[2021] UKFTT 154 (TC)

TC08123

Inaccuracy penalty – whether HMRC proved that due to Appellant's deliberate behavior – no – HMRC disavowed case based on carelessness – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2020/00002

BETWEEN

ANGEL RODRIGUEZ-ISSA **Appellant**

-and-

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

TRIBUNAL: JUDGE DAVID BEDENHAM
ANN CHRISTIAN

The hearing took place on 1 March 2021. With the consent of the parties, the form of the hearing was video with the parties attending through the Tribunal video platform. A face to face hearing was not held because of the ongoing Covid 19 pandemic and social distancing guidance.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

Mr Robert Maas, Chartered Accountant, for the Appellant

Mr Arshad Khan, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. On 17 July 2019, HMRC issued the Appellant with a penalty in the sum of £24,996.09 pursuant to Paragraph 1 of Schedule 24 to the Finance Act 2007 ("FA 2007") because HMRC formed the view that there were inaccuracies in the Appellant's tax return for the 2016/17 year, and those inaccuracies were the result of deliberate behaviour on the part of the Appellant.

2. On review, the conclusion of which was notified on 19 November 2019, HMRC maintained that the inaccuracies were the result of deliberate behaviour on the part of the Appellant but increased the reduction given for disclosure. The revised penalty amount was £23,805.

3. The Appellant appealed to the Tribunal

4. Before us, HMRC submitted that the evidence established that the inaccuracies were the result of deliberate behaviour on the part of the Appellant. However, HMRC stated that, if we were against them on that point, we should allow the appeal because HMRC did not seek to advance a case based on carelessness. We were rather surprised by HMRC's position, but that is the way that HMRC's case was advanced and that is the case that the Appellant sought to meet.

5. For the reasons set out below, we are not satisfied that HMRC have discharged the burden of proving that the inaccuracies were the result of deliberate behaviour on the part of the Appellant. We therefore allow the appeal.

BACKGROUND

6. The Appellant was made redundant by Morgan Stanley in July 2016. The Appellant subsequently commenced employment with BNP Paribas.

7. The Appellant's 16/17 tax return, filed on 11 December 2017, omitted £176,738 of income received from Morgan Stanley in the period December 2016 to February 2017 (i.e. after he had left employment with Morgan Stanley). The return also omitted any reference to Morgan Stanley having written off a loan of £143,420. The central issue in dispute in this appeal is whether those omissions were deliberate on the part of the Appellant.

RELEVANT LAW

8. Paragraph 1 of Schedule 24 FA 2007 provides:

> "(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."

9. The documents listed in the table referred to in paragraph 1 include "income tax or capital gains tax return".

10. Paragraph 3 of Schedule 24 FA 2007 provides:

> "(1) For the purposes of a penalty under paragraph 1, inaccuracy in a document given by P to HMRC is–
>
> 'careless' if the inaccuracy is due to failure by P to take reasonable care,
>
> 'deliberate but not concealed' if the inaccuracy is deliberate on P's part but P does not make arrangements to conceal it, and
>
> 'deliberate and concealed' if the inaccuracy is deliberate on P's part and P makes arrangements to conceal it (for example, by submitting false evidence in support of an inaccurate figure)"

11. Paragraph 4 of Schedule 24 FA 2007 sets out the standard amounts of penalty for the behaviours that are the subject of the Schedule 24 regime. For a "category 1" inaccuracy (which applies in the present case) the penalty payable (subject to any reduction for disclosure) is: for a careless inaccuracy 30% of the potential lost revenue, for a deliberate but not concealed inaccuracy 70% of the potential lost revenue, and for a deliberate and concealed inaccuracy 100% of the potential lost revenue.

12. Paragraph 5 of Schedule 24 FA 2007 provides:

> "The potential lost revenue" in respect of an inaccuracy in a document (including an inaccuracy attributable to a supply of false information or withholding of information) or a failure to notify an under-assessment is the additional amount due or payable in respect of tax as a result of correcting the inaccuracy or assessment."

13. Paragraphs 9 and 10 of Schedule 24 FA 2007 provide for reductions in the penalty where a person provides disclosure in relation to an inaccuracy.

