TC04315

Appeal number: TC/2014/04076

INCOME TAX – PAYE – tax code notice – coding change – calculation of earnings without reference to previous pay and tax – resultant under-deduction of PAYE by employer – notice of determination issued – argument that adviser had taken reasonable care and made error in good faith – effect of determination – exclusion of any direction that employer not liable to pay PAYE excess to HMRC – determination not precluded by any prior direction under reg 72(5) – on facts, no basis for determination to be adjusted – consideration whether conditions for direction would have been fulfilled – no – absence of any basis on which liability for excess could be placed on employee rather than employer – no means of seeking relief through Tribunal for liability falling on employer – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

POOLE LEISURE LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN CLARK
MR TYM MARSH

Sitting in public at Southampton on 27 January 2015

Lewis Ball, Lewis Ball and Co., Nina Ball, Southern Payroll Services, and Phillip Curley, Director, for the Appellant

Colin Brown, Presenting Officer, Appeals and Reviews, Local Compliance, HM Revenue and Customs, for the Respondents

DECISION

1. The Appellant ("Poole Leisure") appeals against a determination by the Respondents ("HMRC") under Regulation 80 of the Income Tax (PAYE) Regulations 2003 (SI 2003/2682), referred to in this decision as the "PAYE Regulations". (References to "reg" followed by a number are to the relevant PAYE Regulations.) The appeal raises other questions as to its extent, as we explain below.

The background facts

2. The evidence consisted of a bundle of documents. In addition, shortly before the hearing Mr Brown provided to the Tribunal and to Poole Leisure and its advisers a supplementary bundle containing three pages of correspondence and two pages of miscellaneous documents, as well as print-outs of legislation. He also provided a separate folder entitled "HMRC Notes for Hearing" Both at the hearing and subsequently, Poole Leisure's representatives objected to the submission of the additional materials at that stage. We raise later in this decision the issue of the extent to which we considered that we could or could not accept the additional items as evidence.

3. Mrs Ball and Mr Curley made comments and gave information in the course of presenting the case; where we considered this to amount to evidence, we have taken it into account.

4. From the evidence, we find the following background facts.

5. Mr Curley explained that Poole Leisure's business had been set up about ten years ago, after he had worked for many years in the financial services industry. The business (trading as Camden Bar and Kitchen) was a successful bistro café bar. He dealt with anything relating to the business, from washing up to payroll. He found that Mrs Ball was much more meticulous than he was in relation to the payroll matters.

6. Mrs Ball's firm, Southern Payroll Services, provided (and continues to provide) payroll services to Poole Leisure. Mrs Ball stated that she had come to her computer to find an instruction from HMRC to amend the pay and tax of one of Poole Leisure's employees, William Butcher. The date of issue of this instruction was 10 December 2012.

7. Mrs Ball followed the instructions (considered in more detail below). The result of the amendment was a large tax refund to Mr Butcher.

8. We accept the above evidence given by Mr Curley and Mrs Ball.

9. Mr Butcher's position was that he had become an employee of Poole Leisure at some time in March 2012. He completed a form P46 on 29 March 2012. By placing an X in the relevant box, he indicated that his circumstances fell within "C" on the form:

"I have another job or receive a state or occupational pension."

10. The P46 was required because Mr Butcher's circumstances meant that he would not have been able to produce a form P45 to Poole Leisure. As he had another job, his income from Poole Leisure was taxed under code BR, so that tax was deducted at basic rate.

11. As Mr Butcher subsequently explained in a letter to HMRC, he left his previous main job on 23 November 2012. As a result, his only employment from then onwards in 2012-13 was with Poole Leisure.

12. The revised 2012-13 tax code for Mr Butcher issued electronically by HMRC to Mrs Ball as payroll agent for Poole Leisure was 816L. Among the other information included in that tax code notice was Mr Butcher's previous pay of £7,430 and previous tax amounting to £396.60. The wording at the foot of the electronic notice was:

> "PAYE – Notice to employer of employee's tax code (or amended code) and previous pay and tax. Please use this tax code from the next pay day following the effective date shown above."

13. Mrs Ball interpreted this notice as requiring Mr Butcher's PAYE tax to be calculated without reference to the figures of previous pay and tax for Mr Butcher. On 11 December 2012 she emailed Mr Curley to explain that a new tax code had been received that day for Mr Butcher. It would generate approximately £800 of tax refund, which Poole Leisure would have to fund up front, but which would be deducted from the next monthly payment to HMRC.

14. Payment of Mr Butcher's earnings for December 2012, including the tax refund, was made to his bank account on 21 December 2012.

15. On 20 April 2013, Poole Leisure sent HMRC its annual employer's return, which included the Form P14 return for Mr Butcher. This form showed Mr Butcher's starting date in employment as 7 April 2012, his pay and tax deducted in previous employment both as "£0.00", his total pay in his present employment as £7,744.18 and the tax deducted as £31.40. His final tax code was shown as 816L.

16. An email sent by Mr Curley to Mr Butcher on 21 June 2013 attached Mr Butcher's payslips for that day and the previous Friday, and referred to his tax treatment. Mr Curley suggested that if Mr Butcher had paid 20 per cent tax from April to December, then HMRC thought that he had two jobs during that time; if he did not, then this could have been the reason for the rebate in the first place. Mr Curley attached a note from Mrs Ball explaining the history concerning his coding alteration, and emphasised that she had no idea of the rationale behind HMRC's notification.

