[2018] UKFTT 729 (TC)

TC06862

Appeal number: TC/2017/01219

INCOME TAX – HMRC enquiry – closure notice and amendment to self-assessment return – penalty – appeal allowed in part and penalty reduced

FIRST-TIER TRIBUNAL
TAX CHAMBER

SANDRA ANNETTE CARTER **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE REDSTON

The Tribunal determined the appeal on 10 December 2018 without a hearing under the provisions of Rule 29 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (determination without a hearing).

DECISION

1. On 16 March 2016, HMRC issued a closure notice amending Mrs Carter's 2013-14 self-assessment ("SA") return, increasing the tax due by £6,824.77. On the same date HMRC issued her with an inaccuracy penalty of £3,105.27 on the basis that she acted deliberately.

2. The Tribunal has allowed her appeal in part, reducing both the assessment and the penalty.

Summary of the position

3. This paragraph summarises the position. In relation to the 2013-14 tax:

(1) Mr Denton increased Mrs Carter's taxable profits by adding £22,915.97 to her turnover. This was not correct, and I have reduced her taxable income to remove that figure.

(2) However, I agree with Mr Denton that Mrs Carter's claim for "home as office" was too high, and that she also over-claimed her car capital allowances.

(3) HMRC will now recalculate her 2013-14 tax on that basis.

4. I have told HMRC to recalculate the penalties, based on a lower starting point and also using a lower percentage.

5. My instructions to HMRC are at the end of this decision. HMRC are to inform Mrs Carter of the revised figures. If she does not agree that HMRC have carried out those calculations in accordance with my instructions, she can write to the Tribunal within 30 days of receiving HMRC's new figures, using the reference number TC/2017/01219 and marking her letter for my attention.

Preliminary matters

6. There were a number of preliminary matters, namely:

(1) whether the appeal was late;

(2) whether the appeal was by Mrs Carter, by her husband, Mr Carter, or by both of them together;

(3) whether the appeal was to be decided at a hearing, or on the papers; and

(4) what amounts and issues were under appeal.

Whether the appeal was late

7. Taxes Management Act 1970 ("TMA"), s 31A(1)(b) provides that a person must appeal to HMRC against a closure notice within 30 days of its date of issue. The same rule applies to inaccuracy penalties (see Finance Act 2007, Schedule 24, para 16 read together with TMA s 31(1)(d) and s 31(1A).

8. The closure notice and the penalty were issued on 16 March 2016, and Mrs Carter was therefore required to appealed within 30 days. On 24 March 2016, Mr and Mrs Carter sent a letter to Mr Denton, the HMRC officer who had been dealing with

the SA enquiry and who had made the decisions. It opened by saying "we write in response to your letter [sic] dated 16 March 2016", and complained that HMRC had failed to address points made in earlier correspondence. An invoice from Ms Annabelle Obey was attached, referring to further expenses of £380,554. Mrs Carter's letter claimed that the true position was that, as the result of these further expenses, she was due a tax repayment of £60,003.17.

9. On 8 April 2016, Mr Denton responded, saying that the request for a refund was "without merit". He did not consider whether her letter should be read as an appeal against the closure notice and the penalty.

10. On 19 October 2016, HMRC issued a "statement of liabilities" showing that Mrs Carter owed HMRC £10,168.95. On 8 November 2016, Mrs Carter wrote to Mr Denton, disputing that this sum was due and attaching a copy of her letter dated 24 March 2016.

11. On 7 December 2016, Mr Denton replied to Mrs Carter's letter, acknowledging that it was an appeal against the decision dated 16 March 2016. However, as it had been received after the 30 day time limit, and as Mrs Carter had not given a reasonable excuse for the lateness, he refused to consider her appeal.

12. By letter dated 18 January 2017, Mr and Mrs Carter wrote to the Tribunal asking it "to review my file" in relation to HMRC's 2013-14 compliance check. Mr Denton's letters of 16 March 2016 and 7 December 2016 were attached.

13. The Tribunal inferred from Mr Denton's second letter that Mrs Carter was out of time to make an appeal, and so needed to ask the Tribunal for permission to make her appeal late. HMRC's Statement of Case took the same approach, and asked the Tribunal to refuse to allow her late appeal.

14. However, it is fair to read Mrs Carter's letter of 24 March 2016 as an appeal against the closure notice. She was clearly disputing the correctness of Mr Denton's further assessment. That letter was received by HMRC within 30 days, and so was not late. Although it does not refer to the penalty, it states that the correct result for the year is that tax is repayable. Were that to be the position, there would be no penalty. I decided that the letter should be treated as including an appeal against the penalty.

