It is common ground in this case that the disclosure made by the Appellant was a prompted disclosure.

37. Paragraph 10 provides that "[w]here 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. Paragraph 9 (3) provides that "quality" includes timing, nature and extent.

38. Thus, in the case of a prompted disclosure, Paragraph 10 provides for a minimum penalty for careless inaccuracy. However, even that minimum penalty can be further reduced in special circumstances as provided by paragraph 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."

39. HMRC also have a power to suspend all or part of a penalty for careless inaccuracy, but only if this would help a person to avoid becoming liable to similar such penalties. Paragraph 14 provides:

> "(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."

40. Appeals may be made in respect of penalties charged under Schedule 24 FA 2007 in a number of ways. Paragraph 15 provides as follows:

> "(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."

41. As Judge Berner said in *David Collis v HMRC Commissioners* [2011] UKFTT 588 (TC):

> "Although set out in this way, there will be many cases, in fact it is likely to be common, where a taxpayer subject to a penalty will want to make an appeal under more than one of the heads of appeal available. In many cases taxpayers will be unrepresented, and will not make any distinction, based on para 15, in the nature of the appeal that is made. In such cases, in the interests of fairness and justice the tribunal should be slow to exclude any avenue of appeal available to an appellant purely on the technical nature of the appeal that has been made. Issues of liability and amount will often go hand in hand and should normally be considered in that way by the tribunal. Accordingly, if a tribunal affirms the decision of HMRC that a penalty is payable, it should normally go on to consider the amount of that penalty, including any decision regarding the existence or effect of any special circumstances, and also any decision whether or not to suspend the penalty and any conditions of any such suspension."

42. We respectfully agree with these comments and approach the issues in this appeal on that basis.

Discussion

Careless inaccuracy

43. As we have noted, there is no suggestion in this case that the inaccuracy in the Appellant's return was deliberate or fraudulent. All that is said against her by HMRC was that the inaccuracy was careless, viz that the Appellant failed to take reasonable care. We agree with the statement of Judge Berner when he said in *Collis* (at paragraph 29):

> "We consider that the standard by which this falls to be judged is that of a prudent and reasonable taxpayer in the position of the taxpayer in question."

44. Applying that test, we consider that the Appellant was careless in failing to report her redundancy payment accurately on her tax return. We accept that the fact that the payment was recorded on different payslips and Forms P60 was confusing to the Appellant. We also accept that the Appellant took genuine steps to clarify the position with GMTV, ADP and ITV and that those companies failed to assist her. At that point, however, the Appellant should have sought to clarify the position with HMRC and, at least, to have noted the confusion on her tax return. We have some sympathy for the Appellant. She did make an attempt to understand the correct position and to clarify it, but having been unable to do so, in her own words she

"parked it". We accept that she was under stress, stemming both from her redundancy and from her father's illness which came to light around the same time, but she was aware of the substantial amounts she had received on her redundancy and could have appended a simple statement of those amounts, and of her unsuccessful attempts to clarify the confusion over the documents she had received, in the "white space" of her tax return. Without at least such a statement, her return was inaccurate and we consider that such inaccuracy in respect of the GMTV redundancy payment was careless.

Suspension

45. The Appellant argued that the penalty should be suspended under paragraph 14 of Schedule 24.

46. In a letter to the Appellant dated 20 April 2011, Mr Bains considered the question of suspension. He wrote:

> "I have considered whether the penalty may be suspended on this occasion and can advise that it is not suitable for suspension because this type of occurrence is unlikely to be repeated and therefore there are no measurable conditions which can be set."

47. As regards the issue of suspension of a penalty, our jurisdiction is limited. We cannot substitute our opinion for that of HMRC simply because, if we had been in their shoes, we might have come to a different conclusion. Paragraph 17 (4) provides that we can only overturn HMRC's decision on suspension if we consider it to be "flawed".

48. In any event, in our view, this is not a suitable case for suspension.

49. We were referred by Ms Weare to the decision of this Tribunal in *Anthony Fane v HMRC Commissioners* [2011] UKFTT 210 (TC) in which the Tribunal concluded that it was clear from the statutory context of Schedule 24 that a condition of suspension must be more than an obligation to avoid making further returns containing careless inaccuracies over the period of suspension (a maximum period of two years). The Tribunal observed that an important feature of paragraph 14(3) is the link between the condition and the statutory objective, in that there must be a condition which would help the taxpayer to avoid becoming liable for further careless inaccuracy penalties.

50. In our view, paragraph 14 is not suitable for dealing with "one-off" events such as a redundancy in the case of the Appellant. We do not say that redundancy must always be a "one-off"; that is a question of fact which will depend on the circumstances of each case: see *Cobb v HMRC Commissioners* [2012] UKFTT 40 (TC)

51. We therefore conclude that HMRC's decision not to suspend the penalty was not flawed.

Special circumstances

52. Paragraph 11 Schedule 24 gives HMRC a discretion to reduce the penalty because of "special circumstances." The expression "special circumstances" is an

unusual one in a tax context. It is, however, a phrase which is used in many other statutory contexts, but most notably in a labour law context in relation to the right of a trade union be consulted in cases of redundancy.