17. On 12 July 2013 Mr Curley emailed Mr Butcher to provide him with Mrs Ball's "paper trail" relating to Mr Butcher's PAYE history from 2012-13.

18. On 29 August 2013, Mr Butcher wrote to HMRC. The first paragraph of his letter stated:

> I am in receipt of an Income Tax underpayment advice about which there have been numerous telephone conversations. I now wish to dispute the amount due as I believe it to be an error on the part of my employer not applying the correct information regarding my tax free allowance."

He set out the history, and continued:

> Whilst I agree that the tax demand from HMRC in [*sic*] indeed correct, I feel that based on the above information, that [*sic*] there has been negligence on behalf of Poole Leisure and therefore this error should surely be covered by their errors and omissions insurance.
>
> I look forward to receiving your advice on this."

19. On 24 October 2013, HMRC wrote to Poole Leisure stating that according to HMRC's records, Poole Leisure had not deducted enough PAYE tax on the earnings paid to Mr Butcher. This was because Poole Leisure did not include the previous pay and tax details shown on the coding notice dated 10 December 2012. HMRC calculated that Poole Leisure still owed tax of £973.83. A detailed calculation was included in the letter. HMRC asked Poole Leisure to pay the amount still owed. If it agreed that it made a mistake but thought that the employee should pay the tax, it should send HMRC an explanation in writing showing how the error was made.

20. On 6 November 2013, Mrs Ball wrote to HMRC to explain the position. Her letter included the following comments:

> - "Mr Butcher commence [*sic*] employment on week 2 of the 12/13 tax year
> - A P46 was completed showing that he had another job and accordingly a BR code operated.
> - On 10th December I acted upon a notification of change of tax code to 816L. The previous pay and tax were not included on the payroll system as the note at the end clearly says "Please use this tax code from the next pay day". I have always been under the assumption that earlier year figures are only ever taken from a P45 & there is no mention in this notice to include previous figures
> - I have always understood that the new code took into consideration previous pay and tax – hence how the new code was arrived at.
> - This generated a large tax refund to the employee who at no point questioned why this was the case and why he received it
>
> I look forward to hearing from you that my client will not be held responsible for the tax outstanding."

21. On 4 December 2013, Mrs MT Binnell, an Assistant officer of HMRC, wrote to Poole Leisure in response to Mrs Ball's letter. After referring to Mrs Ball's explanation, HMRC indicated that reference should be made to the Employer Help book (E13) at page 28 part 7. HMRC's records showed that the coding notice issued

to Poole Leisure on 10 December 2012 included the previous pay and tax details. HMRC emphasised that the previous pay and tax details included in the coding notice were for 2012-13 and not for a previous year as mentioned in Mrs Ball's letter. [We consider that this was a misinterpretation of what Mrs Ball had said; we think that she was referring to the earlier part of the same tax year.] They asked for a copy of the coding notice to be forwarded to them.

22. On 9 January 2014 Mrs Ball replied to Mrs Binnell; HMRC's letter had been referred to Mrs Ball by her client after being delayed over the Christmas period. She asked that HMRC should take no further action until the contents of her letter were resolved, and continued:

> "I stand by my statement as referred to in paragraph two of the letter. No instructions were received to include previous figures in our payroll system. The instruction should have been via Form P45.
>
> I do not understand the request for a 2012/13 Notice of Coding showing the tax code 816L. I do not have this. You must have the notice and a copy thereof.
>
> My client will not be paying the outstanding tax. It is blatantly clear that the beneficiary of the amount due to [HMRC] is Mr Butcher and an application must be made to him to pay the outstanding sum. He received over £900 in a pay packet as a refund. This can surely be done by [HMRC], either by demand or certainly through his present coding notice.
>
> You refer to further action, such as a determination under Regulation 80 PAYE Regulations 2003. I would ask that you do not do this. It is not helpful to the situation and would lead to an appeal by my client on the grounds that although an error may have occurred, the beneficiary of the sum of £973.80 is Mr Butcher and he is the person who should be pursued by [HMRC] to pay the money.
>
> You additionally refer to a potential penalty for sending an incorrect P35. The P35 is not incorrect. It is potentially possible that the P35 is incorrect. The P35 is merely a reflection of the P11s and the P35 is not technically incorrect.
>
> I trust this matter can now be resolved and I look forward to hearing from you."

23. On 26 February 2014, HMRC issued a Notice of Regulation 80 Determination to Poole Leisure. The amount determined was £973.83.

24. On 12 March 2014, Mrs Ball wrote to HRMC to appeal the notice on behalf of Poole Leisure. She raised various matters, in particular that no account had been taken of her letter dated 9 January 2014 to Mrs Binnell, nor had any response been received; Mrs Ball found this surprising and discourteous. She asked why HMRC were not pursuing Mr Butcher for the tax owing. She stated that the situation which had occurred was a genuine mistake, "following misinterpretation of the complex rule and the way of presenting Tax Code Change Notices via email was relatively new and was not as established as it is today". She continued:

> "4. Indeed in your letter of 24 October 2013, you clearly state on page 2 of that letter, that we should explain that 'we took reasonable care to operate PAYE and made the error in good faith'. This is indeed what happened.
>
> 5. The appeal should thus be upheld and Mr Butcher pursued."