15. As HMRC did not offer a statutory review of its decisions, and as Mrs Carter did not ask for a statutory review, there was no 30 day time limit for the appeals to be notified to the Tribunal, see Taxes Management Act 1970 ("TMA"), ss 49D, 49G and 49H.

Who was the appellant?

16. The letter of 24 March 2016 was from Mr and Mrs Carter, as was the notification to the Tribunal. However, the closure notice and the penalty notice were both addressed to Mrs Carter, and in correspondence she has confirmed that she is the only appellant.

A decision on the papers?

17. Mrs Carter informed the Tribunal that she was in the United States dealing with the estate of a family member, and she did not know when she would return; she said that she would like the appeal decided on the papers. HMRC agreed.

18. Rule 29(1) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules") provides that the Tribunal can only decide cases – other than those categorised under Rule 26 as "default paper cases" – if each party has consented to the matter being decided without a hearing and the Tribunal considers it is able to decide the matter without a hearing.

19. Both parties have consented to Mrs Carter's appeal being decided without a hearing, and I considered that I was able to decide it without a hearing.

The amounts and issues under appeal

20. In correspondence between Mrs Carter and the Tribunal, and between Mrs Carter and HMRC, Mrs Carter challenged not only the closure notice and the penalty, but also a late payment penalty of £330, interest and other matters.

21. On 18 January 2018, Judge Mosedale made a preliminary decision that this appeal concerned only the closure notice and the inaccuracy penalty. Judge Mosedale's decision was not appealed. It follows that those are the only two issues with which this appeal is concerned.

The evidence

22. The Tribunal had the benefit of a helpful bundle prepared by HMRC, which contained the correspondence between the parties and Mrs Carter's 2013-14 SA tax return.

The facts

23. On the basis of that evidence, the Tribunal finds the facts set out below. Further findings of fact are set out later in this decision.

24. Mrs Carter submitted her 2013-14 SA return on 18 December 2014. This consisted of the following pages:

(1) Self-employment pages for a childminding business, with disclosed turnover of £21,154, allowable expenses of £20,579 and capital allowances of £5,834, giving a total loss for the year of £5,259, of which £4,346 was set off against other income (see below).

(2) Self-employment pages for a business called "assisting and consulting". This disclosed turnover of £45,219, expenses of £39,673 and capital allowances of £1,200, giving a profit of £4,346.

(3) Property pages which disclosed income from rents of £15,900 and net profits of £1,173.

25. Mrs Carter's "assisting and consulting" business included giving tax advice and filing tax returns for clients. On 12 February 2014, Mr Paul Kendrew of HMRC and another HMRC Officer attended a meeting at Mrs Carter's home, and, in her words "closed the business". Mrs Carter was told that HMRC would no longer allow her to act as an authorised agent**;** her existing clients were subsequently transferred to another firm, called Candid Accountants.

26. On 5 February 2015, Mr Richard Denton of HMRC's local compliance office opened an enquiry into her 2013-14 return. For each self-employment business he asked for an analysis of the expenses claimed, together with the corresponding receipts; an analysis of the turnover, information about how customers paid and whether the income was all banked. In relation to the property business he asked for invoices and receipts for the expenses claimed, and evidence of the rental income in the form of tenancy agreements. He also required the provision of bank statements showing business income and expenditure.

27. On 9 March 2015 Mrs Carter sent HMRC various documents, including bank statements for two bank accounts. HMRC do not submit that the bank documentation was incomplete, and I therefore find as a fact that Mr Denton was provided with all the business bank statements.

28. Further correspondence ensued about numerous issues, but these finally crystallised into three areas of concern: bad debts, use of "home as office" and car capital allowances.

Bad debts?

29. On 16 November 2015, Mrs Carter wrote to Mr Denton, saying:

> "When HMRC closed the business, the new accountants had us perform tasks for their new clients and when we provided our invoices to the new accountants and asked about collecting our costs we were advised that they were doubtful debts…we have never moved to take Individuals/Organisations to Courts [sic] for the monies they owe us for the Services performed for them; HMRC is fully aware of this as we expressed this to them in our meetings."

