TC04380

Appeal number: TC/2014/02687

VAT – penalty assessment for 'prompted careless inaccuracy' in VAT return – application for permission to appeal out of time – whether reasonable excuse for delay – consideration of merits of appeal and whether HMRC's decision not to suspend penalty under paragraph 14 Schedule 24 Finance Act 2007 was flawed – no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

AUTOMOTION CPM GROUP LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER PETER WHITEHEAD

Sitting in public at Phoenix House, Rushton Avenue, Bradford on 6 January 2015

Mr Mark Dunstan, Director of the Appellant, for the Appellant

Ms Lisa Saxton, Officer of HMRC, for the Respondents

DECISION

The Appeal

1. This is an appeal by Automotion CPM Group Limited ('the Appellant') against a penalty assessment issued on 28 February 2013 by the Respondents ('HMRC') under Schedule 24 Finance Act 2007, for a prompted careless inaccuracy in the Company's VAT returns during the year ended 5 April 2012.

2. The Appellant also applies for permission to appeal out of time. The review decision by HMRC was made on 5 July 2013 and therefore the appeal should have been lodged with the Tribunal no later than 4 August 2013. The notice of appeal was not however lodged until 14 May 2014.

3. There are two main issues in the substantive appeal. First, whether the Appellant was careless when it made an error in its VAT returns and secondly whether the penalty should be suspended. The Appellant concedes that there were inaccuracies in its returns, but argues that these should not be regarded as instances of carelessness, but rather a series of one-off mistakes that will not be repeated.

4. The evidence consisted of a bundle of documents (including correspondence) prepared by HMRC. In addition, Mrs Debra Tidmarsh (a VAT Assurance Higher Officer of HMRC) gave oral evidence.

Background and findings of fact

5. The business carried on by the Appellant is the sale of second hand cars. On 5 November 2012, Mrs Tidmarsh, undertook an inspection of the VAT records of the Appellant. The purpose of the visit was to verify a 09/12 VAT repayment return. During the visit Mrs Tidmarsh checked the build up to the 03/12, 06/12 and 09/12 VAT returns. These periods were selected because the input and output figures were significantly lower than those declared on the Company's previous VAT returns.

6. Mr. Mark Dunstan, a director of the Appellant, confirmed that he was responsible for its VAT returns and that he used an Excel spreadsheet from which he prepared VAT returns. Initial checks to the records suggested there were no issues with the information collated on spreadsheets, but there appeared to be inaccuracies on the VAT returns, as the returns submitted for periods 03/12, 06/12 and 09/12 were all repayments which was unusual for the business. It was then established that in all three periods, only the last month of each quarter had been accounted for.

7. The error applied to both sales and purchases and resulted in net under declarations of £56,179 in the 03/12 quarter, £54,893 in the 06/12 quarter and £40,278 in the 09/12 quarter.

8. Mr. Dunstan could not explain how he had made such a basic error but explained that he had not questioned the repayments as he had purchased a number of qualifying cars in the periods in question and assumed this was the reason. A qualifying car is a car which has not been subject to the full input tax block. This means that the business has recovered the input tax on the purchase in full. Such cars are sold on with VAT charged on the full selling price.

9. Mrs Tidmarsh explained to Mr Dunstan that the errors had to be treated as careless due to clear change in the pattern of the returns and the fact that Mr Dunstan did not question why the three returns were all repayment returns. It then transpired that errors had been identified on an earlier visit, which suggested that there had been a continuing lack of care when submitting returns. Consequently there was no scope to suspend the penalties.

10. HMRC issued a VAT Assessment, for periods 03/12 & 06/12 totalling £111,072 and the VAT return for period 09/12 was amended by agreement.

11. A Notice of penalty assessment totalling £22,372.80 was also issued in respect of the inaccuracies in the VAT returns for periods 03/12, 06/12 and 09/12 as follows:

Period	PLR	Penalty @ 15%	Amount suspended	Amount not suspended
03/12	£56,179.00	£8,426.85	£0.00	£8,426.85
06/12	£54,893.00	£8,233.95	£0.00	£8,233.95
09/12	£38,080.00	£5,712.00	£0.00	£5,712.00

12. HMRC explained that the behaviour relating to the errors was regarded as 'careless' and that the disclosure was 'prompted'. For a careless inaccuracy with a prompted disclosure the minimum percentage penalty is 15% and the maximum penalty percentage is 30%. The Company had received the maximum reduction possible for the quality of the disclosure based on its full cooperation and providing the required information without delay. As such, the penalty percentage which had been applied was the minimum of 15%.

