[2016] UKFTT 280 (TC)

TC05054

Appeal number: TC/2015/04797

INCOME TAX – employers deducted correct tax from Appellant under PAYE – self-assessment return completed incorrectly by accountant – closure notice and amendment to return – appeal against amendment dismissed – whether appellant careless – failure of accountant to understand self-assessment system – whether penalty should be mitigated – Tribunal's jurisdiction over mitigation – role of accountant – penalty upheld

FIRST-TIER TRIBUNAL
TAX CHAMBER

BERNARD BEDIAKO **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE REDSTON
MRS JO NEILL

Sitting in public at Fox Court, Brooke Street, London on 7 April 2016

Mr Mohammed Drammeh, trading as M&D Accountancy Services, for the Appellant

Mrs Beverley Levy, of HM Revenue & Customs Reviews and Appeals Unit, for the Respondents

DECISION

Introduction and summary

1. This was Mr Bediako's appeal against:

(1) an amendment made by HM Revenue & Customs ("HMRC") to his 2013-14 self-assessment ("SA") return, which increased the tax due by £1,890.60; and

(2) a Penalty Notice charging an inaccuracy penalty of £567.18 for carelessness ("the Penalty Notice").

2. To summarise our decision:

(1) Mr Drammeh, Mr Bediako's accountant, made a mistake when completing Mr Bediako's SA return; the mistake happened because Mr Drammeh did not understand how self-assessment worked;

(2) HMRC's amendment to the SA return was therefore correct;

(3) although it was Mr Drammeh who completed the return, Mr Bediako was careless in not checking it, so a penalty was due; and

(4) the penalty could not be reduced below the 30% charged by HMRC, because neither Mr Drammeh nor Mr Bediako provided HMRC with assistance or co-operation during the enquiry. The Penalty Notice was therefore confirmed.

3. It followed that we dismissed Mr Bediako's appeal.

Late appeal

Facts relevant to this issue

4. On 2 March 2015, Miss Keates of HMRC wrote to Mr Bediako, saying she intended to issue a closure notice, amend the return, and charge a penalty. On 4 March 2015 she sent a copy of her letter to Mr Drammeh.

5. On 27 March 2015 Mr Drammeh sought to appeal against that letter, although at that stage no appealable decision had been made.

6. On 7 April 2015, Miss Keates issued the closure notice and amended Mr Bediako's SA tax return. On 15 April 2015, she wrote to Mr Drammeh, saying that the letter of 2 March 2015 did not meet the statutory requirements as it had been at a time when there was no appealable decision, and because she was "currently unclear" as to the grounds of appeal.

7. However, she also asked Mr Drammeh to "confirm" the grounds of appeal and said "you can send me further information in support of your appeal." She attached factsheet HMRC1, which gave further details of the appeal process, although no copy of that factsheet was in the Tribunal Bundle.

8. On 29 April 2015, Mr Drammeh replied, saying (wording in original):

> "I am not satisfy with you for the way of handling this enquiry…I therefore will lay down 7 points grounds of appeal to the HMRC Independent Tribunal for final adjudication. Consider this as a notice going before the Tribunal."

9. HMRC did not reply to that letter. On 30 April 2015, the Penalty Notice was issued.

10. On 5 August 2015, Mr Drammeh completed a Notice of Appeal to the Tribunal. Although the grounds were unclear, he attached Miss Keates' letter of 2 March 2015, which refers to both the amendment to the assessment and the Penalty Notice. The Tribunal accepted that Mr Drammeh's intention was to notify appeals against both the amendment and the Penalty Notice, and HMRC have taken the same approach.

HMRC's position

11. During the hearing, the parties reviewed the correspondence set out above. Having done so, Mrs Levy accepted that Mr Drammeh's letter of 29 April 2015 should be treated as an in-time appeal against the amendment to Mr Bediako's SA return. However, it could not be treated as an appeal against the Penalty Notice as it was sent before that Notice had been issued.

12. Mr Drammeh did not appeal the Penalty Notice by writing to HMRC. Instead, he included the penalty in the Notice of Appeal to the Tribunal on 5 August 2015. Mrs Levy said that HMRC had treated that Notice of Appeal as including an application to make a late appeal to HMRC, and that they often took this pragmatic approach where an appellant has gone straight to the Tribunal having overlooked the need to appeal first to HMRC.

13. It was clear from pre-hearing submissions that HMRC subsequently refused to give permission for a late appeal. This was because no reasonable excuse had been given for the lateness, so Condition B at Taxes Management Act 1970 ("TMA") s 49(5) had not been met. Mrs Levy said that Mr Drammeh's application for permission to make a late appeal against the Penalty Notice was thus for the Tribunal to decide under TMA s 49(2).

14. At the beginning of the hearing, HMRC's position was that the Tribunal should refuse permission to make a late appeal. However, having considered the correspondence, Mrs Levy said that HMRC no longer objected to the appeal proceeding.

Mr Drammeh's submissions

15. Mr Drammeh said that he had not understood what was required by the appeals procedure and had been waiting for HMRC to reply to his letter of 29 April 2015. When HMRC did not reply, he completed the Notice of Appeal.