30. She provided a list of seven clients, together with the relevant amounts, which totalled £36,542. On 15 December Mr Denton asked for more information, and on 4 January 2016, Mrs Carter said:

> "HMRC was made more than fully aware in the handing over of clients that there was quite a lot of consultancy work done hence we raised the invoices for the Services and gave them to Candid Accountants. Candid Accountants returned the invoices asking that they be raised in the Clients' name and since then we have not heard from anyone…as of today we have had no revenue/income from the invoices as Candid Accountants did not recognise the expense as theirs whilst we do not know what has happened to the transferred Clients as they have never paid these invoices."

31. As part of the amendment to Mrs Carter's SA return, Mr Denton increased Mrs Carter's profits by the £36,542 (subject to an adjustment because of the interaction with VAT, and taking into account some element of expenses, as referred to below), on the basis that the invoices had been omitted from her turnover. He did not accept that they were bad debts.

32. It is however clear from the evidence that:

(1) the £36,542 was not included in Mrs Carter's SA tax return 2013-14 figure, either as income or as a bad debt;

(2) it was never invoiced to Mrs Carter's clients, but to Candid Accountants;

(3) Candid Accountants returned the invoice to Mrs Carter;

(4) the invoice was not paid; and

(5) Mrs Carter has no intention of issuing the invoices to the clients, or of taking legal action against them for these amounts.

33. Mrs Carter's view is that she will never receive this £36,542 and it is therefore a bad debt. I agree. HMRC have refused to allow her to deal with them as a tax agent, and her clients have been transferred to another business. Candid Accountants have already refused to pay these amounts, and no invoices have been issued to the clients, because Mrs Carter recognises that there was no realistic possibility that the amounts would be paid. As a result, I find as a fact that although the £36,542 was correctly added to turnover, an equal amount is deductible as a bad debt.

Home as office

34. Mrs Carter's home has eight rooms. In previous years, Mrs Carter had claimed "home as office" costs in relation to three rooms, being a meeting room for clients, an "operational room", and a storage room**.**

35. In her 2013-14 SA return Mrs Carter claimed that she used five rooms for her business, and that she needed the extra space because HMRC opened 22 compliance checks into her clients. The total cost relating to the use of her property in 2013-14 was £15,679.84, and the amount claimed as a deduction from her "assisting and consulting" income was £9,811.15.

36. Mrs Carter has not submitted that any of the rooms in her property were used exclusively for business and I find as a fact that they were not.

37. It is reasonable to assume that the house contained a bathroom, a kitchen, and a bedroom for Mr and Mrs Carter. Mr Carter is significantly disabled, and I make the further assumption that at least one room was needed for him, in addition to the bedroom. That leaves a maximum of four other rooms as being possibly available, not the five claimed by Mrs Carter.

38. It is also relevant that Mrs Carter operated a child-minding business, and her SA return contains a further deduction of £2,845 for "rent, rates, power and insurance" relating to that business. She provided an analysis of that figure, which shows that it

includes £729.32 of "home as office" costs, calculated as a rough percentage allocation of total costs.

39. Thus, although Mrs Carter's "assistance and consulting" work increased as the result of HMRC's compliance checks, it is not credible that she was using 5/8 of the property for her that business.

40. As part of the amendment to Mrs Carter's SA return, Mr Denton reduced the deduction for home as office costs to £1,959.8, being equivalent to one room. I return to this at §XX below.

Capital allowances

41. Mrs Carter claimed a deduction of £1,200, calculated on a straight line basis, for the use of a motor vehicle. Mr Denton did not dispute that she used the car for business purposes, but amended the deduction in line with the capital allowances legislation, as explained below.

The closure notice and the assessment

42. On 3 February 2016, Mr Denton wrote to Mrs Carter saying he was proposing to close the enquiry and make the following adjustments:

(1) an increase to the taxable profits for the year as the result of adding back the "bad debts". As the result of various assumptions about margins and VAT which I do not need to rehearse here, the increase in profit was £22,915.17;

(2) a reduction in home as office costs of £7,851.17 (£9,811.15 - £1,959.98);

(3) a reduction in the car capital allowances of £336 (£1,200 – £864).

43. In total, Mrs Carter's profits increased by £31,102.35. The extra tax and Class 4 NICs totalled £6,824.77. On 16 March 2016, Mr Denton closed the enquiry on that basis and issued a revised assessment.

