TC02433

Appeal number: TC/2012/08652

INCOME TAX - Penalty. Self assessment. Failure to take reasonable care.

FIRST-TIER TRIBUNAL
TAX CHAMBER

MR MARK HEARN **Appellant**

- and -

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

TRIBUNAL: JUDGE GERAINT JONES Q. C.
DAVIDWILLIAMS ESQ CTA

Sitting in public at 45 Bedford Square, London WC1 on 09 November 2012.

The Appellant in person.

Mrs Gardiner, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. On 02 July 2012 the respondent issued a penalty assessment against the appellant, Mr Herne, in the sum of £8891.94p on the basis that there had been negligence on his part in completing his self assessment tax return for the fiscal year ended 5 April 2009.

2. It is common ground that on 30 June 2008 the appellant was made redundant from his employment with Lehman Bros Ltd, shortly before that company went into administration. The appellant entered into a Compromise Agreement with his erstwhile employer, further to which he was entitled to receive £329,415, by way of redundancy and/or an ex gratia payment upon entering into various covenants in favour of his erstwhile employer. The first £30,000 of that sum was exempt from tax but the remaining sum was taxable.

3. When the appellant completed his self assessment form for the year ended 5 April 2008 he made no reference whatsoever to the sum of £329,415. The self-assessment form actually completed and submitted over the Internet on 18 December 2009 showed that the appellant had overpaid tax in the sum of £735.95. He duly received a refund.

4. The respondent opened an enquiry on 4 August 2010 and amended the self assessment return on 2 July 2012, with the consequence that the appellant owed £59,883 in respect of the year ended 5 April 2009. A penalty sum was assessed based upon 15% (less than the 30% that could have been imposed) in respect of a careless or negligent omission.

5. The case put forward by the respondent is that the appellant knew, or ought reasonably to have known, from the content of the Compromise Agreement of 8 August 2008, that the compensation sum was taxable and moreover, had not been taxed at source under PAYE arrangements. The respondent relies upon the size of the sum involved and the fact that the appellant had been employed in an industry dealing with finance on a day to day basis.

6. The appellant has made it clear that he does not dispute that his tax return was wrong and/or that additional tax was due. Indeed, the additional tax has been paid. It is only the penalty that arises for consideration in this appeal.

7. The appellant's case is that he was not careless or negligent in failing to include any reference to the £329,415 in his tax return. He puts his case firmly on the basis that he had not received what he referred to as "proper material" from his erstwhile employer detailing the full amount paid to him and the amount of tax deducted under PAYE arrangements. Such material, in his view, were documents such as forms P60 and P11D to which he had been accustomed to refer when completing his returns in earlier years. By reference to section C in the respondent's bundle, the appellant said that he had not, in respect of the payment in issue before us, received a salary payslip or document of the type appearing at page C35. This he described as a "manual payslip" and said that he understood it to be Lehman Brothers' procedure to send such a document when payments were made after a termination of employment. He put the fact that he did not receive such a document at that time down to the administrative disarray in which Lehman Bros found itself when it collapsed into administration. He did eventually receive such a document (C15-16 of the respondent's bundle) but not until some time in August 2010. The appellant went on to tell us that he received his payment, as one lump sum, within some two –

three weeks of entering into the Compromise Agreement, which begins at page C26 of the bundle. That agreement provided for the appellant to receive a sum as payment in lieu of notice and a further sum which was rather strangely referred to as the forgiveness of a debt notwithstanding that it does not appear that any money had been lent to the appellant.

8. Clause 14 of the agreement made it clear that the claimant would be "subject to the deduction of income tax (except as to the first £30,000) at the basic rate". The appellant's case is that he could not reasonably have been expected to be familiar with the content of the Compromise Agreement and that because it was what he described as a "legal document", it never occurred to him to refer to it when completing his tax return. Instead, in his submission, he was entitled to rely solely upon such information as was provided to him in the P45 that was issued to him upon termination of his employment.

9. There was then a rather strange passage in the appellant's evidence. He did not produce the bank statement showing the payment to him of his compensation sum. It eventually emerged that the sum received by the appellant was £329,415 less basic rate tax at 20% (giving due allowance for the first £30,000 being tax free). The passage in the evidence was strange because the appellant feigned to give the impression that the receipt of such a large sum of money was something that he could not reasonably have been expected to observe, let alone to check, on his bank statement. He feigned that the sum of money was not so consequential that he would wish to check the fact of its receipt and/or the accuracy of the amount. He did say that he was aware that he had received, in his words, "a large sum", but assumed that it was taxed as fully as it needed to be. We found that evidence quite unpersuasive.

10. We are left in no doubt that the appellant knew that only basic rate tax had been deducted from his compensation payment and that all but the first £30,000 thereof was liable to tax at his higher marginal rates. We do not accept that somebody as intelligent and accomplished in financial affairs as the appellant, could have failed to observe that his P45 demonstrated that only basic rate tax had been deducted from his compensation payment any more than we accept that he was unaware that he would have to account for tax at his higher marginal rates by disclosing the sum received in his tax return. We are entirely satisfied that the appellant chose not to disclose it. He took a gamble; he lost.

11. We were singularly unimpressed by the appellant's assertion that he had not received all relevant information that would have avoided him making the omission in his self assessment return. We are in no doubt that the appellant had received the relevant information certainly by way of the Compromise Agreement and, we find, well knew that the compensation sum had been taxed at only the basic rate. That would have been obvious not only from the terms of the Compromise Agreement but also to anybody capable of undertaking a relatively simple mathematical calculation upon seeing the sum mentioned in the P45 and the sum received into his bank account.

12. The appellant also appeals on the basis that there should have been a "special reduction" in the penalty. The penalty was levied at the rate of 15% against a possible maximum of 30%. In our view that was as generous as the respondent could possibly have been to the appellant and find there to be no merit in this limb of the appeal.

13. The appellant has also contended that the penalty should be suspended. In *Fane v HMRC [TC/2010/08765]* this Tribunal decided that the respondent was correct not to suspend a penalty unless the circumstances were such that suspension would or could lead to the non-repetition of the error or omission leading to the imposition of the penalty. That does not arise in this case. This was a one off omission from the tax return, which, at the very least, was careless or negligent.

14. 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.

Decision.

Appeal dismissed. Penalty affirmed.

GERAINT JONES Q. C.
TRIBUNAL JUDGE

RELEASE DATE: 17 December 2012