14. Paragraph 11 of Schedule 24 FA 2007 provides that a penalty can be further reduced in "special circumstances". Paragraph 17 provides that the Tribunal's power to substitute its own decision for that of HMRC may include a reduction on account of special circumstances but this reduction may only differ from that applied by HMRC if the Tribunal thinks that HMRC's decision in respect of the application of paragraph 11 was flawed when considered in the light of the principles applicable in judicial review proceedings.

15. Paragraph 14 of Schedule 24 FA 2007 provides HMRC with a power to suspend all or part of a penalty for a careless inaccuracy, but only if this would help a person to avoid becoming liable to similar such penalties in future.

16. Paragraph 15 of Schedule 24 FA 2007 provides a right of appeal to the Tribunal in relation to the decision to issue a penalty, the amount of the penalty and the decision not to suspend a penalty (or to suspend on conditions).

17. Paragraph 18 of Schedule 24 FA 2007 provides:

> "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.
>
> 18(2) In paragraph 2(1)(b) and (2)(a) a reference to P includes a reference to a person who acts on P's behalf in relation to tax.

> 18(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 the inaccuracy (in relation to paragraph 1) or unreasonable failure (in relation to paragraph 2)."

18. It is for HMRC to prove that the Appellant is liable to a penalty (and the amount of the penalty).

19. In *Auxilium Project Management v HMRC* [2016] UKFTT 249 (TC), the Tribunal held:

> "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.
>
> The test of deliberate inaccuracy should be contrasted with that of careless inaccuracy. A careless inaccuracy occurs due to the failure by the taxpayer to take reasonable care (see paragraph 3(1)(a) of Schedule 24 Finance Act 2007 and *Harding v HMRC* [2013] UKUT 575 (TCC) at [37])."

20. We agree with the approach set out in *Auxilium.*

21. HMRC also referred us to the decision in *Clynes v HMRC* [2016] UKFTT 369 (TC) where the Tribunal stated:

> "we consider that the term "deliberate inaccuracy on a person's part can extend beyond this. Our view is that, depending on the precise circumstances, an inaccuracy may also be held to be deliberate where it is found that the person consciously or intentionally chose not to find out the correct position, in particular, where the circumstances are such that the person knew that he should do so. 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 view the case where a person makes such a conscious choice not to take such steps with the result that an inaccuracy occurs, as no less of a "deliberate inaccuracy" on that person's part than making the inaccuracy with full knowledge of the inaccuracy."

22. We agree that an inaccuracy may be held to be deliberate where it is found that the person consciously or intentionally chose not to find out the correct position. However, as the Tribunal indicated in *Clynes*, this will be a question of fact and degree that must be determined on a case by case basis. Care must be taken not to blur the line between careless and deliberate conduct.

HMRC'S SUBMISSIONS

23. HMRC submitted as follows:

(1) The Appellant has agreed that income was omitted from his 16/17 tax return and, therefore, that return contained inaccuracies.

(2) That the omissions from the Appellant's tax returns were deliberate is evidenced by the following:

(a) The Appellant's tax affairs are very straight forward. Despite this, the Appellant failed to declare a significant sum. This is unlikely to be an innocent mistake.

(b) The Appellant's settlement agreement with Morgan Stanley provided that the Appellant was liable for income tax arising out of the settlement sums. Further, the Appellant took legal advice prior to signing the settlement agreement.

(c) The Appellant had failed to declare a taxable benefit (an interest free loan) in his 2015/16 return for which inaccuracy HMRC has issued a penalty.

(3) The Appellant could have taken advice to ensure his 16/17 return was accurate but chose not to do so.

24. In relation to the failure to declare a taxable benefit in the 2015/16 return, HMRC accepted this was careless rather than deliberate. HMRC also conceded that the closure notice for 2015/16 had only been issued on 16 February 2018 (i.e. after the Appellant had filed his 16/17 return), and they could not point to any other document to establish that the Appellant was aware of the 15/16 inaccuracy prior to filing his 16/17 return.

THE APPELLANT'S SUBMISSIONS

25. The Appellant submitted as follows:

(1) HMRC have not established that the 16/17 tax return contained an inaccuracy which amounts to, or leads to, an understatement of a liability to tax.

(2) HMRC have not established that any inaccuracies in the 16/17 tax return were due to deliberate behaviour on the part of the Appellant.