25. On 7 April 2014 Mrs Barnfather, an officer of HMRC, replied. She had considered Poole Leisure's appeal against the Regulation 80 determination, but did not agree that it had complied with its responsibilities to operate PAYE correctly and make the required payments in accordance with reg 68 of the PAYE Regulations. She commented:

> Where it is identified that the employer has failed to operate the PAYE system correctly, then the underpayment is the responsibility of the employer and not the employee. The Regulation 80 determination is therefore correct and payable by you."

26. On 28 May 2014, Lewis Ball and Co. wrote to Mrs Barnfather accepting the offer of a review. The accompanying form explained that her 7 April letter had only just been received, and referred to earlier correspondence. The following statement was included on the form:

> "It is clearly wrong in Common Law and in Natural Justice that Mr Butcher is gaining nearly £1k at the cost of my client and that HMRC refuse to pursue him."

27. On 10 July 2014, Siobhan Ruddy, the HMRC Review Officer, wrote to Poole Leisure with the results of her review. Her conclusion was that the decision to raise the tax determination was correct. She set out detailed reasons for her conclusion; as these matters are considered later in this decision, we do not set them out here.

28. On 18 July 2014, Poole Leisure gave Notice of Appeal to HM Courts and Tribunals Service ("HMCTS").

Arguments for Poole Leisure

29. Many of the matters raised on behalf of Poole Leisure related to issues of fact; it is more convenient for us to deal with disputes on factual matters at a later point in this decision, taking into account the submissions of both parties.

30. Mrs Ball referred to reg 72 of the PAYE Regulations, and in particular to reg 72(3) (reproduced at [83] below). In relation to Condition A in reg 72(3), she submitted that an error had been made in good faith. In relation to Condition B, she argued that there had not been a wilful failure to deduct tax. In their Statement of Case, HMRC had submitted at paragraph 8.7 that Condition B was not met. Mr Ball intervened to say that this begged the question of why the hearing was taking place.

31. He summarised the position and indicated that what had arisen was based on a mistake; it had not been wilful.

32. In the 9 January 2014 letter, Mrs Ball had requested that a Regulation 80 determination should not be made. HMRC had never explained why they did not pursue Mr Butcher.

33. Mr Ball explained that on 8 January 2014 there had been a telephone conversation with HMRC relating to Mrs Binnell; HMRC had denied knowledge of her. However, Mrs Ball had received a letter from her.

34. The letter from Mr Butcher to HMRC had not been seen by Poole Leisure or its advisers until about two weeks before the hearing. In that letter, Mr Butcher had accepted that the tax demand from HMRC was correct. He had admitted that there was a mistake.

35. Mr Ball submitted that the case authority included in HMRC's bundle (*Mr Jeffrey Sasin v Revenue and Customs Commissioners* [2010] UKFTT 354 (TC), TC00636) was not in point, as it related to an employee and not an employer. (Mr Brown intervened to accept that this submission was correct.)

36. Mr Ball referred in general terms, without giving a specific reference, to a First-tier Tribunal decision relating to a Mr Blanche. (We comment on this below.) The case for Poole Leisure was similar, that there had been a failure due to an error made in good faith. The submission for Poole Leisure was that HMRC should pursue Mr Butcher and obtain the funds that he had put in his own pocket.

37. Mrs Ball submitted that everything in relation to Mr Butcher had been operated correctly, right up to the point when he left his employment and received a Form P45.

38. Mr Ball referred to the difference between HMRC's internet version of the tax code notices given to employers, and the hard copy version. (We consider this below.)

39. He referred to the statistics for HMRC's coding errors as published by the Public Accounts Committee.

40. He argued that as the PAYE error was not wilful, it resulted from a mistake. As a consequence, this involved considering an application under reg 72A of the PAYE Regulations for HMRC to make a direction under reg 72(5). He argued that HMRC should have made such a direction in respect of Mr Butcher.

41. Mr Curley submitted that there was no doubt that Mrs Ball had taken due care; she had taken into account the instruction from HMRC and followed it.

Arguments for HMRC

42. Mr Brown stated that the appeal was against the Regulation 80 determination. On the question of a decision under reg 72A, it was not possible to identify any application or any decision.

43. He referred to the effect on reg 80. Under reg 72, HMRC had a discretion to consider whether to recover from an employee tax which had not been deducted by an

employer. If an employer wanted HMRC to direct (in relation to Condition A in reg 72) that the employer was not liable to pay the tax, the mechanism for doing so was set out in reg 72A.

44. Once a determination had been made under reg 80, this "shut off" any possibility of a direction being made under reg 72(5).

45. Thus it was an employer's option to go for a reg 72A application, but this only worked for correspondence *before* the reg 80 determination. In order to make a reg 72A application, the notice of request had to meet the requirements set out in reg 72A(2). Mr Brown questioned whether all the necessary requirements could be taken to have been fulfilled in the present case; we review this in a later section of this decision.

46. Mr Brown emphasised the difference between a direction made by HMRC pursuant to their own discretion under reg 72(5), and a direction made as a result of an application by an employer under reg 72A. It was only in the latter case that the employer had a right of appeal (under reg 72A(4)-(6)).

47. If there was a reg 72A request, it would be necessary to find that HMRC had made a decision on it. If there was no decision, there was a question whether a reg 80 determination could be made while such an application remained open; this would not be a particularly reasonable application of the statutory provision. If, on the other hand, there was a decision, no valid reg 80 determination could be made.

