[2018] UKFTT 229 (TC)

TC06462

Appeal number: TC/2016/04938

INCOME TAX – penalty – schedule 24 Finance Act 2007 – deliberate inaccuracy in return – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

SAMIR KAPOOR **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN CANNAN

Sitting in public at Taylor House, London EC1R 4QU on 5 March 2018

Mr Arnob Battacharya for the Appellant

Mr Thomas Nicholson of HM Revenue & Customs for the Respondents

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DECISION

Background

1. This is an appeal against a penalty pursuant to Schedule 24 Finance Act 2007 in the sum of £4,343. The penalty is based on an allegation that the appellant submitted a self assessment tax return for tax year 2014-15 which contained a deliberately inaccuracy.

2. The appellant now resides in India and was unable to attend the hearing. He was represented by a work colleague, Mr Arnob Battacharya. I am grateful to Mr Battacharya for his assistance. As a result, I did not hear oral evidence from the appellant but I did have the benefit of various pieces of correspondence and documentation in which he put his case, together with the submissions of Mr Battacharya.

Statutory Framework

3. Save where otherwise noted references in this decision are to Schedule 24 Finance Act 2007.

4. Paragraph 1(1)(a) provides that a penalty is payable where a taxpayer gives HMRC a document including a self assessment tax return and two conditions are satisfied. The first condition for present purposes is that the document contains an inaccuracy which leads to an understatement of liability to tax. The second condition is that the inaccuracy was careless or deliberate.

5. Paragraph 3(1)(a) provides that an inaccuracy in a document is "careless" if "*the inaccuracy is due to failure by [the taxpayer] to take reasonable care*". Paragraph 3 also distinguishes inaccuracies which are "*deliberate but not concealed*" from those which are "*deliberate and concealed*". It is not suggested by HMRC that the inaccuracy in the present case was concealed but they do contend that it was deliberate.

6. Paragraph 4 makes provision for the standard amount of penalties. The standard penalty for careless action is 30% of the potential lost revenue ("PLR"). The standard penalty for deliberate but not concealed action is 70% of the PLR.

7. Paragraph 5 defines the PLR as follows:

> " (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 …."

8. Paragraphs 9 and 10 provide for reductions in the standard penalties where a person discloses an inaccuracy. Disclosure in this context is defined as:

> " (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."

9. There is a distinction for these purposes between an "unprompted" disclosure and a "prompted" disclosure. Paragraph 9(2) provides that a disclosure 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. Otherwise a disclosure is prompted.

10. Paragraph 10 sets out the reductions for disclosure which HMRC must apply to a penalty. Those reductions depend on whether any penalty is a 30% penalty for a careless inaccuracy or a 70% penalty for a deliberate but not concealed inaccuracy. The reduction which HMRC must apply will depend on whether the disclosure was prompted or unprompted. It must also reflect the "*quality*" of the disclosure. Paragraph 9 defines the quality of a disclosure as including "*timing, nature and extent*".

11. The reductions in the standard penalty by reference to the quality of disclosure give a range of potential penalties. For example, the standard penalty for a deliberate but not concealed inaccuracy is 70% of the PLR. Where there is prompted disclosure the penalty must be reduced but the minimum penalty is 35% of the PLR. In the present case the Penalty has been applied at 35% of the PLR so that the maximum reduction for disclosure has been given on the basis that the inaccuracy was deliberate but not concealed and that the Appellant's disclosure was prompted.

12. Paragraph 11 permits HMRC to reduce a penalty generally "*if they think it right because of special circumstances*", but special circumstances does not include inability to pay.

13. There is no general discretion to reduce a penalty simply because there are mitigating circumstances.

14. Paragraphs 15 to 17 set out the rights of appeal in respect of penalties. The tribunal has jurisdiction to affirm or cancel HMRC's decision that a penalty is payable. It may also affirm HMRC's decision as to the amount of any penalty payable, or substitute another decision which HMRC would have had power to make. The jurisdiction of the tribunal to reduce a penalty because of special circumstances is restricted to cases where HMRC's decision in relation to special circumstances is "flawed" in light of the principles applicable in proceedings for judicial review.

