# TC01576

**Appeal number: TC/2011/05323**

***Penalty for "careless" error – bonus after termination of employment – Appellant's case that she relied on the P45 – whether careless – on the facts, yes – penalty reduced to 15% for "prompted" disclosure – whether degree of carelessness should affect penalty reduction - whether penalty should be suspended – HMRC's interpretation of scope of discretion - meaning of "flawed" – appeal dismissed and penalty confirmed***

**FIRST-TIER TRIBUNAL**

**TAX**

**ROSEMARY HOOK** **Appellant**

**- and -**

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

**TRIBUNAL: ANNE REDSTON (PRESIDING MEMBER)**
**SHEILA CHEESMAN (TRIBUNAL MEMBER)**

**Sitting in public at 45 Bedford Square, London WC1 on WC1 on 25 October 2011.**

**The Appellant did not attend and was not represented**

**Mark Radcliff, of HM Revenue and Customs Appeals and Reviews Unit, represented the Respondents**

## DECISION

1. This is Ms Hook's appeal against a penalty of £2,053.50 for submitting an inaccurate 2008-09 self-assessment return.

2. There was no dispute that there was an error in Ms Hook's 2008-09 return, or that its disclosure was prompted by HMRC opening an enquiry into the return. There was also no dispute as to its quantum, which was £13,690. HMRC did not seek to argue that the error was deliberate.

3. The issues in the case were:

(1) whether the error was "careless";

(2) if so, whether the Tribunal should confirm the quantum of the penalty; and

(3) whether the penalty should be suspended.

4. The Tribunal decided that the error was "careless". It confirmed the penalty and upheld HMRC's decision not to suspend the penalty.

## The parties' attendance at the hearing

5. Mr Ratcliff attended the hearing to put HMRC's evidence and submissions to the Tribunal.

6. Bruton Charles, a firm of Chartered Accountants acting as agent for Ms Hook, sent a letter by email to the Tribunal on 24 October 2010, the day before the hearing. The letter said that neither a representative from Bruton Charles nor Ms Hook were able to attend the hearing, but that they were happy for the case to be decided in their absence. The letter also contained written submissions to the Tribunal on Ms Hook's behalf.

7. The Tribunal considered the position in the light of Rule 33 the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules").

8. Given the very clear statements in Bruton Charles's letter, its timing (arriving the day before the hearing), and the full submissions made therein, the Tribunal was satisfied both that Ms Hook and Bruton Charles had been notified of the hearing and that it was in the interests of justice to proceed in their absence.

## The legislation

9. The legislation setting out the penalties for inaccuracies is at Finance Act 2007 ("FA 2007") Sch 24. So far as relevant to this Decision, the law which applied at the relevant time is summarised as follows:

(1) Paragraph 1 states that a penalty is payable where the taxpayer gives HMRC a document containing an inaccuracy which amounts to, or leads to, an understatement of the taxpayer's liability to tax, and the inaccuracy was careless or deliberate.

(2) Paragraph 3(1)(a) defines an inaccuracy in a document given to HMRC as "careless" if it is "due to the failure...to take reasonable care."

(3) Paragraph 4(1)(a) sets the penalty for a careless inaccuracy at 30% of the "potential lost revenue".

(4) Paragraph 5 defines "potential lost revenue" as the additional amount due or payable in respect of tax as a result of correcting the inaccuracy.

(5) Paragraph 9 allows for reductions in the penalty for "disclosure". This is defined as "telling HMRC about it", giving HMRC reasonable help in quantifying the inaccuracy and allowing HMRC access to records for the purpose of ensuring that the inaccuracy is corrected. 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 it is "prompted".

(6) Paragraph 10(1) states that "HMRC shall" reduce the penalty (but not below 15%) if the person liable for the penalty has made a "prompted disclosure." The reduction must take into account the "quality" of the disclosure. Paragraph 9(6) says that the "quality" of the disclosure includes its "timing, nature and extent".