(3) HMRC have put their case on the basis of deliberate behaviour. If the Tribunal finds that HMRC have not made out that case, the Tribunal cannot instead uphold the penalty in the careless basis.

EVIDENCE

26. The following was apparent from the documents before us and/or was not in dispute:

(1) The Appellant was made redundant by Morgan Stanley with effect from 29 July 2016. The Appellant subsequently commenced employment with BNP Paribas.

(2) The Appellant entered into a Settlement Agreement with Morgan Stanley dated 12 September 2016 which, inter alia, provided:

(a) Morgan Stanley would pay to the Appellant all outstanding salary and make a payment equivalent to three months salary in lieu of notice.

(b) Morgan Stanley would pay to the Appellant a "severance payment";

(c) Morgan Stanley would waive its right to repayment of a loan that had been made to the Appellant.

(d) Morgan Stanley would calculate the estimated income tax and NIC liabilities arising from the loan waiver and make a payment to the Appellant to cover any such liabilities.

(e) The Appellant would be responsible to HMRC for payment of:

(i) Any income tax or NICs in excess of that deducted at source in respect of the severance payment; and

(ii) Income tax arising from the loan waiver.

(3) The Appellant's 16/17 tax return was filed on 11 December 2017.

(4) In February 2018, HMRC issued a closure notice in relation to the Appellant's 15/16 tax year. The Appellant was informed of an inaccuracy in his 15/16 tax return (failing to disclose a taxable benefit in the form of a loan) for which HMRC issued a penalty on the careless basis.

(5) On 25 October 2018, HMRC opened an enquiry under s 9A of the Taxes Management Act 1970 into the Appellant's 16/17 tax return.

(6) In March 2019, HMRC and the Appellant agreed that there were inaccuracies in the Appellant's 16/17 tax return such that his tax liability had been understated by £68,015,59.

(7) On 4 April 2019, HMRC wrote to the Appellant and asked that he explain the circumstances in which he had come to submit an inaccurate return. It was explained that this would assist HMRC in determining whether a penalty should be issued to the Appellant (and at what level).

(8) On 3 May 2019, the Appellant responded to HMRC as follows:

> In 2015 I received a loan from my ex-employer Morgan Stanley for US$250,000…The tax related to that loan had been reported on the P11Ds provided to me by the company, which along my P60s I had been relying on to complete my returns historically and accurately. In July 2016, Morgan Stanley made me redundant and wrote off the balance of the loan, triggering thus a lump-sum tax liability that I was not aware of until after your inquiry. I absolutely followed due process in order to prepare my tax return by following the exact instructions on the self assessment system and relying, as indicated by your instructions, on the information provided by Morgan Stanley and BNP Paribas (my new employer) including:
>
> 1) the P45 I received when I was made redundant
>
> 2) the payslips I received from Morgan Stanley up to June 2016 (that was the last)
>
> 3) the P60 provided by BNP Paribas
>
> All of the above has been shared with you (see my e-mails to you from 29 of October 2018).
>
> Further, one of those emails show that I asked Morgan Stanley on July 8th 2016 for my latest P11Ds and P60s, however, I did not receive a P60 or a P11D for 2016/17, and only a P45 was provided to me by post, so, in retrospect, the information provided to me was incomplete.
>
> As you and I found out, Morgan Stanley registered further payments to me on a monthly basis, even after I had been made redundant but no document showing those payments was ever made available to me (I still to this date have no document P60, payslip or otherwise stating these payments and their corresponding tax).
>
> …"

(9) On 28 May 2019, HMRC issued the Appellant with a notice of intended penalty in the sum of £24,996.09, and a penalty explanation schedule which stated:

(a) The Potential Lost Revenue was £68,016.59;

(b) The penalty was to be imposed on a deliberate (prompted) basis because:

> "Your tax affairs are very straight forward, however you have failed to declare over 41% of your income. Although I appreciate you relied on paperwork from your Employers which ultimately did not include all this income, it is still your responsibility to ensure the information provided to you is accurate before entering this into your tax return. It is also reasonably expected that you would be aware of the total amount income received during the tax year. You were subject to an enquiry in 2015/16 where a beneficial loan payment was omitted from your return, a careless penalty was charged for this error. You have committed the same error in your 2016/17 return by again failing to declare employment related benefits. The settlement statement you received from Morgan Stanley (Paragraph 21) also stipulates that you were liable to pay any additional tax due on the beneficial loan, however you did not seek any additional advice on this aspect and chose not to include this on your return.
>
> The disclosure was Prompted because you didn't tell us about the Inaccuracy before you had reason to believe that we'd found out about it, or were about to find out about it"

(c) The disclosure reduction applied was 95%.