The subsequent expense claim

44. Mrs Carter was very upset by the assessment, which she thought was unfair and unjust. In particular, she said that if HMRC were going to increase her turnover, they should allow her to deduct the expenses relating to the work she carried out for those clients. On 24 March 2016, she sent Mr Denton the following documents:

(1) A letter from a Ms Annabelle Odey, of Linden Boulevard, Brooklyn, New York, dated 24 March 2016, stating that she had been contracted by Mrs Carter to provide "consultancy advice" carried out in March 2016 totalling $27,000 or £15,795. The letter contains several typographical errors, and the heading at the top says "Maintaining and keeping your system healthy throughout the 2014-2019 years". Towards the end of the letter, a paragraph reads:

> "I will endeavour to provide the advice directly nevertheless I reserve the right to provide the advice via another who is as qualified as I am or more competent than me ie Lawyer, Solicitor, Medical Professional etc".

(2) An invoice dated 30 March 2014, from Ms Odey, stating that she is owed "in line with the agreed contract" an amount of £380,554.98 for work carried out on 22 clients at £225 an hour. The text reads "to provide Consultancy Advice in respect of receiving raised queries and the best solution for dealing with the query for Various Clients".

45. Mrs Carter asked Mr Denton to: allow these costs; recalculate the 2013-14 tax position and arrange for her to be repaid the resulting tax refund, which she estimated was £60,003.17. As noted at the beginning of this decision, Mr Denton said that her request was "without merit".

46. I find as a fact that no such expenses were incurred, for the following reasons:

(1) if Mrs Carter had genuinely incurred these costs in the 2013-14 tax year, she would have included them in the detailed schedules provided to HMRC;

(2) the only document which bears any resemblance to a contract is dated 24 March 2016, the same date as Mrs Carter's letter to Mr Denton. There was no written contract in place during 2013-14 tax year;

(3) it is extremely unlikely that Ms Obey would be able to give advice on UK tax compliance, given that she is based in New York and her headed notepaper makes no reference to any tax qualification or experience;

(4) there is no evidence of any advice actually having been provided, such as technical letters; and

(5) Mrs Carter invoiced Candid Accountants £36,542 for the work done on these 22 clients. That is less than 10% of the £380,554.98 costs she is now seeking to claim were incurred in relation to the same clients.

The penalty

47. On 16 March 2016, Mr Denton wrote again, saying that the adjustments had been "prompted by the opening of the enquiry" and adding:

> "I consider the error to be as a result of deliberate behaviour based on the fact that you failed to correctly account for all of your invoices, and being agents you should know that all invoices must be included in the gross turnover future. You additionally failed to provide proof of these being Bad Debts."

48. The maximum penalty for a prompted disclosure where the behaviour is deliberate but not concealed is 70% of the "potential lost revenue" or PLR. HMRC mitigated this maximum penalty to 45.5%, having taken into account "quality of the disclosure"; the resulting penalty was £3,105.27.

49. In assessing the "quality of the disclosure" Mr Denton said that Mrs Carter had "failed to admit the error" in her turnover figure and "failed to produce the original invoices or evidence of the bad debt".

The parties' submissions

50. HMRC submitted that the assessment should be upheld in accordance with Mr Denton's reasoning. They also submitted that the penalty was correctly charged, but that in the alternative Mrs Carter was "at least careless", because she "failed to take such steps as would reasonably have been expected, to ensure that the tax she owed was correctly calculated and declared".

51. Mrs Carter asked the Tribunal to reverse Mr Denton's amendments and allow a deduction for the £380,554.98.

Discussion and conclusions on the assessment

52. I have already found as a fact that the £36,542 was a bad debt, and so should not have been treated as extra income. It follows that HMRC's assessment must be reduced to remove the £22,915.17 included by Mr Denton as extra trading income.

53. Mrs Carter did not seriously challenge HMRC's amendment to the car capital allowance claim, and I uphold HMRC's reduction of £336.

54. As already explained, I refuse Mrs Carter's claim to deduct further expenses of £380,554.98.

55. That leaves only the home as office costs. The relevant legislation is at Income Tax (Trading and Other Income) Act 2005, s 34. This is headed "Expenses not wholly and exclusively for trade and unconnected losses" and reads:

> "(1) In calculating the profits of a trade, no deduction is allowed for
>
> (a) expenses not incurred wholly and exclusively for the purposes of the trade, or
>
> (b) losses not connected with or arising out of the trade.
>
> (2) If an expense is incurred for more than one purpose, this section does not prohibit a deduction for any identifiable part or identifiable proportion of the expense which is incurred wholly and exclusively for the purposes of the trade."

56. Section 34(1)(a) means that Mrs Carter is entitled to a deduction if her home as office costs are "wholly and exclusively" for her "assisting and consulting business". However, I have already found as a fact that she uses no part of her home wholly and exclusively for that business, and she has not identified any costs which were incurred wholly and exclusively for that business – they are all apportioned costs.

