[2020] UKFTT 0448 (TC)

TC07924

Income Tax – Self-assessment - Penalties – Penalty for inaccurate return – Whether penalty was invalid if issued before the related tax – No - Whether error was "deliberate"– No – Appeal allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/02620

BETWEEN

SIMON DOLAN **Appellant**

-and-

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

TRIBUNAL: JUDGE KIM SUKUL
IAN MENZIES-CONACHER

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1 on 3 February 2020

Nick Davis, associate director of The Independent Tax & Forensic Services LLP, for the Appellant

Christopher Vallis, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. Mr Simon Dolan appeals against the decision by the Respondents ("HMRC") to impose a penalty, in the amount of £46,199.63, under Schedule 24 of the Finance Act 2007 ("FA 2007") charged on the basis that Mr Dolan provided to HMRC a self-assessment tax return for the year ended 5 April 2014 which contained an inaccuracy.

2. The penalty was imposed by a notice dated 4 September 2017 and upheld by HMRC following a statutory review on 4 April 2018. The penalty was calculated on the basis that the disclosure of the inaccuracy was prompted and the inaccuracy was "deliberate but not concealed" as defined in paragraph 3(1) of Schedule 24 FA 2007.

3. Mr Dolan accepts that his tax return for the year ended 5 April 2014 contained the inaccuracy but disputes that the inaccuracy was "deliberate" within the meaning in paragraph 3 of Schedule 24 FA 2007. For the reasons set out below, we found that the inaccuracy was not deliberate but careless and we reduced the penalty to £19,799.84.

4. In this decision, the legislation and case law is cited so far as relevant to the issues in dispute.

PRELIMINARY ISSUES

5. The parties made a number of applications.

Application to admit witness statement

6. An application was made on behalf of Mr Dolan on 27 January 2020 to admit the witness statement of Ms Kent, Mr Dolan's colleague, into evidence. The application confirmed that the witness would not be attending the hearing. HMRC objected to this application on 31 January 2020 on the basis that they would not be able to challenge the evidence by way of cross examination, nor would the Tribunal be able to ask questions, and accordingly the Tribunal should place no weight on this statement. HMRC also noted a 10-month delay from the date of the statement to the application being made.

7. We considered the application and the objection. We decided that, as the evidence was relevant to the appeal and the reasons to exclude it were not sufficiently compelling, the witness statement would be admitted in the interests of fairness and justice. However, as the witness did not attend the hearing to be cross-examined, the weight we placed upon this statement was limited.

Application to adjourn

8. At the beginning of the hearing Mr Davis made an application, on Mr Dolan's behalf, to postpone the hearing on the grounds that his colleague, who was expected to present Mr Dolan's case, had been called away urgently due to a medical emergency involving a close family member. Mr Davis did not consider himself capable of providing effective representation on Mr Dolan's behalf as he had not prepared to present this case.

9. Mr Vallis opposed the application, stating that there had been numerous delays and previous applications to postpone the hearing. He submitted that Mr Davis is an experienced tax advisor who had been involved in the preparation of the appeal and is the named representative for Mr Dolan on his notice of appeal.

10. We carefully considered the submissions made by both parties and the Tribunal's overriding objective under rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. We concluded that it was not in the interests of fairness and justice to postpone the hearing. The Tribunal and Mr Davis had the benefit of the hearing and authorities bundles, witness statements and the appellant's skeleton argument, which Mr

Davis had been involved with drafting. We therefore did not consider Mr Dolan would be prejudiced by Mr Davis presenting the case and a further delay should be avoided. The application to postpone was refused.

Application to exclude submissions

11. Mr Vallis made an application on HMRC's behalf to exclude 3 new arguments which had been included in Mr Dolan's skeleton argument relating to the legal validity of the penalty, mistake and the quantum of the penalty. HMRC's submission was that the arguments had only been introduced the previous working day, meaning that HMRC did not have sufficient time to properly prepare, which effectively amounted to an ambush. Mr Davis contended that he was not involved in putting together those skeleton arguments but they should be considered by the Tribunal.