Discussion and decision

16. We first consider Mr Bediako's appeal against the amendment to the self-assessment. Mrs Levy has accepted that Mr Drammeh's letter of 29 April 2015

should be treated as an in-time appeal to HMRC. As a result, TMA s 49D applies. It reads:

> "**49D Notifying appeal to the tribunal**
>
> (1) This section applies if notice of appeal has been given to HMRC.
>
> (2) The appellant may notify the appeal to the tribunal.
>
> (3) If the appellant notifies the appeal to the tribunal, the tribunal is to decide the matter in question.
>
> (4) Subsections (2) and (3) do not apply in a case where
>
> (a) HMRC have given a notification of their view of the matter in question under section 49B, or
>
> (b) HMRC have given a notification under section 49C in relation to the matter in question.
>
> (5) In a case falling within subsection (4)(a) or (b), the appellant may notify the appeal to the tribunal, but only if permitted to do so by section 49G or 49H."

17. It was common ground that neither TMA s 49B or 49C was relevant, because no statutory review had been offered or accepted. Mr Bediako's appeal can therefore be notified to the Tribunal under TMA s 49D(2). Unusually, this provision has no prescribed time limit.

18. Although both parties made their submissions on the basis that the appeal had been notified late, and during the hearing we gave permission for the appeal to proceed on that basis, we now formally record that this was not the position. Because s 49D(2) does not have a time limit, the notification was not late, so no permission was needed.

19. In relation to the Penalty Notice, HMRC have accepted that the Notice of Appeal to the Tribunal should be treated as including an application to make a late appeal, which was now before the Tribunal for determination.

20. We considered the correspondence and the parties' submissions in the light of the tests set out in by Morgan J in *Data Select Ltd v HMRC* [2012] UKUT 187 (TCC) and in particular the questions posed at [34] of that decision. The root cause of the delay was Mr Drammeh's lack of understanding of the appeal procedure; HMRC did not now object to the late appeal and the prejudice to Mr Bediako in not being able to appeal the Penalty Notice significantly outweighed the prejudice to HMRC if the appeal was allowed to proceed. On the basis of the tests in *Data Select,* our decision would favour Mr Bediako.

21. However, we also considered the recent Court of Appeal decision in *BPP Holdings v HMRC* [2016] EWCA Civ 131. This found at [11] that "the stricter approach to compliance with rules and directions made under the CPR as set out in *Mitchell v News Group Newspapers Ltd* [2014] 1 WLR 795 and *Denton v TH White Ltd* [2014] 1 WLR 3296 applies to cases in the tax tribunals." Although in *BPP* the

Court of Appeal expressly did not analyse *Data Select,* see [44] of the judgment, we considered whether, if we took that stricter approach, we should give permission.

22. It is clear that under the *BPP* approach we are still required to consider all the circumstances. In this case the appellant's representative, Mr Drammeh, was wholly unfamiliar with the tax appeals process. Moreover, the penalty followed from the assessment, which was under appeal before us.

23. Taking into account all the circumstances, we found that it was in the interests of justice for Mr Bediako to be allowed to make a late appeal against the Penalty Notice. Mr Drammeh then notified the appeal to the Tribunal, again under TMA s 49D.

TMA ss 32 and 33

24. Mr Drammeh's letter of 27 March 2014 stated he was appealing under TMA ss 32 and 33. These read as follows:

> "**32 Double assessment**
>
> (1) If on a claim made to the Board it appears to their satisfaction that a person has been assessed to tax more than once for the same cause and for the same chargeable period, they shall direct the whole, or such part of any assessment as appears to be an overcharge, to be vacated, and thereupon the same shall be vacated accordingly.
>
> (2) An appeal may be brought against the refusal of a claim under this section…
>
> **33 Recovery of overpaid tax etc**
>
> Schedule 1AB contains provision for and in connection with claims for the recovery of overpaid income tax and capital gains tax."

25. TMA s 32 therefore allows a claim to be made to HMRC where a person considers he has been taxed twice on the same income; a refusal of that claim can then be appealed to the Tribunal. That is not the position here.

26. Mr Drammeh has therefore relied on an incorrect section of the TMA. We have however treated the appeals as having been made under TMA s 49D, as explained above.

The evidence

27. The Tribunal was provided with a helpful bundle of documents which included:

(1) the correspondence between the parties and between the parties and the Tribunal;

(2) in relation to 2013-14, the coding notices issued by HMRC to Mr Bediako's employers; the P14s completed by those employers; Mr Bediako's P60s and his SA return;

(3) HMRC's "SA Notes" relating to Mr Bediako, from 8 November 2012 to 23 September 2015; and

(4) the "action history" record from HMRC's debt management department in relation to Mr Bediako from 12 April 2013 to 12 January 2015.

28. Mr Drammeh also provided copies of P60s for earlier tax years, but as no appeals had been notified to the Tribunal in relation to those years, those documents were not relevant to the issues we had to decide.

29. Mr Drammeh gave evidence, which we accepted, about his completion of the SA return and his communications with Mr Bediako, both in relation to that return and the subsequent HMRC correspondence.