(10) On 10 June 2019, the Appellant's then accountants wrote to HMRC stating "Our Client strongly disagrees that the tax return was incorrect due to his deliberate behaviour; at worst it was careless…"

(11) On 17 July 2019, HMRC issued the Appellant with a penalty in the sum of £24,996.09.

(12) On 18 July 2019, HMRC issued a closure notice which stated:

> "During the course of my check it was established that you had omitted £176, 738 of [income] you received from your employment with Morgan Stanley and a beneficial loan of £143,410.
>
> I have amended your return in line with my decision:
>
> - It previously showed that you had paid £2,235.80 too much tax
> - It now shows that you were due to pay £65,779.79
> - The difference is £68,015.59
>
> …
>
> If you disagree with my decision, you can appeal. You need to write to us by 16 August 2019…"

(13) On 18 July 2019, HMRC wrote to the Appellant's then accountants stating that they remained of the view that the Appellant's behaviour had been deliberate and gave the following reasons:

> "Mr Issa's tax affairs are very straightforward (PAYE income & Employment benefits. However, your client omitted over £176,738 of his income received through Morgan Stanley. Regardless of whether or not this amount was missing from his P45/P60 he still should have had an inclination of receiving this sum. This is a substantial amount of income and over 41% of his income

for that year. HMRC does not believe the sole reliance of using the information on P60/P45 is an excuse to omit such substantial amounts of income and would reasonably expect an individual to be aware of the income they receive.

Mr Issa failed to declare £143,420 in beneficial loan which was written off by his employer Morgan Stanley and declared to HMRC by them on form P14. In the settlement letter of 12/09/2016 which your client received from MS, Paragraph 21 stated Mr Issa would be liable to any additional tax due on the waiver payment. HMRC would reasonably expect an individual to seek advice and attempt to understand how this payment should be treated for tax purposes if they were unsure. However, your client did not do this and chose to omit the payment from his return.

Mr Issa was subject to an enquiry into his 2015/16 return in which he failed to declare a beneficial loan sum of £4975 received through MS. Your client was charged a careless penalty (not suspended) for this error. The purpose of the HMRC enquiry is to make a taxpayer aware of their tax obligations going forward and the enforcement of such penalty is to try and change the behaviour of an individual so they become more compliant and to avoid future inaccuracies occurring. Your client has committed the same error in the 2016/17 by again omitting a beneficial loan sum/employment related benefit. Where a penalty has already been charged for the same error HMRC must take a much firmer stance on the penalty position to ensure this error does not occur again."

(14) On 27 August 2019, the Appellant's then accountants appealed against the penalty.

(15) On 18 September 2019, HMRC issued a "view of the matter" letter by which it confirmed it was standing by the decision to issue the penalty on the deliberate basis.

(16) On 7 October 2019, the Appellant requested that HMRC review the penalty decision.

(17) On 19 November 2019, HMRC notified the Appellant of the conclusion of the review which was that HMRC maintained that the inaccuracies were the result of deliberate behaviour on the part of the Appellant but increased the reduction given for disclosure giving a revised penalty amount of £23,805.

(18) On 11 December 2019, the Appellant filed an appeal with the Tribunal.

27. Ashley James, an officer of HMRC, provided a witness statement and gave evidence before us. His evidence can be summarised as follows:

(1) The s 9A enquiry was opened because HMRC held information which suggested that the Appellant had underdeclared his employment income and had failed to declare an employment related benefit. Specifically, HMRC's RTI records indicated that the Appellant had received additional income from Morgan Stanley totalling £176,738 between December 2016 and February 2017. Morgan Stanley also submitted a P11D showing £143,420 as a 'loan write off."