12. We reviewed the new arguments and concluded that they were sufficiently connected to the matters before the Tribunal, for which HMRC had prepared, that additional time to prepare was not essential. We considered that any prejudice to HMRC by their inclusion was outweighed by the prejudice to Mr Dolan that would be caused by excluding arguments in circumstances where his chosen representative was unable to attend the proceedings. We therefore considered it to be in the interest of fairness and justice to consider the arguments and we refused HMRC's application to exclude them.

THE EVIDENCE

13. The bundle of documents for the hearing, prepared by HMRC, comprised of the notice of appeal and the correspondence between the parties. The bundle also contained the witness statement of Ms Kelly, Mr Dolan's assistant. HMRC confirmed that they did not dispute the contents of that statement and the witness was therefore not present at the hearing.

14. We heard witness evidence from Mr Dolan. We found him to be a credible witness and accepted his evidence.

15. In addition to the applications which preceded the hearing of the appeal, Mr Vallis also made an application during the hearing, to adduce the witness evidence of Mr Hurst, an Officer of HMRC involved with the conduct of HMRC's enquiry, to address some of the issues raised in the appellant's skeleton argument. Mr Davis did not object and we considered it to be in the interests of fairness and justice to allow the application. We heard witness evidence from Mr Hurst. We found him to be a credible witness and accepted his evidence.

FACTS

16. Based on the evidence summarised above, the Tribunal made the following findings of fact, none of which was in dispute. We make a further finding of fact at [46].

17. Mr Dolan is a qualified accountant but has not practised since 1997. He was not aware of the detailed tax rules with regard to residency that applied during the year in question although he knew the rules in force prior to that period.

18. On 9 July 2013, Mr Dolan ceased to be a UK resident and moved to Monaco.

19. On 22 January 2015, Mr Dolan submitted a tax return for the year ended 5 April 2014. The return was completed by Ms Kelly, using calculations done by Ms Kent and based on information provided by Mr Dolan.

20. The return included UK dividend income of £320,000 and stated that Mr Dolan was not a resident in the UK for that year. Mr Dolan's return did not have a tick in the relevant box to confirm that his circumstances met the criteria for split year treatment, which it should have done as the amount of time Mr Dolan spent in the UK during the year meant he did not satisfy the tests for automatic non-UK residence.

21. Mr Dolan did not accurately complete the boxes on the tax return because he did not know the non-resident rules had changed. He did not check the return as he expected his advisors would do that and it "went in last minute". He did not seek up to date professional tax advice before submitting the return.

22. The information provided was inaccurate and resulted in the mistreatment of Mr Dolan's dividend income.

23. On 8 September 2015, HMRC opened an enquiry into Mr Dolan's return.

24. By letter dated 31 March 2016, Mr Dolan's representative stated that his circumstances fell within the split year rules and confirmed that he had received dividend income of £320,000 prior to his departure from the UK in July 2013.

25. On 23 January 2017, Mr Dolan's representative agreed that the dividend income was subject to UK income tax.

26. In correspondence dated 28 July 2017, HMRC stated that they considered the inaccuracy to be deliberate and the disclosure to have been prompted by their enquiry, attracting a maximum penalty percentage of 70% of the £97,777 potential lost revenue ("PLR"). In such circumstances HMRC considered a penalty percentage of 47.25% of the PLR to be appropriate based on mitigation for telling at 20%, for helping at 25% and for giving at 20%.

27. On 4 September 2017, HMRC issued a penalty assessment in the amount of £46,199.63. The assessment was issued before HMRC closed their enquiry and before the income tax assessment in respect of the dividend income was issued.