The facts

30. From the evidence set out in the previous section, we find the following facts.

31. Mr Bediako has worked for a number of years for large cleaning companies. He usually has two employments running concurrently.

32. In 2009-10 Mr Bediako underpaid his PAYE tax. We do not know how this happened. On 8 November 2012 HMRC issued him with SA returns for tax years 2008-09 and 2009-10. On 1 February 2012 Mr Bediako attended Harlow Tax Enquiry Centre and the HMRC staff there helped him to fill in his SA returns. Mr Bediako was unable to pay the resulting tax because he was already finding it difficult to live on his income, and he had other debts.

33. In 2013 Mr Bediako negotiated a time to pay arrangement with HMRC under which he repaid £20 a month of the amount owing. He had frequent contact with HMRC's debt management unit by telephone and also took advice from the Citizens Advice Bureau.

Earnings and tax in 2013-14

34. In the year 2013-14 Mr Bediako worked for two large companies. We have called one of these companies "T Ltd" and one "M Ltd."

35. Mr Bediako earned gross salary of £15,509 from his work for T Ltd and £10,322 from his work for M Ltd. Together this came to £25,831.

36. HMRC provided PAYE tax codes to T Ltd and M Ltd. T Ltd operated PAYE code 944L. This gave Mr Bediako the benefit of his personal allowance, which was £9,440. As a result, tax of £1,212 was deducted from his earnings during the year. The P60 gives these figures and so does the P14.

37. M Ltd operated PAYE code BR. It therefore deducted tax at 20% from Mr Bediako's earnings, with the result that tax of £2,064.40 was taken from his salary before receipt. These figures are shown on the P60 and P14.

38. The PAYE codes were therefore correctly operated by both companies. In other words, Mr Bediako's employers deducted the amount of tax they were legally required to deduct.

39. Mr Bediako's tax liability for the year was very straightforward:

Income	25,831
Personal allowance	(9,440)
Net income after PA	16,391
Tax at 20%	3,278.20

40. In total, the two companies deducted £3,276.40 (£1,212 + 2064.40) from Mr Bediako's earnings. By the end 2013-14, he had therefore underpaid tax of only £1.80. In other words, the PAYE system had worked as intended: almost exactly the correct amount of tax had been deducted from his earnings during the year, so he had negligible tax to pay afterwards.

Completing the SA return

41. On 6 December 2013 Mr Bediako appointed Mr Drammeh to act as his agent. Mr Drammeh trades as M&D Accountancy Services and has other clients for whom he provides tax filing and related services.

42. After the end of the 2013-14 tax year Mr Bediako gave Mr Drammeh his P60s for that year. Mr Drammeh completed Mr Bediako's SA return and filed it on 20 July 2014. He always sends his clients copies of their SA returns and he sent a copy to Mr Bediako.

43. The SA return requires that a person complete an "employment page" for each employment. Box 1 on the form says "Pay from this employment – enter the total from your P45 or P60." Box 2 says "tax taken off pay in Box 1."

44. Mr Drammeh correctly completed the employment page for Mr Bediako's employment with M Ltd. He put the earnings of £10,322 in Box 1 and the tax deducted of £2,065 in Box 2.

45. However, he took a different approach to the employment page for T Ltd. He included the earnings of £15,509 in Box 1, but in box 2 he put £3,102 instead of the £1,212 shown on the P60.

46. In the "any other information" box on the main SA return, he wrote:

> "T Ltd employment – additional information. This employer declares wrong deduction on tax certificate and the PAYE records are inaccurate. Please investigate."

47. The higher tax figure in Box 2 of the T Ltd employment page meant that Mr Bediako's tax calculation gave rise to a tax overpayment figure of £1,888.80. This sum was offset against the debt to HMRC which had resulted from the 2009-10 underpayment. No money was repaid to Mr Bediako.

The enquiry

48. On 13 August 2014 Mr Crowley of HMRC opened an enquiry under TMA s 9A into Mr Bediako's 2013-14 SA return. He wrote separate letters to Mr Bediako and Mr Drammeh, and copied each letter to the other person.

49. In his letter to Mr Bediako, Mr Crowley asked for bank account statements so he could "compare the figures transferred to your account with the sums the employer alleges were transferred." He also asked for any other information to support the tax deducted figure in the SA return. Mr Crowley gave Mr Bediako his direct telephone number, postal address and email address. Mr Bediako did not reply to this letter.

50. In his letter to Mr Drammeh, Mr Crowley repeated much of this information. He also told Mr Drammeh that he had checked the P24, and the gross pay shown on the SA return was the same as that on the P14 from the employer.

51. On 28 August 2014 Mr Drammeh replied to Mr Crowley, saying he had previously contacted HMRC in relation to Mr Bediako's SA returns for the periods before April 2010 and that (wording as in original):

> "there are repayments due in all and no payment due to HMRC; this is because of negligent by HMRC system of obtaining tax payers accurate data or employer's malpractice for tax avoidance. Taxes have been deliberately misrepresented.
>
> Therefore kindly reviewed all previous correspondence sent to you regarding my client for the last 18 months. Meanwhile I will look into your request for checks and respond by 27 October the earliest."