Findings of Fact

15. Based on the documentary evidence before me I make the following findings of fact. All findings in this section and in my reasons below are made by reference to the balance of probabilities.

16. The appellant is an employee of HCL, which is a multi-national software business. The appellant was the Sales and Solutions Director in the UK between 2014 and 2016 and was the sole point of contact for financial services software. Mr Battacharya worked under him. I understand that the appellant had moved to the UK from India and in 2016 he moved back to Delhi, where he continues to work for HCL.

17. On 28 August 2015 the appellant telephoned the HMRC helpline seeking to obtain a unique tax reference so that he could do a self assessment tax return. He said that he intended to claim a deduction against earnings for household living expenses including groceries and travelling expenses. The adviser established from the appellant that he was employed and the travel expenses related to travel from home to office. The appellant stated that he thought because he was on a short term visa he could claim relief for such items. The adviser explained to the appellant that he was not entitled to claim tax relief in relation to the items identified by the appellant and was not required to make a self-assessment tax return.

18. In fact, the appellant's income for 2014-15 exceeded the rate of £100,000 per annum which HMRC treat as triggering a requirement to make a tax return. The appellant contacted the HMRC helpline again on 3 September 2015 to explain that his income exceeded £100,000 per annum and he wanted to make a self assessment return. The appellant was given a unique tax reference for self assessment purposes and required to make a self assessment return for 2014-15.

19. The appellant submitted his self assessment return for 2014-15 on 2 December 2015. In that return he claimed a deduction for expenditure of £32,630. The appellant has subsequently explained and I accept that this expenditure covered the following items:

Amount £	**Description**
13,150	Rent
1,031	Council Tax
18,500	Household/Personal Expenses

20. Based in figures in the appellant's return there was a sum of tax repayable to the appellant of £7,857. This took into account a credit for tax deducted via PAYE of £13,587. During the year a tax code of BR for PAYE purposes had been operated, whereas the appellant was in fact a higher rate taxpayer. The result was that the tax deducted via PAYE during the year was less than it would have been with a tax code reflecting the fact that the appellant was a higher rate taxpayer. The figure of £7,857 for tax repayable took into account the tax payable at the higher rate.

21. On 15 December 2015 HMRC opened an enquiry into the appellant's self assessment return for 2014-15. This was an aspect enquiry checking the deduction for expenditure claimed by the appellant.

22. On 2 February 2016 HMRC issued a closure notice. The sum of £32,630 claimed as a deduction was disallowed. Instead of tax repayable of £7,857, the tax due from the appellant was £4,551.

23. HMRC considered that there was a deliberate inaccuracy in the appellant's self assessment return. On 10 February 2016 they notified a penalty assessment based on potential lost revenue of £12,408, which was the difference between the tax repayable calculated with the deductions claimed by the appellant and the tax payable without those deductions. There was a reduction for disclosure given by the appellant which resulted in a penalty rate of 52.5% and a penalty of £6,514.

24. The appellant lodged an appeal against the penalty in an email to HMRC dated 25 February 2018. In broad terms he contended that he had made an innocent mistake when completing his return. I consider the appellant's case in more detail below. HMRC maintained their view that the inaccuracy was deliberate and the penalty was payable. Following a review of that decision HMRC remained of the view that the inaccuracy was deliberate. However, the review officer considered that the reduction for disclosure should be increased to give the maximum reduction. The effect of this was that the penalty was reduced to the minimum penalty chargeable in respect of a deliberate inaccuracy with prompted disclosure, which was 35% of the potential lost revenue. The penalty was therefore reduced to £4,343. It was not considered that there were any special circumstances to justify a special reduction.