(2) When completing his 16/17 tax return, the Appellant appeared to have relied on the P60 provided by BNP Paribas and the P45 from Morgan Stanley. Those documents only detailed the amount of employment income received from Morgan Stanley up to 29 July 2016 – the date the Appellant ceased employment with Morgan Stanley. After this date, the Appellant received further employment income from Morgan Stanley of £176,738.

(3) He was of the view that the omissions in the 16/17 tax return were deliberate for the same reasons as set out at paragraph 23 above.

(4) Where a taxpayer is given a penalty for a careless inaccuracy in one tax year and a similar inaccuracy arises in the following tax year, the starting point is that the subsequent inaccuracy will give rise to a deliberate penalty.

(5) Even though the Appellant was only notified of the inaccuracy in the 15/16 return after he had filed the 16/17 return, the Appellant still had over 9 months to correct the 16/17 return before the enquiry was opened.

We accept Mr James' evidence as to factual matters. However, whether or not the omissions were due to the Appellant's deliberate behaviour is, of course, a matter for us to determine.

28. The Appellant gave evidence before us (he had not provided a witness statement in advance but HMRC stated they has no objection to him giving oral evidence). We found the Appellant to be vague and somewhat evasive in some of the answers he gave. However, HMRC only cross-examined him relatively briefly and did not challenge significant parts of his account. His evidence can be summarised as follows:

(1) He completed his 16/17 tax return himself (i.e. did not use the services of an accountant or any other adviser).

(2) He used the figures on the documents (P60 and P45) provided to him by his employers to complete the 16/17 tax return. He complied with the guidance on the return which stated "pay from this employment – the total from your P45 or P60".

(3) He did not understand the tax treatment of the loan waiver and did not realise that this needed to be declared on his tax return.

(4) Morgan Stanley put forward the settlement agreement and paid for him to take independent legal advice on its terms.

(5) No advice was given to the Appellant in relation to his tax liability other than to say that the first £30,000 of the redundancy payment was tax free.

(6) He accepted that Morgan Stanley made payments to him after he had ceased to be employed by them. Some of those payments were made into a US dollar account. He was, however, not aware of those payments having been made until after he had filed his 16/17 return. In any event, he has struggled (even now) to reconcile the payments received against what he was due from Morgan Stanley and certainly did not identify that there were amounts that needed to be included in his tax return over and above the figures taken from the P60 and P45.

(7) He accepted that the 16/17 return contained omissions but he was not aware of these until they were brought to his attention by HMRC.

(8) He did not know about the inaccuracy in the 15/16 return until notified of it by HMRC in January/February 2018 which was after he had filed the 16/17 return.

(9) On receiving the penalty in relation to the 15/16 return, he did not amend his 16/17 return because he still did not appreciate that there was anything to amend.

In circumstances where this evidence was not meaningfully challenged we, despite some reservations, accept the Appellant's evidence.

DECISION

29. We are satisfied that there were inaccuracies in the 16/17 return as alleged by HMRC. As much was conceded by the Appellant in correspondence and in his evidence.

30. However, as stated above, HMRC advanced their case on an "all or nothing" basis. That is, HMRC stated that if we were not satisfied they had established deliberate conduct, we should allow the appeal.

31. We are not satisfied that HMRC has discharged the burden of proving that the inaccuracies arose from the Appellant's deliberate conduct applying the approach in *Auxilium.* Nor are we satisfied that HMRC has established that this is one of those circumstances envisaged in *Clynes* where it can be said that deliberate conduct is made out because the Appellant consciously or intentionally chose not to find out the correct position (where the circumstances are such that the person knew that he should do so).

32. We find that:

(1) The Appellant understood that he had accurately completed his 16/17 tax return because he had used the figures provided on the P60 and P45 in relation to employment income.

(2) The Appellant did not understand the tax treatment of the loan waiver and did not know that it needed to be included on his tax return.

(3) The Appellant did not know that there were inaccuracies in his 16/17 return until told as much by HMRC.

33. Alleging that a taxpayer has deliberately filed an inaccurate return is a serious matter. Where such a serious allegation is made, it is incumbent on HMRC to put forward a cogent case and to challenge the Appellant's account to the extent it is inconsistent with that case. That was simply not sufficiently done in the present appeal.

34. This appeal is allowed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

35. 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.

DAVID BEDENHAM
TRIBUNAL JUDGE

RELEASE DATE: 14 MAY 2021