13. On 23 April 2013 the Appellant requested an independent review of the decision not to suspend the penalty. He did not dispute the assessment, save to say that for the purposes of considering suspension the inaccuracies amounted to isolated errors rather than carelessness.

14. Paragraph 14 of Schedule 24 Finance Act 2007 allows HMRC to suspend all or part of a careless inaccuracy penalty. In order to suspend a penalty HMRC must be able to set at least one specific condition in addition to a generic condition that the person meets its payment, notification and filing obligations during the suspension period, to help a person to avoid becoming liable to a future careless penalty. The decision to suspend a penalty is a discretionary matter for HMRC and as such the decision should be reasonable.

15. In deciding whether or not to suspend a penalty where HMRC can set a specific suspension condition, the key objective is to encourage and support a person's future compliance. For this purpose, indicators of likely future compliance include the quality of the disclosure and the taxpayer's compliance history.

16. On 5 July 2013 HMRC undertook an independent review of its decision. Although the quality of the Company's 'disclosure' had been good, allowing maximum reduction in that respect to be applied to the penalty, the Company did not have a good compliance history, as evidenced by the outcome of a visit by HMRC to the Company on 6 October 2010 and as a result of which, VAT assessments totalling £109,395 were issued on 7 March 2011 and a penalty assessment for £18,870.62 on 13 April 2011 with a 24 month suspension period running from 13 April 2011 to 12 April 2013. The penalties totaling £10,338.78 were suspended subject to the following conditions:

> "Meet your payment, notification and filing obligations to HMRC in each month.
>
> Check that the output tax calculated by your spreadsheet formula is correct at the end of each month."

17. Paragraph 14(5) Schedule 24 FA 2007 provides:

> "If P satisfies HMRC that the conditions of suspension have been complied with, the suspended penalty or part is cancelled, and
>
> Otherwise, the suspended penalty or part becomes payable."

18. Paragraph 14(6) Schedule 24 FA 2007 provides:

> "If, during the period of suspension all or part of a penalty under paragraph 1, P becomes liable for another penalty under that paragraph, the suspended penalty or part becomes payable."

19. The Reviewing Officer, Mr Rickaby, explained that although the 13 April 2011 notice of penalty and penalty suspension was not the subject of his review he had to refer to it as it was relevant to consider the impact of non-compliance with suspension conditions on any subsequent decision relating to the suspension of a notice of penalty, the key objective of suspension being to encourage and support a person's future compliance. It was clear that the suspension of the 13 April 2011 penalty had not improved the Company's compliance. It was therefore not unreasonable for HMRC to have decided not to suspend the penalty issued on 28 February 2013, as it was not reasonable to conclude that suspension of the penalty would improve the Company's future compliance.

20. HMRC say that the suspension condition in the notice dated 13 April 2011 specifically referred to the Company having to check the output tax calculated by its spreadsheet formula. Had the Company been regularly carrying out this check then it would have noted that the correct amount of output tax was not being accounted for on the 03/12, 06/12 and 09/12 VAT returns. Mr Dunstan should have been aware of the significance of the suspension conditions when submitting subsequent returns.

21. On 14 May 2014 the Appellant lodged a late appeal with the Tribunal.

Relevant legislation

22. The relevant legislation is at Schedule 24 Finance Act 2007.

> 2 (1) A penalty is payable by a person (P) where-
>
> (a) an assessment issued to P by HMRC understates P's liability to a relevant tax, and
>
> (b) P has failed to take reasonable steps to notify HMRC, within the period of 30 days beginning with the date of the assessment, that it is an under-assessment.
>
> (2) In deciding what steps (if any) were reasonable HMRC must consider-
>
> (a) whether P knew, or should have known, about the underassessment, and (b) what steps would have been reasonable to take to notify HMRC.
>
> (3) In sub-paragraph (1) "relevant tax" means any tax mentioned in the Table in paragraph 1.
>
> (4) In this paragraph (and in Part 2 of this Schedule so far as relating to this paragraph)-

(a) “assessment” includes determination, and

(b) accordingly, references to an under-assessment include an under-determination.