57. Thus, Mrs Carter needs to rely on s 34(2). To succeed, she must show that there is an "identifiable part or identifiable proportion of the expense" which relates to her assisting and consulting business. HMRC have accepted that she uses one room; she has claimed five rooms. It is for Mrs Carter to provide the evidence to show that HMRC's estimate is wrong. She has not provided any detailed evidence, such as pictures of the rooms, or an analysis of time spent.

58. Moreover, I have already found as a fact that she does not use five rooms in her house only for her assisting and consulting business, because that is simply not possible given the other uses of those rooms. Taking into account both her claim that she used five rooms, and also her attempt to deduct further expenses of £380,554.98 without any credible evidential basis, I find that Mrs Carter is not a reliable witness.

59. Taking all relevant matters into account, including Mrs Carter's credibility, I find as a fact that she uses one room in her house for her assurance and consulting business. It follows that I uphold HMRC's amendment on that point, and that Mr Denton was correct to reduce her allowable home as office expenses by £7,851.17 .

Conclusion on the assessment

60. Mrs Carter's profits for 2013-14 are therefore increased by £8,187.17 (£7,851.17 + £336), instead of by £31,102.35, the amount included in the amended assessment.

61. HMRC are directed to recalculate her income tax and Class 4 NICs liability for 2013-14 based on adding back £8,187.17 only, see further the end of this decision.

The penalty

62. In this part of my decision, I first consider the law on penalties for deliberate behaviour, and then decide whether or not Mrs Carter's behaviour was deliberate, careless or neither, and the amount of any penalty.

The legislation

63. The relevant legislation is at Finance Act 2007, Schedule 24 ("Sch 24"); the relevant provisions are summarised in an appendix to this decision.

The meaning of "deliberate"

64. In *Tooth v HMRC* [2018] UKUT 38 (TCC) ("*Tooth*") at [63] the Upper Tribunal (Smith J and Judge Hellier) said, in the context of the TMA, that "an allegation of deliberately bringing about a tax loss is a serious one, tantamount to an allegation of fraud". There have also been various First-tier Tribunal ("FTT") decisions about the meaning of "deliberate", which were helpfully summarised by Judge Ragavan in *Dorothy Lyth v HMRC* [2017] UKFTT 549 (TC):

> [23] In *Auxilium Project Management v HMRC* [2016] UKFTT 249 (TC) the tribunal, noting that the legislation did not further define the word 'deliberate', took the view (at [62]) that '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'. The tribunal emphasised this was a subjective test and that the question was not whether a reasonable taxpayer might have made the same error or even whether the taxpayer failed to take all reasonable steps to ensure that the return was accurate, 'it is a question of knowledge and intention of the particular taxpayer at the time.' In *Salim Miah v HMRC* [2016] UK FTT 644 (TC) put the meaning in a similar way (at [44]); something was 'deliberate' if it had been 'thought about'. The penalty there (which concerned a sale which

> should have been reported on a VAT return was deliberate if the appellant 'knew that the sale should been reported on...the...return but decided that it should not be'. Similarly in *Bhagya Raj Subbrayan t/a Swiss Cottage Diet Clinic v HMRC* [2013] UKFTT 161 (TC) the tribunal, in finding the taxpayer's conduct there had been deliberate because 'she must have known that the amount of taxable income shown on her return was less than her actual income...', used a test of knowledge of the inaccuracy.
>
> [24] However in *Anthony Clynes v HMRC* [2016] UKFTT 644 (TC) the tribunal considered (at [86]) that an inaccuracy 'may also be held to be deliberate where it is found that the person consciously or intentionally chose not find out the correct position, in particular where the circumstances are such that the person knew that he should do so.'"

Were Mrs Carter's failures "deliberate"

65. Mr Denton decided that Mrs Carter had acted "deliberately" because "the turnover figure was manipulated to produce a lower declared income than would otherwise have been the case". He made no reference her acting "deliberately" in relation to the home as office claim or the car claim, but nevertheless calculated the penalty on the basis of the total figure by which Mrs Carter's assessment was increased.

66. As Mrs Carter did not deliberately manipulate her profits, it follows that Mr Denton was wrong to make his penalty decision on that basis. However, the Tribunal has the power to substitute for HMRC's decision another decision that HMRC had power to make (Sch 24, para 17).

