Neutral Citation: [2024] UKFTT 00151 (TC)

Case Number: TC09082

FIRST-TIER TRIBUNAL
TAX CHAMBER

Decided on the papers

Appeal reference: TC/2023/08212

Corporation Tax – R&D Relief - Careless Inaccuracy

Judgment date: 16 February 2024

Decided by:

TRIBUNAL JUDGE WATKINSON

Between

H & H CONTRACT SCAFFOLDING LTD

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

The Tribunal determined the appeal on 13.2.24 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 12.5.23 (with enclosures), HMRC's Statement of Reasons dated 16.10.23 and the remainder of the hearing bundle running to 261 pps.

DECISION

INTRODUCTION

1. The Appellant appeals against a penalty assessment dated 21.9.22 by which the Respondents charged a penalty of £6,632.01 for a careless inaccuracy in the Appellant's Corporation Tax ("CT") return for the tax period 1.7.18 - 30.6.19 under Schedule 24 Finance Act 2007 ("Sch.24 FA07").

THE LAW

2. Under para.1 Sch.24 FA07 a penalty is payable where a person gives HMRC a document, including a CT return, which contains an inaccuracy which amounts to or leads to an understatement of a liability to tax and where the inaccuracy was careless or deliberate on the person's part. Para.1 Sch.24 FA07 defines a "careless" inaccuracy as one due to the failure by the person to take reasonable care. Paras.4-8 Sch.24 FA07 set out the scheme for calculating the penalty by reference to standard percentages based on potential lost revenue ("PLR"). Paras.9-10 Sch.24 FA07 provide for disclosure reductions up to a minimum percentage. Para.11 provides for special reduction.

3. Para.14 Sch.24 FA07 provides that HMRC may suspend a penalty for a careless inaccuracy under para.1, but only if compliance with a condition of suspension would help the person to avoid becoming liable to further penalties under paragraph 1 for careless inaccuracy.

4. Under para.15 Sch.24 FA07 a person may appeal against a decision that a penalty is payable by them, and against a decision not to suspend the penalty.

5. Para.17 Sch.24 FA07 provides the Tribunal's jurisdiction on the appeal. Under para.17(1) Sch.24 FA07 on an appeal against a decision that a penalty is payable the tribunal may affirm or cancel HMRC's decision. Under para.17(4) Sch.24 FA07, on an appeal against a refusal to suspend a penalty, the tribunal may order HMRC to suspend the penalty only if it thinks that HMRC's decision not to suspend was flawed when considered in the light of the principles applicable in proceedings for judicial review.

6. Under para.18 Sch.24 FA07 a person is liable under para.1 where a document which contains a careless inaccuracy is given to HMRC on their behalf. The "person" in para.3 Sch.24 FA07 also includes a reference to a person who acts on that person's behalf in relation to tax. Despite those provisions, where the person can show that they took reasonable care to avoid inaccuracy he is not liable to a penalty.

7. The burden is on the Respondents to prove carelessness by the Appellant, save where burden shifts to the Appellant under para.18 Sch.24 FA07.

8. In *Collis v HMRC* [2011] TC 01431 the Tribunal said at [29]:

> "We consider that the standard by which this falls to be judged is that of a prudent and reasonable taxpayer in the position of the taxpayer in question."

THE APPELLANT'S CASE

9. The Appellant's Grounds of Appeal are attached to the Appellant's Notice of Appeal. That Notice of Appeal contains a declaration of truth signed by the Appellant's director, Mr. Andrew Thomas:

> *"1. I used what I understood was a reputable company, "Legal Rooms", to make an R&D claim on my behalf.*
>
> *2. I had met the R&D agents on several occasions at NASC events:*

a. as this is the professional body for scaffolders, this assured me as to their competence.
b. as this was over a period of time, this assured me further.

3. I had also spoken to other NASC members and was reassured by them that I was instructing a reputable company, who would be able to advise to the highest standards.

4. I complied with CH75160 in that:
a. the adviser had a history of acting in respect of R&D claims for people in my line of work, namely scaffolders.
b. I did not simply instruct Legal Rooms and leave them to it.
c. I gave the adviser full and accurate facts.
d. I checked the adviser's advice as far as possible for someone with my ability and competence, e.g., "an ordinary person cannot be expected to challenge specialist professional advice on a complex legal point".
e. as a layman, I cannot be expected to review specific guidelines, such as the BEIS ones.
f. unless there was an error obvious to a layman, a taxpayer has to take advice from an expert as being correct.
g. I implemented their advice and did not omit a vital step.
h. I did not take the advice of a lay person, I chose an adviser who, so far as I could tell, was trained and competent for the task in hand.

5. As far as I was concerned, the advice given was tenable. HMRC taking another view does not make accepting the advice careless. This is a highly specialised area and as a lay person I could not be expected to know my adviser's considered advice was debateable.

6. As per CH81140, people make mistakes and HMRC cannot expect perfection, especially in such a specialised area.

7. I did not use Stack & Jones in respect of the details of the claim, as they have no experience of R&D for scaffolders. I therefore chose a specialist adviser who I understood was competent in this area.