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 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).

(2) An inaccuracy in a document given by P to HMRC, which was neither careless nor deliberate on P’s part when the document was given, is to be treated as careless if P-

(a) discovered the inaccuracy at some later time, and

(b) did not take reasonable steps to inform HMRC.

4(1) This paragraph sets out the penalty payable under paragraph 1.

(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.

(3) If the inaccuracy is in category 2, the penalty is-

(a) for careless action, 45% of the potential lost revenue,

(b) for deliberate but not concealed action, 105% of the potential lost revenue, and

(c) for deliberate and concealed action, 150% of the potential lost revenue.

4(4) If the inaccuracy is in category 3, the penalty is-

(a) for careless action, 60% of the potential lost revenue,

(b) for deliberate but not concealed action, 140% of the potential lost revenue, and

(c) for deliberate and concealed action, 200% of the potential lost revenue.

(5) Paragraph 4A explains the 3 categories of inaccuracy.

4A(1) An inaccuracy is in category 1 if-

(a) it involves a domestic matter, or

(b) it involves an offshore matter and-

(i) the territory in question is a category 1 territory, or

(ii) the tax at stake is a tax other than income tax or capital gains tax.

13(1A) A penalty under paragraph 1, 1A or 2 must be paid before the end of the period of 30 days beginning with the day on which notification of the penalty is issued.

(2) An assessment-

(a) shall be treated for procedural purposes in the same way as an assessment to tax (except in respect of a matter expressly provided for by this Act),

(b) may be enforced as if it were an assessment to tax, and

(c)may be combined with an assessment to tax.

(3) An assessment of a penalty under paragraph 1 or paragraph 1A must be made before the end of the period of 12 months beginning with-

(a) the end of the appeal period for the decision correcting the inaccuracy, or

(b) if there is no assessment to the tax concerned within paragraph (a), the date on which the inaccuracy is corrected.

(4) An assessment of a penalty under paragraph 2 must be made before the end of the period of 12 months beginning with-

(a) the end of the appeal period for the assessment of tax which corrected the understatement, or

(b) if there is no assessment within paragraph (a), the date on which the understatement is corrected.

(5) For the purpose of sub-paragraphs (3) and (4) a reference to an appeal period is a reference to the period during which-

(a) an appeal could be brought, or

(b) an appeal that has been brought has not been determined or withdrawn.

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.

(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.

(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 inaccuracy (in relation to paragraph 1) or unreasonable failure (in relation to paragraph 2).

(4) In paragraph 3(1)(a) (whether in its application to a document given by P or, by virtue of sub-paragraph (1) above, in its application to a document given on P's behalf) a reference to P includes a reference to a person who acts on P's behalf in relation to tax.

(5) In paragraph 3(2) a reference to P includes a reference to a person who acts on P's behalf in relation to tax.

The Appellant's Case

23. The Appellant's grounds of appeal, as stated on his Notice of Appeal are, in summary, as follows:

> "On the 5th November 2012 Mrs Tidmarch of HMRC visited our company to verify the 09/12 VAT repayment return. We then checked the 03/12 return that had previously been checked by a member of the HMRC,….On examination we found that the input and output figures were one third of those declared on previous returns. Then after looking closely at the returns, it came to light that due to the change of returns from monthly to quarterly I was using the wrong Excel sheet and only adding on one month's figures being the last month of each return. I was shocked and