(7) Paragraph 14 contains provisions relating to the suspension of penalties. HMRC may only suspend a penalty if compliance with a condition of suspension would help the person avoid becoming liable to further careless inaccuracy penalties.

(8) Paragraph 15 sets out the person's appeal rights; at paragraph 17 are the Tribunal's powers. The Tribunal may either affirm the penalty or substitute another penalty which HMRC had power to make; however in relation to suspension, the Tribunal can only set aside HMRC's decision if it is "flawed". Paragraph 17(6) says that "flawed" means "flawed when considered in the light of the principles applicable in proceedings for judicial review".

## The evidence

9. The Tribunal was provided with the correspondence between the parties.

10. HMRC also supplied a copy of Ms Hook's P14 for the 2008-09 tax year, her self-assessment calculations both before and after the HMRC enquiry; and a copy of blank self-assessment employment pages for that year, along with the related HMRC guidance notes.

## The facts

11. During the 2008-09 tax year Ms Hook had two employments, the first with Capital Shopping and the second with Liberty International Ltd ("Liberty").

12. Ms Hook was given a P45 by Capital Shopping and she handed this to her new employer, Liberty.

13. Ms Hook ceased to be employed by Liberty in October 2008. Her P45 from Liberty, dated 31 October 2008, showed her combined earnings from the two employments, which totalled £334,496.

14. While Ms Hook was still an employee of Liberty she received an "advance" of £54,006. Liberty did not include this advance on her P45.

15. In January 2010 Ms Hook received a payslip for Month 10, showing taxable income of £68,445; this was entitled "bonus share vesting". However, the income was offset against the earlier advance of £54,006. It was also further reduced by PAYE of £13,689 (which had been deducted at 20%) and National Insurance Contributions of £684.53. The net amount paid to her was £65.37.

16. Ms Hook also received a payslip for Month 12 (March 2009), showing taxable income of £4.79.

17. Ms Hook completed her self-assessment return for the 2008-09 tax year and submitted it online on 28 January 2010.

18. Her completed return contained a single "Employment" page. The HMRC guidance issued with the return says "we [HMRC] need a separate Employment page for each employment...". The same message is visible on the face of the return, which stipulates "complete an employment page for each employment or directorship".

19. The HMRC guidance issued with the tax return also says that "lump sums paid on, or following, termination of employment" should be included on the Additional Information pages of the tax return. Ms Hook did not include her bonus in the Additional Information box.

20. The total earnings entered on Ms Hook's Employment page were £334,496, the amount shown on her P45. The computation attached to the online return produced a tax repayment of £8,312, which she claimed.

21. On 3 June 2010 HMRC opened an enquiry into her return under Taxes Management Act 1970 ("TMA") s 9A.

22. Bruton Charles were appointed to act for Ms Hook. On her behalf they sent HMRC copies of Ms Hook's payslips for Months 1-7 (April 2008 to October 2008). Month 10 (January 2009) and Month 12 (March 2009).

23. Both parties agreed that, once the enquiry had been opened into her return, Ms Hook made full disclosure.

24. HMRC said that they considered that Ms Hook's failure to include the sum of £68,445 on her tax return had been "careless". They issued a penalty of 15%. Bruton Charles appealed the penalty on Ms Hook's behalf. They also appealed HMRC's refusal to suspend the penalty.

**Bruton Charles's submissions on behalf of Ms Hook**

25. Bruton Charles submits that Ms Hook's mistake was made "despite taking reasonable care" and that no penalty is therefore due. They say Ms Hook possesses no specialist tax knowledge and wrongly but reasonably assumed that the figure on her P45 was her total earnings for the year, and that it "would have included the final bonus payment".

26. They further submit that, although Liberty issued payslips to Ms Hook after the end of the tax year, she "paid little attention to them in the belief that all amounts had been included in the figures reflected on her P45." Specifically, she had no reason to assume that any amounts received after she left her employment would only be taxed at 20% instead of using her previous coding notice. They note that the rules have now been changed, to prevent similar PAYE under-deductions situation arising.