52. Mr Crowley replied on 8 September 2014, saying he was not aware of any open issues relating to periods before April 2010 and that he would consider any further information or evidence which Mr Drammeh wanted to send him. He asked that the information already requested be provided by 15 September 2014.

53. Neither Mr Drammeh nor Mr Bediako responded by 15 September 2014, and on 17 September 2014 Mr Crowley issued Mr Bediako with a Notice under paragraph 1, Schedule 36 of Finance Act 2008 (a "Sch 36 Notice"). This required:

(1) Mr Bediako's explanation for the figure used on his SA return;

(2) whatever evidence he could provide in support of the figure used;

(3) Mr Bediako's bank account details for the year to 5 April 2014; and

(4) that Mr Bediako inform HMRC whether, on reflection, he now agreed with the employer's figure.

54. Mr Crowley sent Mr Drammeh a copy of the Sch 36 Notice. Neither Mr Bediako nor Mr Drammeh responded.

55. On 27 October 2014, Mr Crowley issued Mr Bediako with a penalty notice, charging a penalty of £300 for failing to provide the information and documents required under the Sch 36 Notice. That penalty has not been appealed.

56. Mr Crowley's covering letter explained the reasons for issuing the penalty notice and warned that if the information and documents were not provided, daily penalties of up to £60 a day might be imposed, running from the date of the penalty notice. A copy of the penalty notice and the covering letter were sent to Mr Drammeh. Again, neither Mr Bediako nor Mr Drammeh responded.

57. On 28 November 2014, Mr Crowley issued a further penalty notice, charging a daily penalty of £10 a day from 28 October 2014 to 27 November 2014, a total of £310. A copy was sent to Mr Drammeh. No response was received from either Mr Bediako or Mr Drammeh. This penalty also has not been appealed.

58. Sometime before 9 January 2015 Miss Keates of HMRC took over responsibility for enquiries on all Mr Drammeh's clients, including Mr Bediako.

59. On 9 January 2015, she wrote to Mr Bediako, saying that as no information or documents had been provided, she suspected his SA return might be incorrect. She said she was considering imposing a penalty on that basis and included factsheets about the calculation of inaccuracy penalties. She asked Mr Bediako to write and confirm he had read and understood those fact sheets. She also said that any further information about the SA return was to be provided by 23 January 2015. She gave Mr Bediako her direct telephone line as well as her postal address. A copy of this letter was sent to Mr Drammeh. No reply was forthcoming from either Mr Bediako or Mr Drammeh.

60. On 2 February 2015, Miss Keates wrote again to Mr Bediako, saying that in her view the SA return was inaccurate. She went on to explain that the "behaviours that led to the inaccuracy can affect how the penalty is calculated." She asked whether Mr Bediako had checked that the information on the SA return matched that on the P60 and whether he had carried out any other checks for accuracy, and whether he knew the return was incorrect when it was submitted. She also attached a revised tax calculation showing the corrected figures. A copy of both the letter and the revised calculation were sent to Mr Drammeh.

61. On 19 February 2015, Mr Drammeh called Miss Keates. He told Miss Keates that he was "under serious pressure and very busy with work" which was why he had not responded to her letters in relation to either Mr Bediako or his other clients and said he would reply "as soon as possible." Miss Keates said that he needed to reply by the deadline dates already provided and she would be continuing with the actions previously set out.

62. On 2 March 2015 Miss Keates wrote to Mr Bediako, saying that although Mr Drammeh had called her on 19 February, no information had as yet been received. She said that on 1 April 2015 she would be amending Mr Bediako's SA return on the basis already explained, and she attached a "Penalty Explanation" letter saying that:

(1) the inaccuracy was careless and the disclosure "prompted" because Mr Bediako did not tell HMRC about the error in the SA return; as a result, the penalty range was set by law at between 15% and 30% of the tax understated;

(2) the penalty could be reduced to 15% if the taxpayer had helped HMRC, co-operated with HMRC and provided information to HMRC to assist with the enquiry;

(3) however, Mr Bediako received no reduction for "telling" "helping" or "giving" because he had made no contact whatsoever with HMRC throughout the enquiry. A penalty of 30% was to be charged, being £567.18.

63. In the same letter, Miss Keates again asked Mr Bediako to provide any supporting information. A copy of her letter and the Penalty Explanation was sent to Mr Drammeh.

64. On 27 March 2015, as we have already noted, Mr Drammeh wrote to Miss Keates. The letter is headed "Appeal against J Keats Letter to my client dated 4th March 2015 as per section 32/33 of the TMA for Period 5 April 2014." The letter includes the following statements [wording as the original text]:

> "your findings are totally rejected and based in no facts whatsoever. My client does not owe anything according to the calculation we provided below. Your information is supported by false and wrong information supplied by the employer is part of tax avoidance companies or deliberately taxes deducted from the taxpayer in order to pleased their bank balances. This is going on among many companies and HMRC turning blind eyes to them. By using false or in accurate tax code, you can easily deduct wrong amount from the employee income and as a result; this employee will become under payer of taxes.
>
> Tax codes and payroll system used is misleading and illegal, I referred to this in my letter of 15 September 2014 and asked you to second guest or investigation the employer's concern and many of them."

