



**TC06229**

**Appeal number TC/2016/05539**

*Income Tax - penalty assessment for prompted disclosure of deliberate inaccuracy in tax returns - Appellant received accommodation benefit when occupying flat owned by his Company - whether a 'without prejudice' offer by HMRC to settle penalties and assessments raised against Appellant's Company and Appellant could be accepted in part - no - whether the penalties were correctly imposed - yes - appeal dismissed*

**FIRST-TIER TRIBUNAL**

**TAX**

**VERNON LEONARD RUPESINGHE**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE MICHAEL CONNELL**

**Sitting in public at Taylor House, Rosebery Avenue, London on 15 September 2017**

**Mr P Jayawardene FCA for the Appellant.**

**Ms Siobhan Brown, Officer of HMRC, for the Respondents.**

## DECISION

1. This is an appeal by Mr Vernon Leonard Rupesinghe ('the Appellant') against  
5 total penalty assessments of £2,379.30 issued under Schedule 24 Finance Act 2007 for  
a prompted disclosure of a deliberate inaccuracy in each of his tax returns for the  
years ended 5 April 2011 and 5 April 2012.

2. The penalties in question were:

	2010-11	£1,797.33
10	2011-12	£531.30

3. The tax charged upon the benefit is not in dispute. The appeal relates solely to the  
penalties. There are two issues before me. The first issue is whether HMRC are bound  
by the Appellant's agent's purported acceptance of a 'without prejudice' offer by  
15 HMRC to settle matters on the basis of proposals which included assessments and  
penalties relating to the Appellant personally and also assessments and penalties  
relating to Sala Estates Limited, of which the Appellant is a director and shareholder.

4. The second issue is whether the penalty assessment has been issued correctly and  
if so whether the penalty is in the correct amount.

### 20 **Background**

5. The Appellant occupied a flat owned by Kristal Investments Ltd between 7 April  
2010 and 20 July 2011 on a rent free basis. He is a director and the sole shareholder of  
that company.

25 6. The Appellant's personal tax returns for the years ended 5 April 2011 and 5 April  
2012 were submitted to HMRC on 31 January 2012 and 31 January 2013 respectively,  
and these did not include the benefit from accommodation.

7. HMRC opened an enquiry into the Appellant's tax return on 29 March 2013 under  
s 9A TMA 1970. The officer conducting the enquiry was Officer Steve Ornoch.

30 8. On 26 March 2015 discovery assessments were made by Officer Ornoch to  
recover the additional tax due on the omitted accommodation benefit valued at  
£12,000 per annum, for the years in question.

9. On 22 May 2015 an appeal was made against the 2010-11 discovery assessment  
advising that the start date for the accommodation benefit was in fact 15 April 2011.

35 10. Negotiations continued between HMRC and the Appellant's accountant Mr  
Jayawardene (the agent) to try to reach an agreement to bring enquiries into the  
Appellant's personal returns and associated companies, of which the Appellant was a  
director, to a conclusion. These culminated in a phone call between Officer Ornoch  
and the agent on 1 December 2015. This conversation was followed up by a letter sent

by fax from Officer Ornoch to the agent on 1 December 2015 with four schedules detailing 'without prejudice' proposals for settling the case informally.

11. The proposals covered the Appellant's personal affairs, those of Sala Estates Ltd, and Kristal Investments Ltd which provided the accommodation. The letter said:

5 "I refer to our telephone conversation yesterday when we discussed the Company liabilities and those of the Company director Mr Rupesinghe. I have enclosed schedules to clarify my without prejudice proposals to settle the enquiries."

10 Schedule 1 concerned corporation tax matters relating to Sala Estates and disallowed £35,679 of Sala's losses.

Schedule 2 charged Sala £5,445 under s 455 CTA 2010 with a penalty of £1,905.

15 Schedule 3 related to the Sala Estates class 1A liability and penalties in respect of the accommodation benefit omitted from the company's P11Ds, and charged Sala £1,935 in secondary National Insurance Contributions with (reduced) P11D penalties of £2,400.