> could not believe it, how could I miss this, I was checking everything to make sure it was included and invoices present etc. The first month this was wrong, and should have come to light, was 03/12 return. This was the return that was checked by HMRC, leading me not to question the input and output figures being a 1/3 of what they should have been. This never entered my head, I was so busy making sure that the returns were correct.
>
> The decision letter dated the 5th July 2013 says that I explained the reason as record keeping weakness, this was not the case. It was a simple error and nothing to do with record keeping that was excellent (Mrs Tidemarsh's recommendation), but a simple mistake of using a month Excel sheet in error…. taking the last month of the quarter and using the input and output figures. The actual monthly return was correct, it was just that two months were omitted. …
>
> I think the decision should have been to suspend the penalties because the quality of the disclosure was 100%. The compliance history does however show a previous issue with a program that we had purchased and was set up incorrectly by a third party. This came to light and we took the decision to pull of all reports and do the adding up manually, this was the case. But the reports were only pulled off for one month rather than the three months. The reason for this is the change from month to quarterly returns and the use for the wrong Excel program to run off the information required.
>
> We had abided by the previous suspension, 7th March 2011 for 24 months until the 12th April 2013. We received a letter after the 12th April 2013 to say that we had met the conditions. Condition one, all returns were made on time and all payments were paid on time. Condition two, all output tax calculated by the spreadsheet formula was checked and double checked and was not wrong."

24. At the hearing, Mr Dunstan confirmed that the penalty assessments and calculation were not in dispute. He was asking for the penalty to be suspended. He explained that he had lodged an appeal in time but that the appeal form had apparently not been received by the Tribunal. He accepted that he could not fully explain why he had not chased up the appeal when he did not receive an acknowledgement. He appeared to think that having notified the Tribunal of his appeal that was sufficient and that matters were in hand, before eventually realising that he would have to re-lodge his appeal.

25. Mr. Dunstan largely reiterated the grounds of appeal as set out in paragraph 23 above. He said that the reason the errors came about was "due to the Excel spread sheet that he used to work out the VAT and to remind him what to add into the relevant boxes". He said that he listed the month that the return was due for, (being the date of the month that was used for the return reference) and not the individual months that counted towards the return. He referred to the further explanation given in his letter of appeal to HMRC dated 21 January 2013, in which he said:

> "When pulling all the information together from our dealer management system I only entered the month on the Excel sheet and compiled the return on this sole information for the VAT paid and reclaimed. I never compared or scrutinised VAT return figures on a return by return basis to monitor any changes that looked out of character. I was so busy checking very carefully what was VAT and not VAT and that we had an invoice with a VAT number on, but not the overall actual return figures when completed against over returns.
>
> This has now changed and along with what I previously did I am now closely checking the actual return figures and scrutinising it against

> previous returns and figures for any errors/things that look slightly out of place.
>
> When the first rebate went in I just thought it to be normal with VAT qualifying cars. The cars were checked on the actual system and that VAT workings were fine, then the actual return was checked, but not compared to any previous return. …We had no reason to believe that the return was incorrect.
>
> I can guarantee that this will not happen again and you will not find any future errors in our returns. I had taken reasonable care in checking the return but the error was a simple mistake."

The Respondents' Case

26. Mrs Saxton, for HMRC, said that HMRC objected to the Appellant's application for permission to make a late appeal. The onus was on the Appellant to submit its appeal in time and there had been no satisfactory explanation for the ten-month delay in submission of its appeal.

27. With regard to the Appellant's assertion that its 03/12 return had been checked by an HMRC Officer, and that Mr Dunstan therefore had no reason to believe that the return was incorrect, the "check" had only been a "desk-based check" which had been limited to a check of VAT inputs on the basis of information supplied by the Appellant. The Officer would not have had access to the Appellant Company's full books and records.

28. The Appellant did not have a good compliance history despite previous penalties which had been suspended. It should have been clearly obvious that the monthly figures returned were not quarterly figures. Schedule 24 paragraph 17 says that the Tribunal may only order a penalty to be suspended if HMRC's decision not to suspend is flawed.

29. The suspension condition in the notice dated 13 April 2011 specifically referred to the Appellant Company having to check the output tax calculated by its spreadsheet formula. Had the Appellant been regularly carrying out this check then it would have noted that the correct amount of output tax was not being accounted for on the 03/12, 06/12 and 09/12 VAT returns. The Appellant should have been aware of the significance of the suspension conditions to which it had agreed when submitting the 03/12, 06/12 and 09/12 VAT returns to HMRC.