65. We pause here to note that no letter was sent to HMRC on 15 September 2014 about this enquiry. We have therefore assumed that the letter related to one of Mr Drammeh's other clients.

66. Mr Drammeh's letter continued by setting out a Schedule which he said listed all the figures from Mr Bediako's P60s for the years 2009 through to 2014 ("the Schedule"). He attached copies of the P60s. In respect of the year 2013-14, the Schedule said:

T Limited	15,509
Less: PA	(9,440)
Taxable profit [sic]	6,069
Tax due £6,069 x 20%	1,213. 80
Tax recalculated by us based on correct tax code	1,212
Tax overpaid/underpaid	1.80

67. Before the Tribunal, Mr Drammeh accepted that these figures were the same as on the P60. He also accepted that he had forgotten to include Mr Bediako's earnings from M Ltd.

68. On 7 April 2015 Miss Keates closed the enquiry and amended Mr Bediako's SA return. On 30 April 2015 she issued the Penalty Notice. We have already set out, earlier in this decision notice, Mr Drammeh's subsequent actions in relation to the amendment to Mr Bediako's assessment and the Penalty Notice.

The Tribunal's directions

69. On 8 December 2015 the Tribunal issued directions. Direction 1 required the provision of lists of documents on which each party would seek to rely at the hearing. Direction 2 required a statement detailing whether or not witnesses were to be called and if so, their names.

70. On 10 December 2015, Mr Drammeh emailed the Tribunal, saying he would attend the hearing "with copies all PAYE/employment details and records such as P60s." The Tribunal responded on 22 December 2015, saying that his email was "insufficient to comply with Direction 1" and warning that if the case needed to be adjourned "the Tribunal is likely to order that any costs wasted as a result of the adjournment are paid either by the Appellant or by you."

71. On 13 January 2016 the Tribunal wrote again, saying that there had been no compliance with either Direction 1 nor Direction 2, and that if Mr Drammeh did not provide the names of his witnesses, "the Judge at the hearing may rule that you cannot call any witnesses." On 18 January 2015, Mr Drammeh asked for more time to provide the list of documents, and on 21 January sent the Tribunal what was essentially another version of the Schedule, with the P60s attached.

72. On 8 February 2016, the Tribunal emailed Mr Drammeh attaching a further letter, which repeated its earlier warning about the possible consequences of failing to name his witnesses. Mr Drammeh replied the same day, saying that he would not be calling any witnesses.

73. Although Mr Bediako did not attend the hearing, as already noted the Tribunal permitted Mr Drammeh to give witness evidence.

Why Mr Drammeh completed the return in the way he did

74. Mrs Levy had provided the Tribunal with a helpful skeleton argument, but Mr Drammeh had no written submissions, and his grounds of appeal were unclear. The Tribunal therefore asked him to explain orally why he had included the figure of £3,102 in the "tax deducted" box of the SA return instead of the £1,212 shown on the P60.

75. Mr Drammeh said he didn't use the P60 figure because "he didn't think it was correct" and that "what has been taken off is not what should have been taken off." He added "I keep telling the Revenue this for all my clients."

76. We asked Mr Drammeh how he arrived at the figure of £3,102 and he said:

> "I made my own my calculations. This is what I calculated. On the gross amount I take into account any expenses due and any personal allowance and the tax based on the rate."

77. In fact it is clear from the SA return figure that no expenses have been deducted from Mr Bediako's T Ltd earnings and neither has a personal allowance. When pressed, Mr Drammeh was unable to remember or explain the reasoning behind the "calculation" carried out in relation to those earnings. We note, however, that £3,102 is exactly 20% of Mr Bediako's T Ltd salary, and 20% is the basic rate of tax for the year in question.

78. The Tribunal explained to Mr Drammeh that the only entry required in Box 2 was the tax deducted by the employer as shown on the P60. When a return is filed online using HMRC's software (or commercial software), that software uses those figures and other information provided on the SA return, plus the personal allowance, to work out the tax due on the person's earnings. When the return is filed on paper, the numbers are entered by HMRC into the software, which produces a calculation in the same way.

79. The Tribunal took Mr Drammeh to the Tax Calculation page relating to Mr Bediako's SA return, and explained how the numbers from the Boxes fed through into the computation of his final liability. This all came as a surprise to Mr Drammeh, who then acknowledged that "the figure [in Box 2 of the SA return] is wrong. The HMRC assessment is right."

80. It was clear to the Tribunal that Mr Drammeh did not understand how self-assessment worked. Instead of the actual tax deducted by T Ltd from Mr Bediako's earnings, he had "calculated" what he thought was the correct amount of tax that should have been deducted from Mr Bediako's T Ltd earnings, and included that figure in Box 2.

81. Mr Drammeh tentatively suggested that he might have put the correct figure on the return, and that this had then been miscopied as the result of an HMRC processing error. However, he retreated from this position when his attention was drawn to the "extra information" box on Mr Bediako's return.