20 Schedule 4 related to the Appellant's personal tax position and the accommodation benefit omission.

25 The letter stated - "WITHOUT PREJUDICE Proposal. No penalty if agreement reached"

12. Officer Ornoch says that he telephoned the agent on 21 January 2016 to see if his proposals had been discussed and accepted by the Appellant. He was advised that the Appellant had cancelled two meetings with the agent. A deadline of the first week of February 2016 was agreed for acceptance of the proposals or he would proceed to make formal assessments and determinations, effectively withdrawing the "without prejudice" proposals as they had not been accepted.

13. On 7 March 2016 the agent wrote to HMRC advising his client's agreement to the accommodation benefit and the Appellant's personal liability, but made no mention of the other three parts of the proposals. The letter simply said:

"We agree the following accommodation benefits  
2010/11 £11,671  
2011/12 £3,450"

40 14. Officer Ornoch says that he wrote to the Appellant on 26 March 2015 asking him to explain the facts relating to the omission of the accommodation benefit from his return. He received no response. He wrote again on 24 March 2016 and explained that in the absence of a response he would conclude from the facts that the Appellant must

have known that his company owned the property and that he was living there rent free. He would therefore conclude that the Appellant had acted deliberately in omitting the accommodation benefit. The discovery assessment for 2010-11 was £12,000 and for 2011-12 was £3,450.

5

15. On 31 March 2016, as the proposals had not been accepted, HMRC proceeded to close the enquiries and issued a penalty assessment notice on the basis of a prompted deliberate inaccuracy in the Appellant's returns for 2010-11 and 2011-12.

10 16. Appeals against the penalty determinations were received on 21 April 2016. The agent also advised that the figure for 2010-11 was based on an incorrect date of commencement of the accommodation benefit.

15 17. On 20 July 2016, the 2011 discovery assessment appeal was determined in agreed revised figures reducing the potential lost revenue to £4,668 for 2010-11 and the penalty to £1,797.33 to take account of the reduction in the underlying tax for that year and to reflect the amendment to the commencement date of the accommodation benefit.

#### **The Appellant's case.**

20 18. The Appellant argues that no penalty should have been charged, as the without prejudice offer dated 1 December 2015 had been accepted on 7 March 2016, in relation to the accommodation benefit. The agent says there was "nothing in HMRC's fax to suggest that the offer was conditional upon agreement to the proposals for Sala Estates Ltd, which is a separate entity".

19. The Appellant also submits that the penalties are "excessive".

#### **25 HMRC's case**

30 20. HMRC contend that a penalty is payable as the Appellant gave HMRC an incorrect personal tax return. The return contained an inaccuracy, which led to an understatement of liability to tax. This is not in dispute. HMRC says that the inaccuracies were deliberate and the disclosure prompted.

21. The proposals in the letter of 1 December 2015, related to the affairs of both Salah Estates Limited and the Appellant. They were made on a without prejudice basis and were not binding.

35 22. The Appellant's agent's letter of 7 March 2016 was not acceptance of the 'without prejudice' offer made on 1 December 2015. It was only acceptance of part of it. HMRC's offer to settle the personal enquiry without penalties also required the acceptance of the settlement proposals relating to Sala Estates Limited.

40 23. As the Appellant was the director of the company and sole shareholder, he would have known he was living in a company property rent free and that accommodation benefit should have been declared. Kristal Investments Ltd failed to report the benefit

and no return of benefits (P11D) was prepared. The facts support a penalty based on deliberate behaviour.

24. The Appellant's failure to declare the accommodation benefit on his returns for 2010-11 and 2011-12 resulted in the submission of inaccurate returns and therefore penalties are due under Schedule 24 FA 2007.

25. The size of a penalty is dictated by the potential lost revenue, multiplied by a percentage which depends upon whether the inaccuracy was concealed, prompted, or unprompted, and whether the inaccuracy was careless or deliberate. The resulting figure is then further reduced according to HMRC's view of how much assistance the Appellant gave in the enquiry. This is separated into 'telling' 'helping' and 'giving'.

26. For a prompted deliberate penalty the minimum penalty (after all adjustments) is 35% and the maximum is 70%. The range is therefore 35%.