53. The expression "special circumstances" was considered in the well-known decision of the Court of Appeal in *Clarks of Hove Ltd. v Bakers' Union* [1978] 1 W.L.R. 1207 (Stephenson , Roskill and Geoffrey Lane LJJ). Geoffrey Lane LJ said (at page 1216), in a much-quoted passage:

> "What, then is meant by "special circumstances"? Here we come to the crux of the case…
>
> In other words, *to be special the event must be something out of the ordinary, something uncommon*; and that is the meaning of the words "special" in the context of this Act." (Emphasis added)

54. With respect, we think it is correct to adopt the same interpretation of the expression "special circumstances" as it appears in paragraph 11, save that the expression should, of course, be interpreted in accordance with its statutory context, i.e. Schedule 24 Finance Act 2007. It was evidently the *Bakers' Union* decision that those drafting paragraph 11 Schedule 24 had in mind (see the Drafting Notes to the Finance Bill 2007).

55. There was some confusion at the hearing whether Mr Bains, the officer imposing the penalty, had considered whether to reduce the penalty imposed on the Appellant by virtue of paragraph 11. Ms Weare noted that there was no indication on her file that Mr Bains had considered the issue before issuing the penalty determination.

56. It is clear, however, from Mr Bains's letter of 8 March 2012 that he did consider the issue, but only after the penalty had been issued. There was no indication in Mr Bains's letter of 4 November 2011, in which the method of calculation of the penalty was explained to the Appellant, that the question of "special circumstances" had been considered. In a letter from Mr Bains to the Appellant dated 17 February 2012, there is a reference to the earlier calculation of the penalty contained in a letter dated 20 April 2011 (which also dealt with the suspension question) and the letter informed the Appellant of her rights of appeal to this Tribunal, but there was no reference to paragraph 11 in that letter.

57. There was certainly no indication in the papers before us that Mr Bains had considered whether to reduce the penalty pursuant to HMRC's discretion under paragraph 11 before his letter of 8March.

58. As we have already indicated, in his letter of 8 March 2012, Mr Bains simply stated:

> "I have also considered whether a special reduction can be applied to the penalty for the two offences [i.e. the GMTV and BSkyB inaccuracies], and can advise that there are no special circumstances and the reduction is not applicable."

59. In fairness, no blame should attach to Mr Bains. HMRC's Compliance Handbook Manual (CH82490) provides meagre guidance in relation to paragraph 11. Besides setting out the terms of the legislation, the Manual states:

> "We will only consider the special reduction of the penalty where exceptional circumstances are identified that cannot be taken into account in arriving at the reduction for disclosure… This means that when you are determining the quality of the disclosure you should only consider those factors that are relevant… You should not be influenced by other factors.
>
> Where a person requests a special reduction you should establish the facts and consider all of the relevant factors before reaching a decision. Make sure that you make a full record in the file of why you reached your decision and the specific areas you considered. If you think that a special reduction may be appropriate you **must** submit the case to Central Policy, Tax Administration Advice (TAA). Your submission should give a concise summary of the compliance check leading up to the penalty and full details of the facts upon which the request for a special reduction is based. You must **not** allow a special reduction without authority from TAA. Similarly, if you decide not to allow a special reduction and your refusal is disputed you should submit the case to TAA."

60. The reference to "exceptional circumstances" is not, perhaps, the best summary of the test to be applied. It would be better to use the better-known phraseology of Geoffrey Lane LJ ("something out of the ordinary, something uncommon"), which was plainly the concept that those drafting the legislation had in mind. "Exceptional" circumstances may be a passable summary of that concept and is the word used in the less-quoted judgment of Roskill LJ in the *Bakers' Union* decision – although it can perhaps too easily be given an over-restrictive meaning.

61. As with the case of suspension, our jurisdiction in relation to an appeal in respect of a refusal by HMRC to exercise its discretion under paragraph 11 is limited. Paragraph 15 provides:

> "(1) P may appeal against a decision of HMRC that a penalty is payable by P.
>
> (2) P may appeal against a decision of HMRC as to the amount of a penalty payable by P.
>
> (3) P may appeal against a decision of HMRC not to suspend a penalty payable by P.
>
> (4) P may appeal against a decision of HMRC setting conditions of suspension of a penalty payable by P."

62. An appeal against a refusal by HMRC to exercise its discretion under paragraph 11 or an appeal that its decision under paragraph 11 on the basis that its decision was flawed, would, in our view, be an appeal under paragraph 15 (2).

63. Paragraph 17 sets out the jurisdiction of this Tribunal in relation to paragraph 11:

> "(3) If the appellate tribunal substitutes its decision for HMRC's, the appellate 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 appellate tribunal thinks that HMRC's decision in respect of the application of paragraph 11 was flawed.
>
> …
>
> (6) In sub-paragraph… (3)(b) …"flawed" means flawed when considered in the light of the principles applicable in proceedings for judicial review."