82. Mr Drammeh was then asked by Mrs Levy whether he had checked Mr Bediako's SA return in the course of the enquiry, and he said that he had not, because "everything came together on my desk…I wasn't looking at that one particular." We understood this to be a reference to the open enquiries involving his other clients.

Decision on the amendment to the assessment

83. For the reasons set out above, HMRC's amendment to Mr Bediako's SA tax return is upheld and the appeal against it dismissed.

The penalty: introduction

84. We move on to considering whether the inaccuracy in the SA return was due to carelessness. If the answer to that question is yes, we must then decide whether Mr Bediako should be charged a penalty, and if so, the amount of that penalty. But first we set out the law under which the Penalty Notice was issued.

The penalty: legislation

85. The relevant legislation is at Finance Act 2007, Schedule 24 ("Sch 24"); the provisions here cited are those relevant to this decision.

86. Paragraph 1 sets out when a penalty is payable.

> **1. Error in taxpayer's document**
>
> (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.

Tax	Document
Income tax or capital gains tax	return under section 8 of TMA (personal return).

87. Paragraph 3 is headed "Degrees of culpability" and reads:

> "(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…."

88. Paragraph 4 says that the amount of a penalty for a careless inaccuracy is 30% of the "potential lost revenue." Paragraph 5 sets out the normal meaning of "potential lost revenue" and reads:

> "'The potential lost revenue' in respect of an inaccuracy in a document …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."

89. Paragraph 9 is headed "Reductions for disclosure" and reads:

"(A1) Paragraph 10 provides for reductions in penalties…where a person discloses an inaccuracy...

(1) A person discloses an inaccuracy…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."

90. Paragraph 10 states that if a person who would otherwise be liable to a penalty at the "standard" rate of 30% "has made a disclosure", HMRC "must reduce the standard percentage to one that reflects the quality of the disclosure." If the disclosure is prompted, the minimum penalty is 15%; the maximum remains at 30%.

91. Paragraph 11 allows HMRC to reduce the penalty "if they think it right because of special circumstances" and paragraph 14 allows HMRC to suspend the penalty "if compliance with a condition of suspension would help [the person] to avoid becoming liable to further penalties under paragraph 1 for careless inaccuracy."

92. Paragraph 15 says that:

"(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..."

93. Paragraph 17 opens by saying:

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

(2) On an appeal under paragraph 15(2) the1 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 1

(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…

Whether Mr Bediako had been careless

94. HMRC decided that Mr Bediako had been careless within the meaning of Sch 24. Mrs Levy relied on *Collis v HMRC* [2011] UKFTT 588 ("*Collis*") where the Tribunal (Judge Berner and Mr Adams) said at [24] that "the standard by which [carelessness] falls to be judged is that of a prudent and reasonable taxpayer in the position of the taxpayer in question."

95. She submitted that Mr Bediako had been careless because he had allowed Mr Drammeh to submit an SA return, which stated that tax of £3,102 had been deducted by T Ltd from his salary, when in fact only £1,212 had been deducted. Mr Bediako would have been able to see, from his P60, that this was the wrong figure. That was not the action of a prudent and reasonable taxpayer.

96. Mr Drammeh said that the penalty "shouldn't be charged" and that Mr Bediako was relying on him to deal with the case.

Discussion

97. We begin by recognising that HMRC has the burden of showing that Mr Bediako is liable to the penalty. We agree with Mrs Levy that *Collis* correctly summarises how we should decide whether Mr Bediako was careless. The approach set out in *Collis* is a mixture of the purely objective "the prudent and reasonable taxpayer," together with an element of the subjective "in the position of the taxpayer in question."

98. We considered first Mr Drammeh's submission that Mr Bediako was not careless, because he was relying on his agent to complete the SA return.

99. Mr Drammeh trades as M&D Accountancy Services and he has other clients for whom he provides tax filing and related services. In some countries, such as Germany, only those who have passed a specified professional qualification are allowed to give tax advice. But in the UK, a person can act as the tax agent for another person, and/or represent them in correspondence with HMRC, providing that other person has confirmed the agent's appointment to HMRC in writing.

100. In *R(oao Lunn and others) v HMRC* [2011] EWHC 240 at [11]-[12] HMRC disclosed that it will sometimes refuse to deal with an agent, for example because of suspected fraud or because the agent's technical ability puts tax at risk, with the consequence that the agent can no longer represent clients. However, it is very unusual for HMRC to take this action and it has clearly not done so in this case.

101. When Mr Bediako appointed Mr Drammeh to act for him, he therefore had no reason to know that Mr Drammeh did not understand the basic mechanics of self-assessment, including how to complete the SA returns. Mr Bediako was therefore not careless in appointing Mr Drammeh.

102. Mrs Levy says, however, that this is not enough: the prudent and reasonable taxpayer would have checked the SA tax return when it was given back to him. We agree. Mr Bediako provided Mr Drammeh with his two P60s, and received back a copy of his SA return, which contained only four numbers, one of which was wrong. In our judgment, a prudent and reasonable taxpayer, who had provided two P60s to his agent, would have ensured that the information had been correctly taken from those two documents and entered on the SA return. Even a quick check would have disclosed to Mr Bediako that the number on the employment page for M Ltd was the same as on the P60, but that for T Ltd was not the same. That does not require any specialist knowledge.