30. In the First Tier Tribunal case of *Anthony Fane v HMRC* [2011] UKFTT 01075(TC) Judge Brannan reasoned:

> "The important feature of paragraph 14(3) is the link between the condition and the statutory objective; there must be a condition which would help the taxpayer to avoid becoming liable for further careless inaccuracy penalties. In other words, if the circumstances of the case are such that a condition would be unlikely to have the desired effect (e.g. because the taxpayer in question has previously breached other conditions or has a record of repeated non-compliance) HMRC cannot suspend a penalty. The question therefore is whether a condition of suspension would have the required effect."

31. In this case the previous notice of suspension issued on 13 April 2011 included a specific condition to help the Company to achieve the statutory objective but it failed to meet this condition, as evidenced by the subsequent errors in 2012. Therefore it is not possible to set suspension conditions that the Company will comply with, as it did not

meet the previous specific condition in the 13 April notice of suspension despite having agreed to do so.

Conclusion

32. We allow the application for permission to appeal out of time. It is not clear why the Appellant thought that the Tribunal was dealing with his appeal, but he clearly intended to pursue the appeal and had made contact with the Tribunal. In making this decision we feel it is necessary that the merits of the appeal need to be fully rehearsed and argued.

33. As stated above, it is common ground that the Appellant's returns during the default periods contained inaccuracies which led to an understatement of the Appellant's liability to tax and that the Appellant has a poor history of compliance.

34. The inaccuracies in the Appellant's VAT returns clearly amounted to carelessness. With regard to the issue of suspension of the penalty, our jurisdiction is confined to determining whether HMRC's decision on suspension was "flawed" in the judicial review sense of that expression. That is the only challenge that the Tribunal can consider. Our jurisdiction is limited to considering the way in which a decision has been made, rather than the rights and wrongs of the conclusion reached.

35. HMRC clearly have a discretion in paragraph 14 to suspend all or part of a penalty for careless inaccuracy. Paragraph 14 (1) provides:

> "HMRC may suspend all or part of a penalty."

36. This power to suspend is then qualified by paragraph 14 (3) which provides:

> "HMRC may suspend all or part of a penalty *only if* compliance with a condition of suspension would help [the taxpayer] to avoid becoming liable to further penalties under paragraph 1 for careless inaccuracy."

37. The issue is therefore whether it reasonable to suggest that, taking into account HMRC's arguments as set out in paragraphs 26 – 31 above, the decision not to suspend was flawed, on the basis that suspension would help the Appellant to avoid becoming liable to further penalties under paragraph 1 for careless inaccuracy.The suspension of a penalty must be the exception rather than the norm. That is implicit in the discretion conferred on HMRC by paragraph 14(3). The suspension of a penalty must have a purpose rather than for example simply giving a taxpayer a second chance or being an alternative route to the non-imposition of a penalty where there may be argument that inaccuracies in a return were errors or a type which, with greater care, could be avoided in the future.

39. Again, we refer to the reasoning of Judge Brannan in *Anthony Fane* where he says:

> "60. On the face of the wording of paragraph 14 (3) there is no restriction in respect of a "one-off event". Nonetheless, 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 (two years). Paragraph 14 (6) provides:
>
> "If, during the period of suspension of all part of a penalty under paragraph 1, [the taxpayer] becomes liable for another penalty and that paragraph, the suspended penalty or part becomes payable."

> 61. 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.
>
> 62. Moreover, it is difficult to see how a taxpayer could satisfy HMRC that the condition of suspension, if it contained no requirement other than a condition not to submit careless inaccuracies in future tax returns, had been satisfied as required by paragraph 14 (6). This would, effectively, require the taxpayer to prove a negative and require HMRC to conduct a detailed review of the taxpayer's tax returns."

40. We conclude that HMRC's decision not to suspend the penalties was not unreasonable, irrational or in any way flawed. HMRC correctly in our view decided that a condition of suspension could not, in this case, be properly imposed.

41. Although the Appellant does not appeal the penalty assessments, for the avoidance of doubt, we confirm that the penalties imposed in respect of the inaccuracies contained in its VAT returns for periods 03/12, 06/12 and 09/12 were correctly imposed. The Appellant's appeal against HMRC's decision not to suspend the penalty is also dismissed.

41. 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.

MICHAEL CONNELL

TRIBUNAL JUDGE
RELEASE DATE 29 April 2015