67. In my judgment, Mrs Carter must have known that she did not use five of her eight rooms entirely for her "assisting and consulting" business. By including a deduction for the costs of five rooms in her SA return she was knowingly providing HMRC with a document that she knew contained an error, with the intention that HMRC should rely upon it as an accurate document. She was therefore acting deliberately, and is liable to a penalty. The disclosure was prompted, so the maximum penalty is 70% of the PLR and the minimum penalty is 30% (Sch 24, paras 4(20(b) and 10(2)).

68. HMRC decided that the penalty should be charged at 45.5%. Mr Denton found that the minimum 35% penalty was not appropriate because Mrs Carter had "failed to admit the error" in her turnover figure and "failed to produce the original invoices or evidence of the bad debt". In the context of the home as office costs, those comments are irrelevant. I find that Mrs Carter fully co-operated with HMRC and the penalty should be charged at 35%.

The capital allowances and carelessness

69. However, the position is different with respect to the car capital allowances. It is clear from the correspondence that Mrs Carter did not understand the rules. She was not acting deliberately; she simply got the calculation wrong.

70. However, she did not take reasonable care to avoid the inaccuracy. She had at least some knowledge of the tax system, because she had been running a business giving advice on tax for some years, albeit that HMRC had decided that she was no longer allowed to be an authorised agent. Had she taken reasonable care, she would have checked the capital allowances position on the HMRC website, or in other guidance.

71. I therefore find that Mrs Carter was careless. The disclosure was prompted, so the minimum penalty is 15% of the PLR and the maximum 30% ((Sch 24, paras 4(2)(a) and 10(2)). As Mrs Carter fully co-operated with HMRC, the appropriate penalty is 15%.

72. A carelessness penalty can be suspended if compliance with a condition of suspension would help the person to avoid becoming liable to further penalties under for careless inaccuracies (Sch 24, para 14). Suspension is not possible in relation to deliberate penalties, so was not previously considered by HMRC. The decision not to consider suspension was flawed, because Mrs Carter did not act deliberately in relation to the capital allowances. I am therefore able to consider whether to suspend the carelessness penalty (Sch 24, para 17(4)). I considered whether it would be possible to set conditions which would help Mrs Carter from avoiding further penalties, such as requiring her to appoint a tax adviser. However, it is clear from the correspondence that Mrs Carter considers herself capable of running her own tax affairs. I decided that it was very unlikely that she would comply with a suspension condition. As a result, the penalty is not suspended.

Conclusion

73. Mrs Carter's appeal is allowed in part. HMRC are directed to:

(1) recalculate the tax and Class 4 NICs due on the basis that her 2013-14 self-employment income is increased by £8,187.17 (£7,851.17 + £336) when compared to the SA return submitted by Mrs Carter. In other words, they are to replace Mr Denton's amendment to her 2013-14 assessment of £31,102.35 by £8,187.17;

(2) cancel the penalty of £3,105.27 and replace it by penalties calculated as set out in the following two paragraphs;

(3) calculate the PLR which arises in relation to the increase of £7,851.17 and issue a penalty notice charging Mrs Carter 35% of that PLR on the basis of prompted disclosure and deliberate but not concealed behaviour;

(4) calculate the PLR which arises in relation to the increase of £336, and issue a penalty notice charging a penalty at 15% of that PLR on the basis of prompted disclosure and careless behaviour.

74. The Tribunal leaves it for HMRC to decide whether the carelessness penalty should be disregarded as below their assessing tolerance. The Tribunal does not have that discretionary power.

Appeal rights

75. 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.

76. 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: 12 DECEMBER 2018

Finance Act 2007

Schedule 24: Penalties for Errors

1. 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).

2. 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
>
> (b) "deliberate but not concealed" if the inaccuracy is deliberate on P's part but P does not make arrangements to conceal it, and
>
> (c) "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)"

3. Paragraph 4 says that the amount of a penalty for a careless inaccuracy is 30% of the "potential lost revenue" and for deliberate but not concealed action, it is 70% of the potential lost revenue.

4. 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."

5. 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."

6. Paragraph 10 states that if a person who would otherwise be liable to a penalty of 70% has made a prompted disclosure, HMRC must reduce the 70% to a percentage, not below 35%, which reflects the quality of the disclosure. Where a person who would otherwise be liable to a 30% penalty has made a prompted disclosure, HMRC shall reduce the 30% to a percentage, not below 15%, which reflects the quality of the disclosure

7. 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."

8. 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..."

9. 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.