LEGISLATION

28. Schedule 24 FA 2007 provides:

> Paragraph 1
>
> (1) A penalty is payable by a person (P) where -
>
> (a) P gives HMRC a document of a kind listed in the Table below, and
>
> (b) Conditions 1 and 2 are satisfied.
>
> (2) Condition 1 is that the document contains an inaccuracy which amounts to, or leads to –
>
> (a) an understatement of a liability to tax,
>
> (b) a false or inflated statement of a loss, or
>
> (c) a false or inflated claim to repayment of tax.
>
> (3) Condition 2 is that the inaccuracy was careless (within the meaning of paragraph 3) or deliberate on P's part.
>
> Paragraph 3
>
> (1) For the purposes of a penalty under paragraph 1, inaccuracy in a document given by P to HMRC is –
>
> (a) "careless" if the inaccuracy is due to failure by P to take reasonable care,
>
> (b) "deliberate but not concealed" if the inaccuracy is deliberate on P's part but P does not make arrangements to conceal it..
>
> Paragraph 4

(1) This paragraph sets out the penalty payable under paragraph 1.

(2) if the inaccuracy is in category 1, the penalty is—

(a) for careless action, 30% of the potential lost revenue,

(b) for deliberate but not concealed action, 70% of the potential lost revenue, and

(c) for deliberate and concealed action, 100% of the potential lost revenue.

Paragraph 13

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

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

(b) if there is no assessment to the tax concerned within paragraph (a), the

date on which the inaccuracy is corrected.

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

(a) the end of the appeal period for the assessment of tax which corrected the understatement, or

(b) if there is no assessment within paragraph (a), the date on which the understatement is corrected.

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

(a) an appeal could be brought, or

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

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

Paragraph 14

(1) HMRC may suspend all or part of a penalty for a careless inaccuracy under

paragraph 1 by notice in writing to P.

(2) A notice must specify—

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

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

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

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

Paragraph 15

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

Paragraph 17

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

(a) The tribunal may order HMRC to suspend the penalty only if it thinks that

HMRC's decision not to suspend was flawed...

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

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

Paragraph 18

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

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

THE BURDEN OF PROOF

29. Mr Dolan does not dispute that his return for the year ended 5 April 2014 contained an inaccuracy which resulted in his dividend income of £320,000 being incorrectly treated as non-taxable.

30. The burden of proof rests with HMRC to show that the penalty is due as a result of an inaccuracy that was "deliberate but not concealed" as defined in paragraph 3(1) of Schedule 24 FA 2007

31. The standard of proof is the civil standard, namely on the balance of probabilities.

HMRC'S ARGUMENTS

32. HMRC contended that the inaccuracy in Mr Dolan's tax return was deliberate. Although he has no experience in residency law, he was aware that residency law is complex and that he needed to take steps to ascertain the correct tax position. Despite this awareness, he did not seek advice in relation to the tax consequences arising from the dividend income.

33. HMRC argued that Mr Dolan must have known that his understanding, on which basis he had instructed his assistant to complete the return, was not informed and essentially guesswork. He was aware of the requirement to take steps to ascertain the correct tax position and he did not do so in relation to his dividend income. A person cannot simply escape liability by claiming complete ignorance where the person clearly knew that he should have taken steps to ascertain the position (see *Clynes v HMRC* [2016] UKFTT 369 (TC) at [86]). Mr Dolan made a conscious choice not to take such steps and the resulting inaccuracy was therefore a deliberate one.

34. In the alternative, HMRC contended that Mr Dolan's behaviour was careless but that in light of paragraph 14 of Schedule 24 FA 2007 and the two-part test set out by Judge Berner in *Eastman v HMRC* [2016] UKFIT 0527 (TC) ("*Eastman*"), no appropriate conditions of suspension that would help Mr Dolan to avoid becoming liable to further penalties could be imposed and therefore HMRC lack the power to suspend the penalty either entirely or partially. Alternatively, if the Tribunal should find that compliance with a condition of suspension would help Mr Dolan to avoid becoming liable to further penalties, then HMRC

should suspend only part of the penalty commensurate with the cost to Mr Dolan of implementing the condition.