48. If Mrs Ball's letter dated 6 November 2013 could be taken as a refusal, this would carry its own right of appeal. This would raise the question whether there was in fact an appeal against that refusal. Mr Brown commented that this raised "horrendous" permutations and difficulties, and acknowledged that he had not been able to consider them all.

49. The grounds of appeal under reg 72A mirrored the conditions set out in reg 72; the questions were whether the employer had made an error in good faith, and whether the employer took reasonable care. In broad terms, the grounds of appeal in reg 72A and the two elements of Condition A in reg 72 were interchangeable.

50. Mr Brown considered in detail the mechanism of the PAYE deduction system as set out in regs 20-23, 46, 49, 53, and 68 of the PAYE Regulations. He emphasised reg 68(4), which required the employer to pay what it was liable to deduct. This was why the employer was liable irrespective of what it had or had not deducted.

51. In relation to reg 80, HMRC's submission was that all the conditions had been met, it was correct mathematically and should therefore be upheld on appeal. He acknowledged that this was subject to the questions relating to reg 72 for the period before the reg 80 determination had been made. The difficulty was whether the point of a valid reg 80 determination had been made; this was not straightforward.

52. He referred to the summary of the relevant regulations in the supplementary bundle. There were subsidiary issues concerning the whole way in which the PAYE system worked.

Discussion and conclusions

The additional materials

53. We deal first with the objection by Poole Leisure to the admission of the additional materials submitted by Mr Brown on the day of the hearing, and the later application dated 30 January 2015 by Mrs Ball on behalf of Poole Leisure for us to disregard those materials in arriving at our decision.

54. In responding to that application, we stated that we did not consider that the items of correspondence were in any way prejudicial, as the three pages concerned were copies of pages which had been enclosures to HMRC's review letter. The other materials were legislation, a summary of the legislation, and a miscellaneous document which we did not consider to be material (it related to the position of Poole Leisure in relation to "Real Time Information" for 2013-14 onwards).

55. In the light of the application by Poole Leisure, we invited it to provide (within 14 days) through its representatives a list of the items to which it objected. We directed that HMRC would then have 14 days to respond, and that no further correspondence or submissions from the parties would then be taken into account.

(a) Points made by Poole Leisure

56. In her letter to HMCTS dated 10 February 2015, Mrs Ball argued that it had been appropriate at the hearing for the Tribunal either to adjourn the hearing, or to dismiss HMRC's case.

57. Mrs Ball referred to the original Directions given in relation to the hearing of the appeal. These stated that all bundles should be deposited with HMCTS and exchanged at least 14 days before the hearing. She submitted that HMRC had clearly disobeyed these Directions.

58. Mrs Ball also argued that the papers submitted by HMRC on the day of the hearing were in excess of 70 pages, including what she described as a revised bundle and a set of notes for the Tribunal. She had had these papers for only 15 minutes before the start of the hearing, and it was utterly impossible to consider any of the papers presented. She continued:

> "I believe that the Judge was bullied into accepting these papers by HM Revenue and Customs and there should never have been the case. The Judge clearly did not, and had no time to read the papers."

59. She also submitted that the additional paperwork showed a change to the stance taken by HMRC. In the original bundle and previous papers, in particular their Statement of Case, HMRC had addressed a great deal of attention to reg 72, and the

reasons why the conditions for its application were not met. In the papers submitted on the day, HMRC had repeated their reg 80 claim, and merely dismissed reg 72 without reference to it.

60. Mrs Ball requested that the Tribunal hearing be reconvened in proper time, or that in the alternative the reg 80 determination should be withdrawn.

(b) Points made by HMRC

61. Mr Brown commented that Direction 6 given on 30 October 2014 provided for either party to apply for the directions to be amended, suspended or set aside. It was therefore within the Tribunal's power to admit the supplementary bundle should it see fit to do so. For completeness he wished to repeat the apology made at the beginning of the hearing for the need to produce the supplement to the bundle.

62. The description of the bundle containing over 70 pages was wrong; it grossly overstated the extent of the supplementary bundle and was seriously misleading. He set out a detailed review of the additional items.

63. In relation to the legislation, HMRC had consistently maintained that the employer was required to use the previous pay and tax figures when calculating the amount to be deducted. The Tribunal was obliged to settle the appeal by reference to the relevant legislation. At face value had the additional material not been included in the bundle the Tribunal would still need to consider those regulations before arriving at its decision.

64. HMRC did not represent the "Notes for Hearing" as forming part of the additional bundle. There was no requirement to provide a skeleton argument. Copies of the notes were provided for the convenience of Poole Leisure, its agent and the Tribunal. Poole Leisure was not disadvantaged by HMRC providing copies of its notes.

65. HMRC did not accept the suggestion that the Tribunal was bullied into accepting the supplementary bundle.

66. Mr Brown made various other points, which we do not reproduce here. In summary, HMRC asked the Tribunal to reject the application made on behalf of Poole Leisure either to

(1) Re-hear the appeal, or in the alternative

(2) Uphold the appeal against the reg 80 determination.