27. Bruton Charles also quote from "HMRC guidelines for the employer" which they state that "if you have to make payments after the P45 has been issued, then you should give a letter to your employee". This letter should show the details including the tax and NICs deducted; no such letter was provided to Ms Hook by Liberty. Instead she received a payslip "without further explanation".

28. They say Ms Hook's mistake was wholly understandable, especially given the stressful situation in which she found herself after being made redundant.

29. Finally, they submit that if the Tribunal finds that a penalty is due, it should be suspended. They quote in their support the decision of *The Athenaeum Club v HMRC* [2010] UKFTT 583 ("*The Athenaeum*"), in which the Tribunal said that it "found it somewhat illogical that HMRC refused to suspend a penalty on the grounds that the Appellant was unlikely to do it again."

**Mr Ratcliff's submissions on behalf HMRC**

30. Mr Ratcliff submitted that Ms Hook's behaviour was careless, for the following reasons:

(1) She should have completed two separate Employment pages as she was required to do by the SA return form and the related guidance; had she done so, this might have helped her to realise she had understated her earnings from Liberty.

(2) The guidance attached to the Tax Return also says that "lump sums paid on, or following, termination of employment" should be included on the Additional Information pages of the tax return, and Ms Hook did not comply with this requirement.

(3) She failed to consider the two payslips she received after she left employment. Had she done so, she was likely to have noticed to the omission of the bonus from the tax return, because the "advance" and the "bonus share vesting" are both clearly shown.

31. Furthermore, he says that although Ms Hook was highly paid, the bonus was significant even in the context of her earnings and it was careless of her not to realise it had not been included on her return.

32. In relation to the request for suspension, he says that the statute does not allow suspension unless "compliance would help [Ms Hook] to avoid becoming liable to another penalty" and that test isn't satisfied. This was a one-off situation which was unlikely to recur.

33. He referred the Tribunal to the case of *Anthony Fane v R&C Commrs* [2011] FTT 201 (TC) at [60]-[61] where Judge Brannan said:

> "...it is clear from the statutory context that a condition of suspension must be more than an obligation to avoid making further returns containing careless inaccuracies over the period of suspension...If the condition of suspension was simply that, for example, the taxpayer must file tax returns for a period of two years free from material careless inaccuracies, paragraph 14 (6) would be redundant."

34. He further says that even if he were wrong in this, so that HMRC had the discretion as to whether to suspend the penalty, their decision in Ms Hook's case was not "flawed". As a result, the Tribunal cannot interfere with it.

## Discussion and decision

35. The Tribunal considered the submissions of both parties.

*Bruton Charles's submissions on Ms Hook's behalf*

36. We were not persuaded by Bruton Charles's submissions that it was reasonable of Ms Hook simply to have copied down the numbers from her P45.

37. Bruton Charles stated that Ms Hook paid "little attention" to the payslips she received after she left her employment "in the belief that all amounts had been included in the figures reflected on her P45". This is, in terms, an admission that Ms Hook took insufficient care: given her statutory obligation to complete an accurate self-assessment tax return, it was incumbent upon her to review the documentation she had been given by Liberty.

38. We do agree that it would have been helpful to Ms Hook had Liberty sent her a letter, as advised by HMRC, but the absence of that letter does not remove her own obligation to check the documentation which she did receive – in particular the two payslips issued subsequent to her departure.

39. We accept that the fact that Ms Hook's bonus had suffered a PAYE tax deduction at only the basic rate 20% (using a basic rate code) did mean that the shortfall was greater than it would be today, given that the PAYE regulations have recently been amended to apply an OT code to post-termination payments[1]. But one purpose of the

[1] The Income Tax (PAYE) (Amendment) (No 2) Regulations 2011 SI 2011/1054

self-assessment return is to act as a check on the deductions taken under PAYE. In our view, the fact that PAYE was operated at only the basic rate does not provide Ms Hook with a "reasonable care" defence for failing to include the bonus on her tax return.

*Mr Ratcliff's submissions on HMRC' behalf*

40. We accepted all Mr Ratcliff's submissions, which we found cogent and clear. Ms Hook failed to comply with the requirements set out on the face of the tax return. She also failed to follow the HMRC guidance on separate employments. This demonstrates a lack of reasonable care.