THE APPELLANT'S ARGUMENTS

35. Mr Davis submitted that the penalty is invalid because paragraph 13(3)(a) Schedule 24 FA 2007 is intended to allow any dispute over the tax upon which penalties are to be charged to be resolved or to be appealed prior to the penalties being issued. The legislation does not allow a penalty assessment to be raised before the tax is brought into charge, as the window for the penalty assessment begins at the expiration of the appeal period.

36. Mr Davis further contended that HMRC are wrong to say that the inaccuracy was deliberate and that Mr Dolan personally chose to ignore the need to get advice on this complex area in which he had no experience. Mr Dolan knew the old rules and proceeded on that basis. He immediately accepted the position when explained to him with no dispute. These are the actions of a compliant taxpayer who wishes to get matters correct and remedies his mistakes immediately on becoming aware of it. It is entirely reasonable that Mr Dolan made the simplest of errors, simply not staying up to date with new legislation in the most hectic period of his life. At worst, the error was careless. His behaviour amounted to a mistake despite taking reasonable care such that there is no penalty due.

37. Mr Davis asked the Tribunal, should we decide that the case is one where a careless penalty is chargeable and that suspension is to be considered, to direct the parties to attempt to agree conditions within 1 month of any decision.

38. Mr Davis also asked the Tribunal, should a penalty be levied, to consider the quantum of the penalty and to take accord of the "telling", "helping" and "giving" reductions and award the full discounting of, respectively, 30%, 40% and 30%.

DISCUSSION

39. The first issue was whether the penalty assessment was invalid on the basis that the legislation does not allow a penalty assessment to be raised before the tax is brought into charge. If the penalty was not invalid for this reason, the second issue was whether the behaviour was deliberate, and the third issue was the quantum of the penalty.

The first issue: the validity of the penalty

40. As set out above, Schedule 24 para 13(4) provides that

> "An assessment of a penalty under paragraph 2 must be made [before the end of the period of 12 months beginning with
>
> (*a*) the end of the appeal period for the assessment of tax which corrected the understatement, or
>
> (*b*) if there is no assessment within paragraph (*a*), the date on which the understatement is corrected."

41. The penalty was clearly issued within the time limit set by the first subparagraph, see the definition of the appeal period at para 13(5) set out above. We considered whether (b) precluded the issuance of a penalty *before* an assessment had been issued but found, based on our reading of the statute, this not to be the case.

42. We therefore do not accept Mr Davis's contention that the legislation does not allow a penalty assessment to be raised before the tax is brought into charge, as the window for the penalty assessment begins at the expiration of the appeal period.

43. We instead agree with Mr Vallis that paragraph 13 Schedule 24 FA 2007 provides that an assessment must be made before the end of a defined period, that is when the window for

assessment closes, but the legislation does not provide for the beginning of that period when the window opens. We find that the assessment has been validly made.

Whether the penalty was deliberate

44. We consider the fundamental issue before the Tribunal to be whether the inaccuracy in the return was "deliberate".

45. The word "deliberate" is not defined within the statute. However, we agree with the view set out in *Auxilium Project Management Limited v HMRC* [2016] UKFTT 0249 (TC) at [63]:

> "In our view, a deliberate inaccuracy occurs when a taxpayer knowingly provides HMRC with a document that contains an error with the intention that HMRC should rely upon it as an accurate document. This is a subjective test. The question is not whether a reasonable taxpayer might have made the same error or even whether this taxpayer failed to take all reasonable steps to ensure that the return was accurate. It is a question of the knowledge and intention of the particular taxpayer at the time."

46. Mr Dolan's evidence was that he was acting on his tax knowledge "which was enough to arrive at the wrong conclusion, but not enough to arrive at the correct position". We accepted his evidence and find as a further fact that he thought he was adopting the correct approach and had he known that approach was not correct, he was in a position to take a more financially advantageous course of action and he would have done so.

47. Mr Vallis raised the point that a person cannot simply escape liability by claiming complete ignorance where the person clearly knew that he should have taken steps to ascertain the position. We accept that proposition. However, we find that the evidence and circumstances in this case demonstrate that Mr Dolan did not know that he should have taken steps to ascertain the correct position as he was under the mistaken belief that he already knew the correct position.