(c) Our conclusions

67. We think it unfortunate that in preparing their Statement of Case, HMRC did not make it clear that (as we discuss below) once a reg 80 determination had been issued, a direction could not be made under reg 72(5). Their Statement of Case was prepared as a response to the Grounds of Appeal set out in the Notice of Appeal given

by Poole Leisure to HMCTS. Those Grounds of Appeal were that a genuine mistake had been made in good faith, based on the format of the "Tax code notice", and that the person benefiting from the original tax refund should be pursued for the underpaid tax.

68. Those Grounds of Appeal appear to have influenced HMRC's choice of the arguments to be considered in their Statement of Case. As a result, the question of the effect of reg 80 determinations on the availability or otherwise of a possible direction under reg 72(5) was not addressed at that stage.

69. The purpose of a direction concerning service of bundles in advance of the hearing is to ensure that as far as possible, the parties have seen all the evidence before the hearing. It is also desirable for each party to have some idea of the legal submissions which the other party is likely to be making at the hearing, but it is not possible to exclude additional legal points being raised, nor would it be appropriate to bar such further legal arguments.

70. The additional papers submitted by HMRC on the day of the hearing were a supplemental bundle, and "HMRC Notes for Hearing". The latter ten-page document was a form of detailed skeleton argument. The Directions dated 30 October 2014 make no reference to skeleton arguments or similar documents, and the Tribunal therefore sees no reason why HMRC's Notes for Hearing should not have been submitted on the day of the hearing, as is often the practice.

71. The Directions also required the parties to serve on each other and on the Tribunal by the fourteenth day before the hearing a statement containing details of any legislation and case law authorities on which that party intended to rely.

72. The supplemental bundle provided by HMRC on the day of the hearing contained different categories of paperwork. There were three pages described as "correspondence", and also one page described as "Miscellaneous Documents". The latter, relating to Poole Leisure "joining" Real Time Information, concerned a later tax year, and the Tribunal therefore did not consider it to be material to the appeal. The three pages of correspondence were described by Mr Brown at the beginning of the hearing as being copies of pages which had been enclosed with the review letter. The Tribunal accepted that this was the case in respect of two of the documents, and as the third document was a copy of the form P14 submitted in respect of Mr Butcher for 2012-13, the Tribunal was satisfied that Poole Leisure would have had sight of the document in advance of the hearing.

73. Thus in relation to the additional documents, the Tribunal was satisfied that there was no prejudice to Poole Leisure in admitting them as evidence. We would add that in our view there is nothing in the supplemental bundle that we consider to have been critical to reaching our decision; we could have proceeded without it.

74. The remaining element of the supplementary bundle was the "Supplement to Legislation". This consisted of HMRC's "Summary of Legislation", and a number of

further regulations extracted from the PAYE Regulations, together with information concerning electronic communications in relation to PAYE.

75. The Tribunal was already familiar with these statutory materials before HMRC submitted the additional materials about half an hour before the hearing began. The Tribunal was therefore able to satisfy itself within a short time that there was nothing in these materials which it considered to be prejudicial to Poole Leisure, even though the Tribunal considered it to be unfortunate that these materials had not been provided to Poole Leisure or its advisers by the time limit set out in the Directions.

76. In relation to the additional regulations, the Tribunal took into account that these were an integral part of the PAYE Regulations, the same statutory provision from which the most relevant regulations had been extracted and included in the original bundle for the hearing. The appeal had to be considered in the context of the PAYE Regulations as a whole.

77. We consider it unfortunate that any party to these appeal proceedings should have felt moved to suggest that the Judge or the Tribunal was bullied by one party into accepting submission of additional papers at the hearing. We can categorically state that this was not the case here. The Tribunal is independent and takes its independence very seriously. We made a point at the beginning of the hearing of explaining, for the benefit of Mr Curley, the independent nature of the Tribunal. The Tribunal is entitled to assume that professional advisers to an appellant will be fully aware of the independent status of the Tribunal in determining disputes between the parties. We refer Mrs Ball to the comments in *TL Watson t/a Kirkwood Coaches v Revenue and Customs Commissioners* [2013] UKFTT 553 (TC), TC02942 at [56]-[57]. The Tribunal is required by the Tribunal Rules

> "to deal with cases fairly and justly." (Rule 2)

78. Any suggestion that a Tribunal has not acted in accordance with this "overriding objective" of the Tribunal Rules requires that the party raising the matter should present full and convincing justification for the allegation. For the reasons set out above, the Tribunal does not accept Mrs Ball's suggestion that it or the Judge was bullied into accepting the supplementary bundle.

79. The Tribunal had to consider whether it was appropriate to adjourn the hearing or to continue, and which of these would be in the interests of justice. It considered that the additional materials handed in by HMRC on the day of the hearing were not prejudicial to Poole Leisure and did not warrant the delay and expense which would inevitably have ensued if the hearing were to be adjourned. It therefore concluded that the appropriate course was to continue with the hearing.

80. In the light of the points made by Mrs Ball, we consider not only the question of the reg 80 determination but also the arguments concerning a possible direction that the PAYE underpayment should not be collected from Poole Leisure and should instead be collected from Mr Butcher, the employee.

The substantive issues

(a) Was the determination valid?