Deferred Penalty:
8. HMRC's starting point appears to be that a deferred penalty cannot apply, based on the Fane case, on HMRC's understanding that this was a one-off error. However, I disagree because:
a. HMRC have has misunderstood my position in that it was not a one-off error, as I could make further R&D claims but have now said I will not do so in order to set a condition to comply with the SMART system. This is exactly what the SMART system is supposed to achieve, i.e., prevent further errors.
b. I believe a condition that I do not make further R&D claims within a 24-month period satisfies the SMART system in that it is:

i. SPECIFIC: the condition relates directly to the business being penalised and the specific error made. The aim of suspension is to encourage better future compliance, which this would achieve.
ii. MEASURABLE: The fact a further R&D claim has not been made will be easily verifiable at the end of the suspension period.

iii. ACHIEVABLE: by not making a claim I can meet this condition. This achieves the aim of the SMART system, i.e., to encourage future compliance, as per CH83150.
iv. REALISTIC: not making a claim is reasonable and proportionate.
v. TIME BOUND: the condition can be met by the end of the suspension period.

c. HMRC also state in the review "that if no claims are made, then a change in behaviour cannot be determined or monitored to help you avoid further penalties for careless behaviour". However, not making a claim in the future, is in itself, a change of behaviour.

d. HMRC have not even considered the alternative proposal put forward that an alternative condition could be that I do not make further R&D claims within a 24- month period, without first asking HMRC for a post transaction ruling, that it qualifies as an advance in science or technology. I understand there is a specific facility provided by HMRC for this, called "Advance Assurance".

THE RESPONDENTS' CASE

10. The Respondents' Statement of Reasons ("SOR") is, with respect, a confused document. Firstly, the SOR asserts that the burden of proof is on the Respondents to show that the penalty has been correctly calculated and that the burden then shifts to the Appellant to demonstrate that a "reasonable excuse" exists for the default. Secondly, the SOR asserts that reliance on a third party does not constitute a reasonable excuse and therefore the Respondents do not accept that the Appellant has such a reasonable excuse. Whilst that may be the position in relation to some tax penalty regimes, it is not the position for inaccuracy penalties under Sch.24 FA07.

11. The Respondents' main stated case against the Appellant in the SOR is:

> "The Appellant submits that they cannot be expected to review the BEIS guidelines, however, the Respondents contend that it is reasonable for them to show that they qualified for the claim made. The absence of this evidence amounts to careless behaviour by the Appellant."

12. The Respondents' case therefore appears to be that if the Appellant cannot show that it qualified for the claim made then the Appellant would have been careless. The Tribunal disagrees. It is inherent in the very existence of the inaccuracy relied on by the Respondents that the Appellant will not be able to show that it qualified for the R&D claim made. The existence of the inaccuracy does not answer whether the inaccuracy itself is careless.

13. Save for the broad statement above, there is no explanation by the Respondents in the SOR as to why the stated inaccuracy was careless. In the Tribunal's judgment, where the Respondents seek to levy an inaccuracy penalty it is incumbent on them to set out, at least at a basic level why on the facts of the case as they assert them to be the taxpayer, or any relevant third party, has been careless.

14. The Respondents' SOR does not specifically take issue with the majority of the grounds of appeal that the Appellant has actually advanced e.g. the Appellant understood "Legal Rooms" to be reputable, that "Legal Rooms" had appeared at several NASC events, that other members had reassured it as to their reputation, that "Legal Rooms" had a history of acting in relation to such claims, appeared competent, and that as far as the Appellant was able to it checked "Legal Rooms'" work.

15. The Respondents do not rely in their SOR on para.18 Sch.24 FA07 being engaged. The Respondents do not assert that "Legal Rooms" were careless. The Respondents do not identify who would be acting on the Appellant's behalf in relation to tax, instead, the Respondents assert that the Appellant submitted the amended CT600 return itself.

BACKGROUND

16. On 11.2.21 an amended CT600 return for the tax period ending 30.6.19 was submitted for the Appellant which included a Research and Development ("R&D") tax credit for £40,194 and a figure of £490,774 for R&D enhanced expenditure.

17. On 6.5.21 the Respondents opened a check into the Appellant's amended CT return under Paragraph 24, Schedule 18 Finance Act 1998 to look at the R&D claim and asked for various information and explanations about the claim.

18. On 22.6.21, the Appellant's appointed agent, Legal Rooms, provided a copy of an "R&D Compliance Report" dated 25.5.21, answering the majority of the questions raised in the letter of 6.5.21, to the Respondents. Thereafter the Respondents and Legal Rooms exchanged further correspondence about the contents of the Report.