Reasons

25. The appellant's grounds of appeal are essentially that the inaccuracy in his return was innocent rather than careless. I have considered all the correspondence the appellant has had with HMRC in which he sets out his case, together with correspondence the appellant has had with the tribunal since lodging this appeal. I have also considered the representation and submissions made by Mr Battacharya on behalf of the appellant. The appellant's case may be summarised as follows:

(1) This was the first time the appellant had filled in a self assessment tax return and he was not familiar with the process. He was aware that he needed to complete a self assessment return because his income was £100,000 per annum.

(2) He included all his expenditure on the return. That is the practice in India and he expected HMRC to calculate what relief he was entitled to. The repayment of £7,857 was automatically calculated by HMRC.

(3) He provided all information in a timely manner and did not seek to hide anything from HMRC.

(4) Once he became aware that tax of £4,556 was due to HMRC he paid it immediately.

(5) The penalty uses an incorrect PLR. The PLR should be £7,857 and the additional tax due of £4,551 arose because the BR tax code was used.

26. The burden in this appeal is on HMRC to establish that the appellant sent his return containing a deliberate inaccuracy. For these purposes there will be a deliberate

inaccuracy where the taxpayer intends to give HMRC an inaccurate document (see *HM Revenue & Customs v Tooth [2018] UKUT 38 (TCC) at [62] – [67]*).

27. I take into account that at the time the appellant submitted his return for 2014-15 he had only been in the UK for a short period, and that the practice for completing tax returns in India is different from the UK. It may be, as Mr Battacharya told me, that in India the practice is to include all expenditure in the tax return and the system then works out what is acceptable and what is not. However, I consider the appellant was given clear information in his telephone call to the HMRC helpline on 28 August 2015. He was clearly told that he could not claim a deduction for household expenses or travelling expenses from home to office. Following that telephone call, I am satisfied that the appellant was aware that he was not entitled to claim deduction for household expenses, including rent and council tax.

28. Having been given that clear information, it is not relevant that the amount of tax payable or repayable was calculated automatically by HMRC's systems. Nor is it relevant, as Mr Battacharya sought to suggest, that the appellant did not claim any benefit after filing the return. The claim for relief was made in the return and the appellant was aware that he should not have entered household expenses on his return.

29. In the circumstances I am satisfied that the appellant deliberately included a deduction for household expenses knowing that he was not entitled to claim relief for that expenditure. He sent a document to HMRC which contained a deliberate inaccuracy and the conditions for a penalty under Schedule 24 are therefore met. I am satisfied on the balance of probabilities that the appellant did intend to give HMRC an inaccurate document.

30. It is clear in the present circumstances that the appellant's disclosure was prompted by the enquiry. I accept that the appellant did co-operate fully with the enquiry into his self assessment return and has paid the tax found due following the enquiry. The penalty under appeal gives full credit for disclosure, including co-operation and is set at the minimum penalty of 35% for a deliberate but not concealed inaccuracy with prompted disclosure. It is not suggested that the appellant sought to conceal the inaccuracy. I also accept that the appellant's salary in India is much less than it was in the UK and he cannot afford to pay the penalty. The tribunal has no jurisdiction to reduce a penalty simply because there are mitigating circumstances, or because the tribunal considers that a lower penalty would be more appropriate.

31. There is jurisdiction to reduce a penalty if I consider that HMRC's decision that there are no special circumstances is flawed. I am not satisfied that it is flawed, or indeed that there are any special circumstances in the present case.

32. The appellant contends that the penalty is based on an incorrect PLR. The PLR is the additional amount due or payable in respect of tax as a result of correcting the inaccuracy. The difference between the tax repayable of £7,857 and the tax payable of £4,551 is the PLR. That difference is solely the result of removing the deduction for expenditure of £32,630. The fact that PAYE had been operated using a BR tax code had no effect on the difference in tax. The tax deducted under PAYE was taken into

account when calculating both the tax repayable in the return as submitted and the tax payable following the amendment.

33. In all the circumstances I am satisfied that the appellant is liable to the penalty as notified and there is no basis to reduce that penalty.

Conclusion

34. For all the reasons given above the appeal is dismissed.

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.

JONATHAN CANNAN
TRIBUNAL JUDGE

RELEASE DATE: 19 APRIL 2018