81. We turn to the substantive issues raised by Poole Leisure's appeal. We accept Mr Brown's legal submissions on the application of the relevant provisions of the PAYE Regulations. The initial question which we have to consider is whether the reg 80 determination dated 26 February 2014 was valid. This depends on whether, before that date, there had been a request by Poole Leisure under reg 72A of the PAYE Regulations, a decision by HMRC on that application, and an appeal against such a decision. Any correspondence after 26 February 2014 cannot affect the position, because reg 80(3) provides:

> "(3) A determination under this regulation must not include tax in respect of which a direction under regulation 72(5) has been made; and directions under that regulation do not apply to tax determined under this regulation."

82. Thus, as Mr Brown submitted, the final part of reg 80(3) "shuts off" any possible application of reg 72(5) once a reg 80 determination has been made.

83. HMRC have a discretion, under reg 72, to direct that the employer is not liable to pay the "excess" (ie the additional amount of PAYE due) to them. The circumstances in which they can exercise that discretion are specified in reg 72(1), (3) and (4). Either condition A or condition B must be met:

> "(3) Condition A is that the employer satisfies the Inland Revenue—
>
> (a) that the employer took reasonable care to comply with these Regulations, and
>
> (b) that the failure to deduct the excess was due to an error made in good faith.
>
> (4) Condition B is that the Inland Revenue are of the opinion that the employee has received relevant payments knowing that the employer wilfully failed to deduct the amount of tax which should have been deducted from those payments."

84. In their letter to Poole Leisure dated 24 October 2013, HMRC stated:

> "If you agree that you made a mistake but think that the employee should pay the tax, please send us an explanation in writing telling us how the error was made by 19 November 2013.
>
> Your explanation should show how you:
>
> - Took reasonable care to operate PAYE, and
> - Made the error in good faith."

85. Mrs Ball's reply dated 6 November 2013 (see [20] above) did not in specific terms provide such an explanation. We acknowledge that at the hearing she made submissions to explain the position, as we consider below, but in the course of the

correspondence she simply explained the actions which she took as a result of the notice to amend the coding for Mr Butcher.

86. Mrs Binnell's reply to Poole Leisure dated 4 December 2013 did not repeat the request for an explanation. It stated that the tax should be paid, and continued:

> "If we do not receive payment by 18 December 2013, we will take further action to collect the tax from you. This means that we will consider making a determination of the amount owed under Regulation 80 PAYE Regulations 2003 and may also charge you a penalty for sending an incorrect P35 return. If we issue this determination, it will stop us from considering any claim by you that Mr WJ Butcher should pay the tax due.
>
> You will also need to pay interest on tax paid late."

87. Mrs Ball's reply dated 9 January 2014 (see [22] above) did not contain any additional explanation. She asked that no determination should be issues, but stated that Poole Leisure would not be paying the outstanding tax.

88. That letter was followed by the determination issued on 26 February 2014.

89. We are satisfied on the evidence of this correspondence that HMRC did not, pursuant to their own discretion, make a direction under reg 72(5) before the issue of the notice of determination under reg 80. They asked for information, but what was provided was not sufficient to cause them to take action pursuant to reg 72.

90. Thus the only basis on which a direction could be regarded as having been sought would have been a request by or on behalf of Poole Leisure under reg 72A that HMRC should make a direction under reg 72(5). Regulation 72A(1) makes clear that the procedure under reg 72A can only apply to condition A in reg 72(3). In other words, the procedure is not available where condition B applies in relation to a wilful failure by the employer to deduct the amount of tax which should have been deducted from payments to the employee.

91. As Mr Brown submitted, the question whether there had been such a request under reg 72A depended on satisfying the formal requirements of reg 72A(2), whether or not in its precise terms:

> "(2) The notice of request must—
>
> (a) state—
>
> (i) how the employer took reasonable care to comply with these regulations; and
>
> (ii) how the error resulting in the failure to deduct the excess occurred;
>
> (b) specify the relevant payments to which the request relates;
>
> (c) specify the employee or employees to whom those relevant payments were made, and

(d) state the excess in relation to each employee."

92. As we have found, the only correspondence between Poole Leisure (through its advisers) and HMRC before the issue of the notice of determination was the sequence which we have just reviewed in the context of reg 72. Did that correspondence satisfy the requirements of reg 72A(2), whether formally or otherwise?

93. In relation to item (a)(i), Mrs Ball's letter dated 6 November 2013 was simply an explanation of what she did. We are not satisfied that it amounted to an account of how Poole Leisure took reasonable care to comply with the PAYE Regulations.

94. We consider that the second requirement as specified at (a)(ii) was satisfied, as Mrs Ball explained the process which she followed.

95. On the question whether (2)(b) was satisfied, Mrs Ball made no specific reference to the payments. We are not satisfied that this requirement can be treated as met by deriving inferences from the correspondence, as there was no reference in her letters to the amounts involved. The letter from HMRC dated 24 October 2013 set out a calculation of the tax which they considered was still owed by Poole Leisure, but this related to the whole tax year rather than to specific payments.

96. It was clear from the correspondence that the employee in respect of whom the question of outstanding tax had arisen was Mr Butcher, so we consider that the requirement in (2)(c) was met.

97. The remaining requirement was that in (2)(d), to state the excess in relation to each employee. The only employee of Poole Leisure in respect of whom an excess had arisen in 2012-13 appears to have been Mr Butcher, but we find that nothing specific in the relevant letters written by Mrs Ball to HMRC can be taken as stating the amount of the tax.

98. In order to make a valid request to HMRC under reg 72A, all the requirements in reg 72A(2) must be fulfilled. The use of the word "must" allows no discretion. As we have found that not all those requirements were met, we find that no valid notice of request can be regarded as having been made to HMRC under reg 72A.