41. She did not include details of her termination payment in the "Additional Information" box, despite the fact that this information was specifically required. In our view this omission, in the face of straightforward and accessible instructions from HMRC, is incompatible with a "reasonable care" defence.

42. We also agree with Mr Ratcliff that a person who receives a bonus payment amounting to 20% of her gross salary (£68,445/£334,496) and omits to put it on her tax return has (in the absence of some exceptional circumstances, which are not evident in this case) not demonstrated reasonable care.

43. We find that a penalty for carelessness is justified.

*The amount of the penalty*

44. The Tribunal has power either to affirm the HMRC decision or substitute for that decision another decision that HMRC could have made.

45. Given that there had been "prompted disclosure", the 15% penalty set by HMRC was at lowest level allowed by statute.

46. This was not a simple case where the taxpayer had nothing but her P45 on which to rely. She had the employer's payslips and clear HMRC guidance; furthermore, the omission amounted to some 20% of her gross earnings. Had the degree of carelessness been a factor to be taken into account in applying the penalty reduction, the Tribunal would have increased the penalty. However, we do not consider such an approach to be correct.

47. The legislation states that the reduction is due for "disclosure", and that in reducing the penalty, HMRC "shall" take into account the "nature, timing and extent" of the disclosure. The reduction thus relates to the taxpayer's behaviour following the "prompt", rather than at the time of the default. There is no statutory provision allowing shades of carelessness to be taken into account.

48. We have thus considered only Ms Hook's behaviour following the "prompt". We accept the parties' evidence that once the enquiry had been opened, Ms Hook made full disclosure. We therefore see no reason to replace HMRC's decision by one of our own, and we confirm the quantum of the penalty.

*Suspension*

49. We then considered the issue of suspension. Bruton Charles invited us to rely on *The Athenaeum*. HMRC referred us to the comments of Judge Brannan in *Fane.*

50. We noted that the comments in *The Athenaeum* were *obiter*; we also preferred the careful and detailed analysis of the statutory provisions given by Judge Brannan in *Fane* at [52] to [68] which we do not repeat here.

51. In our view, the legislation does not give HMRC unfettered discretion to suspend penalties. Suspension can only be used where the suspension condition is likely to change future behaviour. It is thus unlikely to be appropriate in a situation such as this, for the reasons set out by Judge Brannan.

52. Furthermore, we could only direct that the penalty be suspended if we considered HMRC's refusal to suspend was "flawed". The statute states[2] that "flawed" means "flawed when considered in the light of the principles applicable in proceedings for judicial review".

53. In a judicial review context, "flawed" is used to indicate that the decision is so fundamentally wrong (usually because of irrationality, illegality or procedural impropriety) that it cannot stand. The concept has its roots in familiar cases such as *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223 and *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374.

54. In our view, HMRC's decision not to suspend the penalty was reasonable in all the circumstances, and far from "flawed".

55. As a result of the foregoing, we dismiss the appeal, confirm the penalty and uphold HMRC's decision not to suspend the penalty.

*Costs*

56. In the absence of the Appellant and her representative, Mr Radcliff thought it proper to draw our attention to the fact that Ms Hook had given notice to HMRC that she would be seeking the costs of defending her case. Mr Radcliff provided us with a copy of a letter from Bruton Charles dated 6 May 2011 to this effect and asked whether this was something the Tribunal should consider.

57. The Tribunal notes that Rule 10(1)(b) of the Tribunal Rules states that costs are normally not awarded against a party unless that party has behaved "unreasonably". Rule 10 also sets out the procedures for making a costs application. Bruton Charles's letter to HMRC does not constitute a costs application within the meaning of Rule 10 and has not been considered further by the Tribunal.

58. 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

[2] FA 2007, Sch 24 para 17(6)

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.

**Anne Redston**

**TRIBUNAL PRESIDING MEMBER**
**RELEASE DATE: 15 November 2011**