64. We have reached the conclusion that HMRC's decision in respect of paragraph 11 was flawed. We base our conclusion on two grounds.

65. First, there is no evidence before us, and Mrs Weare for HMRC accepted in answer to the Tribunal's questions at the hearing that she had seen none, that the officer (Mr Bains) considered whether to exercise his discretion reduce the penalty pursuant to paragraph 11 when issuing the penalty determination. We do not consider that an *ex post facto* consideration of whether the discretion in paragraph 11 should be exercised (as contained in Mr Bains's letter of 8 March 2012) validates the original decision – the determination has already been made. As Judge Hellier said in *Rodney Warren v HMRC Commissioners* [2012] UKFTT 57 (TC):

> "That failure to consider paragraph 9 at all flawed [the] decision for the purposes of paragraph 15(3). It is thus open to the tribunal to rely upon paragraph 9 to the extent it considers it right in the circumstances."

66. We note that a similar conclusion to that of Judge Hellier was reached by this Tribunal in *Thomas Hardy v HMRC Commissioners* [2011] UKFTT 592 (TC) and *G D & Mrs D Lewis T/a Russell Francis Interiors v HMRC Commissioners* [2011] UKFTT 107 (TC).

67. Secondly, we consider that (if we are wrong on this first point and that an *ex post facto* consideration whether to exercise discretion contained in paragraph 11 validated the penalty determination) insofar as the officer did consider whether to exercise HMRC's discretion under paragraph 11, he gave no reasons for his conclusion that there were no special circumstances justifying a reduction in the penalty.

68. It is true that the common law, "at present", does not recognise a general duty to give reasons for administrative decisions (*R v Home Secretary ex p. Doody* [1994] 1 AC 531 per Lord Mustill at page 564). However, in many cases if a public body, such as HMRC, fails to give reasons for its decision it will be found to have acted unlawfully. As explained in "*Administrative Law*" (10th edition) Wade & Forsyth, there is no closed list of circumstances in which fairness will require reasons to be given.

69. In this case, paragraph 17(3)(b) envisages this Tribunal having to decide whether HMRC's decision is flawed, in the judicial review sense of that term. A failure to give reasons for a decision makes this task almost impossible. It would not then possible to determine whether the decision-maker applied the correct legal test, whether he took account of all relevant factors or whether he took account of irrelevant factors. In short, a failure to give reasons makes it almost impossible for the Tribunal to determine the issue of *Wednesbury* unreasonableness. Parliament must

have envisaged that an officer of HMRC deciding whether to exercise the discretion in paragraph 11 would give reasons for the decision. For this reason, we consider that the failure by Mr Bains to give reasons for his conclusion that there were no special circumstances with the result that no reduction of the penalty should be made under paragraph 11, meant that HMRC's decision was flawed.

70. Accordingly, the Tribunal must consider whether there were special circumstances which would justify it substituting its decision for that of HMRC pursuant to paragraph 17 (3) (b). In our view, there were special circumstances applicable in this case. As already discussed, we take "special circumstances" to mean "something out of the ordinary, something uncommon" in accordance with the *Bakers' Union* decision. The legislation in paragraph 11(2) excludes from consideration the taxpayer's inability to pay, and the argument that there is no net loss to the exchequer because one person's underpayment is balanced by another's overpayment; it also seems to us, and we note that HMRC accept this in their Manual (quoted in paragraph 59 above), that because the legislation already provides a reduction for the quality of the taxpayer's disclosure, these special circumstances must relate to matters which cannot be taken into account in the reductions set out in the statute, and go to the events underlying the understatement of liability rather than the taxpayer's reaction to HMRC's challenge to that understatement.

71. In this case the Appellant, who had not been employed in a financial, accounting or personnel function but in advertising sales, and could not therefore be expected to have any special familiarity with redundancy payments, received confusing information from her employer concerning the tax treatment of her redundancy payment. She was hampered by the fact that her employer (GMTV) had been taken over by ITV and that, therefore, it was difficult for her to track down someone who could help her. She made genuine efforts to resolve her confusion but help was not forthcoming. It is true that when she could not find a satisfactory answer to her difficulties she failed to ask HMRC or to highlight this in her tax return. For this reason, we have found her to be careless. Nonetheless, the factors that we have identified, in our view, take this case out of the ordinary. We consider that these unusual circumstances mitigate the culpability of the Appellant. They should, therefore, be taken into account as special circumstances justifying a reduction in the penalty. In all the circumstances, we consider that a 60% reduction in the penalty is justified and we so decide. The penalty in respect of the GMTV matter is therefore reduced to £254.14, which together with the BSkyB penalty of £58.29, leaves a total payable of £312.43.

Decision

72. The penalty in respect of the BSkyB inaccuracy, which was not contested, is confirmed.

73. The penalty in respect of the GMT redundancy payment inaccuracy is reduced by 60%.

74. The appeal is, therefore, allowed in part.

75. 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.

GUY BRANNAN

TRIBUNAL JUDGE

RELEASE DATE: 01 June 2012