99. As a consequence, we do not consider it necessary or appropriate to examine whether or not HMRC made a decision on a reg 72A request by Poole Leisure. This removes the difficulty referred to by Mr Brown concerning the effect of the absence of a decision by HMRC following such a request; could a reg 80 determination be validly made when HMRC's decision remained open? That issue would raise its own questions as to the construction of reg 80. We prefer to leave that question to be decided in some other case where the factual position has left it open.

100. This also removes the need for us to examine whether Poole Leisure could be regarded as having made an appeal pursuant to reg 72A(4)-(6) against a refusal notice. We merely comment that we have been unable to find anything in the evidence or the Notice of Appeal which could be regarded as amounting to such an appeal.

101. In the absence of a direction by HMRC under reg 72(5), whether pursuant to their own discretion or following a request under reg 72A, the only question which can be considered on appeal is whether the reg 80 determination should stand. Appeals against determinations are covered by reg 80(5), which treats the determination for these purposes as if it were an assessment and as if the amount of tax determined were income tax charged on the employer. The practical effect is to place on Poole Leisure as the Appellant the burden of proof to satisfy the Tribunal on the balance of probabilities that the determination is incorrect.

102. There is nothing in the correspondence to suggest that Poole Leisure or its advisers consider the amount of tax specified in the determination to be incorrect. The arguments raised for Poole Leisure at the hearing related to other matters, and again did not question the amount determined. Instead, the issue raised was whether the tax should have been borne by Mr Butcher as the employee, rather than by Poole Leisure.

103. Questions as to the validity and effect of a determination made in circumstances where it can be shown that there has been a direction under reg 72(5) are considered below. Putting those to one side, we find that there is no basis in the evidence for us to amend or adjust the amount of tax determined in the reg 80 determination dated 26 February 2013, and therefore the determination must stand as made.

(b) What if there was a request for a reg 72A direction?

104. Although we have found that there was no request made by Poole Leisure to HMRC under reg 72A to make a direction under reg 72(5), we think it appropriate to consider the position on the hypothesis that for some reason that finding is held to be incorrect.

105. Putting to one side the real difficulties concerning whether or not HMRC could be regarded as having made a decision on that request, the implications for the status of the reg 80 determination and the difficulty of establishing whether or not appeals had been made to HMRC and subsequently to HM Courts and Tribunals Service against any refusal of such a request, the issue to be considered is whether condition A in reg 72(3) (which is the essential precondition to any direction being made under reg 72(5)) was satisfied.

106. In relation to condition B in reg 72(4), HMRC indicated in their Statement of Case that they did not consider that Poole Leisure wilfully failed to deduct tax that should have been deducted from Mr Butcher's earnings. Mr Ball questioned why, given that statement, the hearing was proceeding.

107. Mr Brown stated at the hearing that he did not consider condition B to be relevant in the present case; it was aimed at a decision by an employer not to deduct tax which should properly be deducted.

108. We are satisfied that, as HMRC acknowledged, condition B is not relevant in the context of Poole Leisure's payment of earnings to Mr Butcher. (In any event, Condition B is not relevant in relation to reg 72A.) Mrs Ball indicated in the Notice of

Appeal that what had happened was a "genuine mistake". It is clear to us that she provided advice to Poole Leisure on the basis of that mistake, and that Poole Leisure acted on that advice. This does not fall within the definition of a wilful failure to deduct tax.

109. We do not think that Mr Ball's comment at the hearing was based on a correct interpretation of reg 72; there is still a question to be answered in respect of condition A. There are two limbs to this condition. In correspondence and in argument, Mrs Ball concentrated on the question whether the failure to deduct the "excess" was due to an error made in good faith. We were satisfied that Mrs Ball had indeed made the error in good faith; we acknowledge Mr Curley's evidence as to her meticulous approach. However, reg 72(3)(a) contains the other limb (see [83] above); did the employer take reasonable care to comply with the PAYE Regulations?

110. The responsibility for compliance with PAYE obligations rests on the employer, whether or not the employer delegates all or part of that responsibility by using the services of some other person or entity. The case of *Wald v Revenue and Customs Commissioners* [2011] UKFTT 183 (TC) confirms the position in relation to the filing of a correct return, and we consider that the same principle applies equally to compliance with the PAYE regime.

111. Thus if an employer relies on a third party to carry out all or part of its PAYE compliance functions, a failure by that third party to exercise reasonable care in relation to those functions must be regarded correspondingly as a failure by the employer to exercise reasonable care.

112. The question is therefore whether Mrs Ball failed to exercise reasonable care in dealing with the coding amendment notice relating to Mr Butcher.

113. It is clear from the evidence that receipt by her of a notice in these circumstances was an event which she had not previously encountered. She took action in relation to the notice, and was aware that the consequence for Poole Leisure was that it would have to fund the tax repayment.

114. As indicated at [12] above, the only annotation on this internet version of the tax code notice was the instruction to use the tax code from the next pay day. At the hearing, Mr Ball pointed out that the paper version of such a notice contains the further wording:

> "Previous pay and previous tax. These must now be added to the totals in your employment."

Mr and Mrs Ball argued that the position would have been entirely different if this wording had been included in the internet version of the document.