103. The prudent and reasonable taxpayer would also have realised, from his own bank statements and payslips, that the amount deducted from his salary during the year was exactly the same as the figure shown on the P60, and so would have known that the number in Box 2 was incorrect.

104. Looked at purely objectively, this shows a lack of care. However, we need also to consider the subjective element, namely whether we should take into account any relevant information about Mr Bediako's position. In making our assessment, we would have been assisted by witness evidence from Mr Bediako.

105. It would have been possible to adjourn and issue a direction under Rule 5(3)(d) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 for Mr Bediako to attend a resumed hearing, or even to issue a witness summons under Rule 16. In deciding whether or not to exercise those powers, we are required by Rule 2 to "give effect to the overriding objective", namely to "act fairly and justly."

106. The following factors were in favour of adjourning the hearing so that Mr Bediako could attend at a future date:

(1) although the penalty is not large in absolute terms, Mr Bediako is working for two employers, probably as a cleaner, and is struggling financially. The imposition of this penalty will no doubt place him under further unwelcome pressure.

(2) It is reasonable to assume that Mr Bediako relied on Mr Drammeh's advice that his witness evidence would not be required. We have already noted Mr Drammeh's lack of familiarity with the appeals procedure; a more experienced adviser might have encouraged Mr Bediako to attend and give evidence.

(3) Rule 2(2)(c) provides that we should ensure that, so far as practicable, the parties are able to participate fully in the proceedings.

107. However, the following factors were in favour of continuing with the case and making our decision on the basis of the evidence and submissions before us:

(1) If we adjourned the hearing, HMRC would incur extra costs, both in time and resources, in preparing for and attending a further hearing.

(2) Mr Drammeh had been repeatedly asked by the Tribunal about witness attendance at the hearing, and had also been warned that if the hearing had to be adjourned, it was likely that the costs incurred by HMRC would be recoverable.

(3) If we now adjourned so Mr Bediako could attend as a witness, it was both reasonable and proportionate for HMRC's extra costs to be paid by Mr Bediako or Mr Drammeh, particularly in the light of that specific warning.

(4) Using the Guideline hourly rates, we estimated that HMRC's costs, calculated on a standard basis, would be of the order of £605, being five hours at the lowest rate applicable to the London postcode where Mrs Levy is based. That would exceed the penalty in issue.

(5) There was in any event no certainty that Mr Bediako would attend as the result of a direction; he had ignored all HMRC's correspondence and requests for confirmation, contact, and documents.

(6) Although it was less likely that Mr Bediako would refuse to comply with a formal witness summons, the purpose of adjourning would be to see if there were further factors relevant to the penalty which would assist Mr Bediako. It was almost certainly disproportionate to issue a witness summons in those circumstances.

(7) Mr Bediako had appointed Mr Drammeh to represent him and had not given any indication, to HMRC or the Tribunal, that he was unhappy with that representation or wished to be personally involved in the case. This is consistent with his continued reliance on Mr Drammeh during the enquiry process, despite HMRC issuing him with two penalties for failure to comply with the Sch 36 Notice.

(8) We are required by Rule 2(2)(e) to avoid delay, so far as compatible with proper consideration of the issues.

(9) We had some information in the Bundle as to Mr Bediako's personal position.

108. Taking all these factors into consideration, we decided that it was in the interests of justice for us to continue with the hearing and not to adjourn for Mr Bediako to provide more information about his personal situation.

109. The issue we have to decide is whether there is anything about Mr Bediako's position which is relevant to our decision. For example, if he were unable to read English, that might change the position because he would not be in a position to check from his P60s to the SA return without help. But we know from HMRC's SA Notes and Action History that Mr Bediako is able to read and understand English." Mr Drammeh did not challenge that evidence.

110. We also know that Mr Bediako completed an SA return in 2012, albeit with assistance, and so this is not the first time he has seen that document. We also have Mr Drammeh's Schedule, which shows that Mr Bediako has worked for a number of different UK companies, and has received P60s from them all, so he is also familiar with those forms.

111. Taking into account all the information which we have, nothing in Mr Bediako's personal situation leads us to the conclusion that his behaviour was not careless.

Whether the penalty should be mitigated

112. HMRC said that the inaccuracy was "prompted" within the meaning of the legislation. The minimum penalty was therefore 15% of the "potential lost revenue," namely the £1,890.60 of tax which was incorrectly shown as having been deducted from Mr Bediako's earnings. The maximum penalty was 30% of this, being £567.18, and the minimum penalty would have been £283.59.

113. On the basis explained at §62, HMRC decided that the penalty should not be reduced below the maximum under any of "telling, helping and giving" because Mr Bediako had not contacted HMRC or assisted with the enquiry.

114. HMRC considered the special circumstances provision, but said that, based on the information available to HMRC, there were no special circumstances. HMRC also refused to suspend the penalty because "no further tax returns are due to be submitted." We understand that this is because Mr Bediako is paid entirely under PAYE.