48. We do not consider Mr Dolan to have knowingly provided HMRC with an inaccurate document and therefore we do not find the inaccuracy in the return to have been a deliberate inaccuracy.

49. Mr Vallis argued, in the alternative, that Mr Dolan's inaccuracy was careless. Mr Davis submitted that the inaccuracy is, at its very worst, only careless.

50. Careless in this context is defined by paragraph 3(1)(a) Schedule 24 FA 2007, which provides that an inaccuracy in a document is careless if the inaccuracy is due to failure by the person giving the document to HMRC to take reasonable care. 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 (see *Collis v HMRC* [2011] UKFTT 588 (TC) at [29]).

51. We have found as facts that Mr Dolan did not accurately complete the boxes on the tax return because he did not know the non-resident rules had changed. He did not check the return as he expected his advisors would do that and it "went in last minute". He did not seek up to date professional tax advice before submitting the return.

52. We do not consider this meets the standard of a prudent and reasonable taxpayer in the position of the taxpayer in question and we agree with the parties that the inaccuracy was careless.

53. As we consider the inaccuracy to be careless, and therefore find that Mr Dolan did not take reasonable care when completing the return, we do not accept Mr Davis's submission that the behaviour was one of a "mistake despite taking reasonable care" such that no penalty is due.

54. With regard to Mr Davis's submission that suspension of the penalty should be considered, we note that Mr Dolan stated in his evidence that he did not think he could do anything to prevent this type of mistake in future, as he is no longer resident in the UK for tax purposes, so this is not relevant to him. We do not therefore consider that a condition may be imposed which would help avoid future careless inaccuracies (see *Eastman* at [43]) and find that suspension of the penalty is not appropriate in these circumstances.

Quantum

55. The parties agree that the PLR is £97,777. This is the amount of income tax underdeclared in Mr Dolan's tax return due to the inaccuracy. HMRC applied a penalty percentage of 47.25% of the PLR to arrive at a penalty of £46,199.63.

56. The penalty was calculated on the basis that the conduct amounted to a deliberate error identified from a prompted disclosure. The penalty range to be applied in those circumstances was between 35-70% of the PLR. A reduction of 65% of the difference was given to reflect the quality of disclosure, resulting in a penalty of 47.25% of the PLR.

57. We accept that, in arriving at the percentage of the reduction, HMRC considered the level and nature of assistance provided by Mr Dolan during their compliance check, with regard to 'telling, helping and giving'. They allowed a reduction of 20% for telling (out of a maximum of 30%), 25% (out of a maximum of 40%) for helping and 20% (out of a maximum of 30%) for giving.

58. Mr Hurst's evidence is that he considers the level of reduction to be appropriate because the error was not immediately accepted, there were delays in providing information, the information was not fully provided at the first opportunity and the case seem to take longer than he considered necessary. This evidence was challenged and Mr Hurst acknowledged that there had also been some delay on HMRC's part.

59. Based on the documentation before us, we agree with Mr Hurst that there had been some delay in providing information and accepting the error. We find Mr Hurst's conclusions regarding the quality of the disclosure to be reasonable in the circumstances and in accordance with the facts as we found them. We therefore do not consider it to be appropriate to disturb the level of penalty reduction of 65%.

60. The penalty range for a careless, prompted penalty is 15-30%. The difference is 15%. Applying the total reduction of 65% gives a percentage reduction of 9.75%. Subtracting the percentage reduction from the maximum penalty of 30% gives a penalty percentage of 20.25% of the PLR, amounting to a penalty of £19,799.84.

DECISION

61. We allow this appeal, in part. We consider Mr Dolan's conduct which resulted in the error to have been careless.

62. We reduce the penalty from £46,199.63 to £19,799.84.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

63. 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.

KIM SUKUL

TRIBUNAL JUDGE

RELEASE DATE: 04 NOVEMBER 2020