115. From the evidence, we are satisfied that Mrs Ball interpreted the notice as requiring her to take into account only the income received by Mr Butcher for the period following the date of the coding notice.

116. The question of the actions which Mrs Ball took or did not take has to be considered in the context of the professional responsibility which she had to advise Poole Leisure on the basis of the applicable law, including the PAYE Regulations. Mr Brown explained the basis of the PAYE system as set out in the PAYE Regulations, and took us to a number of specific provisions within them. It is clear that the normal treatment in the majority of cases is for an individual's PAYE to be calculated cumulatively over the whole year. Although there are some cases where the cumulative basis is not used, these appear to involve relatively unusual or exceptional circumstances. It would therefore have been an unusual event for an employee's PAYE to be calculated in December without taking into account the income for the earlier part of the same tax year.

117. Despite the situation being unusual and one which she had not previously encountered in this way, Mrs Ball did not take any action to query the position, nor did she consider the amount of the tax refund in the context of what Mr Butcher had earned up to that point in his employment with Poole Leisure. We find, in relation to this element of condition A, that she did not take reasonable care.

118. Her position has some similarities to that of the adviser in the recent penalty case of *Elsina Limited v Revenue and Customs Commissioners* [2015] UKFTT 0014 (TC), TC04226. Further, the HMRC guidance in their Compliance Handbook Manual CH81120 appears to be appropriate in her context; she had a professional responsibility to deal with that part of Poole Leisure's PAYE function which had been delegated to her. The final paragraph of CH81120 states:

> "In HMRC's view it is reasonable to expect a person who encounters a transaction or other event with which they are not familiar to take care to find out about the correct tax treatment or to seek appropriate advice."

119. Our conclusion is that, if the mechanism of reg 72 were in principle to have been available either to HMRC in accordance with their discretion under that regulation, or to Poole Leisure as a result of a request properly made under reg 72A, the necessary requirements for a direction under reg 72(5) would not have been met. Both elements of condition A must be fulfilled; we are satisfied that the error was made in good faith, but despite the submissions made on behalf of Poole Leisure, we are not satisfied that the "reasonable care" requirement can be established.

(c) The issue of liability to account for the under-deduction of PAYE

120. A considerable proportion of the submissions made to us for Poole Leisure related to the issue of seeking to place the liability to account for the underpayment of PAYE on Mr Butcher, the employee and to absolve Poole Leisure of that obligation. This raises various matters of principle concerning the PAYE system, on which we think it appropriate to comment.

121. The responsibility to account for tax under PAYE is placed on the employer. This principle is at the very root of the system. Leaving aside special circumstances such as direct collection, and ignoring wilful failure to deduct PAYE, the only basis

on which tax can be collected from the employee is where a direction has been made under reg 72(5). If the conditions for such a direction are not fulfilled, the obligation remains with the employer, however unjust and unfair this may seem to the employer.

122. The absence of a link between the obligation on the employer and the actual tax liability of the employee was considered by the present Judge sitting as a Special Commissioner in the case of *Demibourne Ltd v Revenue and Customs Commissioners* SpC 486, [2005] STC (SCD) 667. This related to a former employee who had carried out work for the company after retirement. He accounted for tax on his earnings through the self-assessment system on the basis that he was self-employed. HMRC concluded that he should have been regarded as an employee and that tax in respect of his earnings should have been accounted for under the PAYE system. This conclusion was upheld on appeal.

123. There appeared to have been a practice in such cases whereby the tax accounted for by the worker under the self-assessment system was treated as fulfilling the employer's obligation to account for the tax. However, in *Demibourne*, HMRC raised the argument that they did not have the discretion to choose whether to collect tax from the employee or from Demibourne. The Special Commissioner held that questions of legitimate expectation could not be considered by the Tribunal, but that even if it had been open to him to consider the point, he had to accept the strict position as argued by HMRC, that HMRC did not have such a discretion. Whether the parties could come to some form of agreement as to offsetting the tax paid by the employee was a matter for the parties and outside the jurisdiction of the Tribunal.

124. The position is similar here, except that the employee, Mr Butcher, has not paid any amount in respect of the tax in question. There is no basis on which the Tribunal can intervene to direct that the relevant amount of PAYE should be paid by Mr Butcher rather than by Poole Leisure. The Tribunal has no jurisdiction to deal with such questions.

125. We do not consider that the position is affected by the *Blanche* case to which Mr Ball referred. We note that there are two decisions relating to a Mr Blanche, one being *Thomas James Blanche v Revenue and Customs Commissioners* [2011] UKFTT 164 (TC), and the other *Thomas James Blanche v Revenue and Customs Commissioners* [2011] UKFTT 863 (TC), heard by differently constituted Tribunals but relating to the same appeal file number. The question in both appeals was whether Mr Blanche should be absolved of liability under a direction that he was liable to pay tax which should have been deducted under PAYE. In the first, the appeal was dismissed; in the second, it was allowed. In the present case, there has been no such direction. The question is whether the liability should fall on Poole Leisure as the employer, or whether there is any basis for the liability to be placed on Mr Butcher as its employee at the relevant time.

Outcome of the appeal

126. The appeal of Poole Leisure against the reg 80 determination dated 26 February 2014 is dismissed.

Right to apply for permission to appeal

127. 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.

JOHN CLARK
TRIBUNAL JUDGE

RELEASE DATE: 6 March 2015