115. Mr Drammeh asked that the penalty be removed on the basis that he had sent HMRC "all the documents needed" and also because Mr Bediako had relied on him throughout.

Discussion

116. In considering this issue we observe, first, that we are bound by the statute. Paragraph 17(2) provides that when considering "the amount of the penalty", the

Tribunal can either affirm HMRC's decision, or "substitute for HMRC's decision another decision that HMRC had power to make." We do not have a free-standing discretion.

117. Under paragraph 10 HMRC can only allow a penalty to be mitigated if there has been "telling", "helping" and/or "giving" taking into account the "timing, nature and extent" of the disclosure. The Tribunal is therefore only able to mitigate the penalty on the same basis.

118. HMRC have decided not to reduce Mr Bediako's penalty because he did not contact them, give them any assistance, or provide any information, so that none of the reductions for "telling", "helping" or "giving" apply. However, they do not mention Mr Drammeh's role. Speaking generally, a person who has appointed an agent to act for him may, without being careless, make no contact with HMRC because he is relying on that agent to deal with the enquiry. Mr Drammeh said that this was the case with Mr Bediako.

119. We first ask whether any mitigation was due because of the actions taken by Mr Drammeh. As is clear from our findings of fact, Mr Drammeh only contacted HMRC three times between the opening of the enquiry on 13 August 2014 and the issuance of the closure notice on 27 March 2015. The first occasion was on 28 August 2014, when Mr Drammeh asked for more time (but did not meet either his suggested time limit or that given by Mr Crowley). The second was on 19 February 2015, when Mr Drammeh again asked for more time because he was under "serious pressure and very busy with work." The third was on 27 March 2015, when, as already noted, he purported to appeal against an amendment to the assessment and a penalty, neither of which had been issued.

120. That letter of 27 March 2015 attached only the P60s, which HMRC had not requested. Mr Drammeh did not provide the bank statements. He did not explain the SA tax deducted figure relating to Mr Bediako's employment with T Limited; that key information was only provided at this hearing. He did not, at any time during the course of the enquiry, even take the preliminary step of checking the details he had included on Mr Bediako's SA return.

121. Mr Drammeh therefore failed entirely to "tell" HMRC about the error and he failed to "give" HMRC reasonable help in quantifying the error. In relation to "allowing access to records" he did provide the P60s and the Schedule, but only at the very last minute, and neither had been requested by HMRC.

122. In other words, he made only the most minimal of dilatory disclosures. Having regard to their "timing, nature and extent", we agree with HMRC that no mitigation should be given on the basis of the actions taken by Mr Drammeh on behalf of his client.

123. However, we also need to consider Mr Bediako's position. He relied on Mr Drammeh. Is it right that a taxpayer suffers the maximum penalty, because his agent has failed to co-operate with HMRC?

124. We are again bound by the statute. The Tribunal can only "substitute for HMRC's decision another decision that HMRC had power to make", so can only able to reduce the penalty if we find that there has been telling, helping or giving. However, Mr Bediako has not contacted HMRC at all. This means that the answer to the question is clear: there is no basis for mitigation.

125. Even were we to have a wider discretion, we would not have exercised it in this case. HMRC repeatedly made direct contact with Mr Bediako: he received the original opening letter; he was asked in that letter to provide his bank statements; he was sent the Sch 36 Notice and the two subsequent penalty notices; and Miss Keates wrote to him on 9 January 2015, 2 February 2015 and 2 March 2015. This correspondence made it abundantly clear that Mr Drammeh was not responding to HMRC's enquiries: Mr Crowley and Miss Keates repeatedly stated that they had not received any information in response to their requests. Mr Bediako could have been in no doubt, for the whole period from 13 August 2014 (the date of the opening letter), through to 27 March 2015 (when Mr Drammeh finally sent his Schedule to HMRC) that the agent he had appointed to act for him had failed entirely to reply to HMRC's questions.

126. We also observe that Mr Bediako knows generally how to contact HMRC: before instructing Mr Drammeh he regularly called to discuss his outstanding debt, and HMRC helped him to complete his 2009 tax return. Moreover, Mr Crowley and Miss Keates both provided him with their personal contact details.

127. We considered special circumstances and suspension, but our jurisdiction is limited, so that we can only interfere if HMRC's decision was unreasonable in a judicial review sense. There was no basis for interference in this case.

128. As the result of the foregoing, HMRC's penalty assessment of £546.17 is upheld.

Decision and appeal rights

129. For the reasons set out above, the amendment to Mr Bediako's 2013-14 SA return is confirmed at £1,890.60, as is the penalty of £567.18. His appeal is dismissed.

130. Mr Drammeh said that the tax Mr Bediako has been asked to pay for earlier years was wrong. By law our decision only considers Mr Bediako's SA return for the 2013-14 tax year, because no appeals in relation to other years have been notified to the Tribunal; we do not know if they have been appealed to HMRC. It also does not consider the two Sch 36 penalties, totalling a further £610, because those penalties have been neither appealed or notified.

131. 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 Rules.

132. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

ANNE REDSTON
TRIBUNAL JUDGE

RELEASE DATE: 25 APRIL 2016