19. On 28.4.22 the director of the Appellant answered various questions posed by the Respondents as to how the R&D claim came to be made:

> *"**1. How did the company first hear about the R&D tax relief scheme?***
> *I investigated R&D after speaking with a fellow scaffolding association member, who knew the type of specialist work we carried out and they advised me to speak with legal Rooms.*
>
> ***2. What prompted the company to make a R&D claims?***
> *Due to the specialist nature of the work conducted by H&H Contract Scaffolding, I believed R&D had been carried out as these projects were far beyond normal scaffolding work.*
>
> ***3. Who are the individuals that took part in preparing and submitting the R&D claims and what were their individual contributions?***
> *I, the company director supplied the documentation to Legal Rooms who prepared and submitted the claim.*
>
> ***4. What steps did the company take as part of completing the claims?***
> *I detailed the projects that had occurred over the tax periods, what challenges we faced and how they were overcame. I also supplied the breakdown of staff involvement, CT600, tax computations and accounts to Legal Rooms.*
>
> ***5. Did the company consult a qualified tax agent when putting the claims together?***
> ***a. What steps did the company take to check that the agent was qualified to submit claims for R&D relief?***
> *I met with Legal Rooms and felt comfortable in them preparing our claim based on their trading history and experience.*
> ***b. What information did you give the agent about the company's R&D project(s)?***
> *I explained the projects and showed the plans/photographs of work carried out over that period. I then supplied our accounts and detailed the staff involvement and costs of materials.*
> ***c. What did the agent tell you regarding the company's eligibility to claim R&D relief?***
> *I was told that my company would qualify for R&D based on using scaffolding methods that were not typical or had been done before and that this innovation can benefit the scaffolding industry to which we believe it has done.*

> ***6. Is or was the company planning to continue claiming R&D tax relief in the future?***
> *I would claim R&D tax relief for the company in future should the business develop advances in science or technology. I would happily discuss any future claims with you directly before considering submitting such claims."*

20. On 21.7.22 the Respondents sent a penalty explanation letter to the Appellant. That letter was not in the bundle produced to the Tribunal.

21. On 19.8.22 the Appellant's then representative, Stack & Jones, sought to appeal the penalty to HMRC and requested that the penalty be suspended under the following "SMART" conditions.

> "*Specific – H&H Contract Scaffolding Ltd would not be submitting another R&D claim during the next 24 months.*
> *Measurable – HMRC would be able to monitor the fact that a claim was not made.*
> *Achievable – the company does not wish to make another claim.*
> *Realistic – Again, the company does not wish to make another claim.*
> *Time Bound – set for 24 months during the suspension period."*

22. On 21.9.22 the Respondents notified the penalty assessment.

23. On 23.11.22 the Respondents issued a closure notice for the tax period concluding that no R&D credits were due to the Appellant because the activities relied on in the R&D Compliance Report did not meet the definitions of R&D for tax purposes as per CIRD81900, the BIS guidelines. The Tribunal is not aware of any appeal against that closure notice.

24. On 14.2.23 the Respondents notified the Appellant that they would not suspend the penalty, saying:

> *"If the company have no intention on making a future claim, HMRC cannot set a reasonable SMART condition in order to monitor or determine whether a suspended penalty can be effective. We must be able to identify the potential careless inaccuracy in the future to help the company to avoid further penalties for a careless inaccuracy."*

DISCUSSION

25. Bearing in mind the issues canvassed below I have not found it necessary to set out the details of the R&D tax relief scheme.

26. The Tribunal does not accept the Respondents' case as set out in the SOR. Ordinarily it is for the Respondents to prove a careless inaccuracy, not for the Appellant to establish a "reasonable excuse". If the Respondents wished to rely on para.18 Sch.24 FA07 being engaged such that the burden of proof was reversed they both could, and should, have made that clear, but they did not. Had the Respondents done so the Appellant may have sought to respond.

27. The Tribunal does not accept the Respondents' case that where the taxpayer cannot show that it qualified for a given relief then it follows that the taxpayer will have been careless, since that would entail the mere existence of an inaccuracy determining that the same inaccuracy was careless. In the absence of the Respondents setting out any other case on careless inaccuracy, and in the absence of the Respondents taking specific issue with the assertions made out in the Appellant's Grounds of Appeal that are subject to Mr. Thomas' declaration of truth, the Tribunal is not prepared to conclude that what the Appellant has said in them is inaccurate.

28. Even if the Tribunal is wrong as to the Respondents' case, and the burden of proof is in fact on the Appellant, and "Legal Rooms' was acting on the Appellant's behalf in relation to tax, and "Legal Rooms" was careless, the Tribunal finds that the Appellant has proved on the

balance of probabilities that it took reasonable care to avoid an inaccuracy. The Tribunal comes to that conclusion because it finds that the facts asserted in the Appellant's Grounds of Appeal at [1, 2, 3, 4, 5 and 7], that are declared to be true by Mr. Thomas's declaration are, on the balance of probabilities, established as facts. The Respondents have not produced any sufficient evidence to controvert those facts. Applying those facts as found by the Tribunal the Appellant has shown, in any event, that it did what a prudent and reasonable taxpayer in the position of the taxpayer in question would do.

29. The Appeal is therefore allowed on the basis that the inaccuracy was not a careless one. The Tribunal does not need to determine whether the penalty should have been suspended.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

30. 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.

HOWARD WATKINSON
TRIBUNAL JUDGE

Release date: 16th FEBRUARY 2024