27. HMRC has given:

- A 20% deduction for telling HMRC about his occupation of the company property.
- A 40% deduction for providing the amount of the benefit.
- A 30% deduction for giving HMRC access to records.

28. The 90% total deduction is then applied to the 35% range, resulting in a figure of 31.5%. The penalty is therefore the maximum of 70%, less 31.5% resulting in the penalty charged of 38.5%. This is only slightly above the statutory minimum tariff of 35% for such an inaccuracy. The penalties charged are then applied to the 'tax effect' on the accommodation benefit figures.

Tax Year	Benefit	Tax Rate	Tax Effect	Penalty @38.5%
	£		£	
2010-11	11,671	40%	4,668.40	1,797.33
2011-12	3,450	40%	1,380.00	531.00

### Relevant Legislation

29. The relevant legislation is at Schedule 24 Finance Act 2007 and summarised below.

#### 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.

5

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 but P does not make arrangements to conceal it, and
  - (c) “deliberate and concealed” if the inaccuracy is deliberate and P makes arrangements to conceal it (for example, by submitting false evidence in support of an inaccurate figure).

10

15

Paragraph 4

- (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.

20

25

Paragraph 5

- (1) “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.

30

Paragraph 9

- (1) A person discloses an inaccuracy or a failure to disclose an under-assessment by -
- (a) telling HMRC about it,
  - (b) giving HMRC reasonable help in quantifying the inaccuracy or under-assessment, and
  - (c) allowing HMRC access to records for the purpose of ensuring that the inaccuracy or under-assessment is fully corrected.

35

40

(2) Disclosure -

45

- (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 or under-assessment, and
- (b) otherwise, is “prompted”.

50

- (3) In relation to disclosure “quality” includes timing, nature and extent.

Paragraph 10

5

- (4) (4)Where a person who would otherwise be liable to a 70% penalty has made a prompted disclosure, HMRC shall reduce the 70% to a percentage, not below 35%, which reflects the quality of the disclosure.

Paragraph 15

10

- (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.

15

Paragraph 17

20

25

30

- (1) On an appeal under paragraph 15(1) the tribunal may affirm or cancel HMRC's decision.  
(2) On an appeal under paragraph 15(2) the 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 11 -  
(a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or  
(b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 11 was flawed.

**Conclusion**

30. The Appellant does not appeal the fact that there was a deliberate inaccuracy in his personal self assessment returns for 2010-11 and 2011-12 and a prompted disclosure.

35

31. He argues that his agent reached a concluded agreement with HMRC by agreeing to the accommodation benefit and the Appellant's personal liability, and in so doing accepted HMRC's assurance that in the event of reaching agreement in that regard there would be no penalties.

40

45

32. A proposal which is expressed to be 'without prejudice' is not capable of acceptance. Thus where an offer is made 'without prejudice' by way of compromise of a matter in dispute, the person making that offer is not making any admission or formal offer beyond stating his willingness to compromise on the basis indicated. A proposal contained in a 'without prejudice' offer must be followed by a formal open exchange of correspondence between the parties or some other form of agreement for there to be any kind of binding commitment. Even if there had been an open offer by Officer Ornoch, it would not have been possible for only part of that offer to be accepted. The Appellant cannot 'cherry pick' the arrangements as set out on the four

schedules of HMRC's letter. To suggest that all the Appellant had to do, to escape penalties on his personal liability, was to agree to a matter not in dispute would not make sense.

5 33. The Appellant also argues that the penalties are excessive. The penalty has been applied at the rate applicable to a prompted disclosure of a deliberate inaccuracy and reduced from the maximum of 70% to 38.5% of the potential lost revenue. The Appellant does not argue that there are any special circumstances. Officer Ornoch allowed a 90% total deduction for 'telling' 'providing' and 'giving', which on the facts, appears to me to be a fair and reasonable assessment. The Appellant has not  
10 offered any reasons why the allowance should be increased from 31.5%. I therefore concur with that allowance. The penalty has therefore been correctly assessed.

34. The Appeal is accordingly refused and the penalties confirmed.

15 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.

20

**MICHAEL CONNELL  
TRIBUNAL JUDGE**

25

**RELEASE DATE: 21 NOVEMBER 2017**