



TC05121

Appeal number: TC/2015/02811

Income Tax - PAYE - underpayment arising from Appellant's amendment to his annual P35 End of Year Return - amendment based on Appellant's own figures - whether Tribunal had jurisdiction as to whether HMRC should exercise its discretionary powers under extra statutory concession under A19 to waive the payment - no - Appeal struck out

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

SUPPIAH AMBIKAIPAKAN

Appellant

- and -

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

**TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER JANE SHILLAKER**

Sitting in public at Fox Court, Brooke Street, London on 13 January 2016

Mr Thambu Kumar for the Appellant

Mr Neil Nagle, Officer of HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal by Mr Suppiah Ambikaipakan against an underpayment of tax of £3,138.99 arising from an amendment to his annual P35 End of Year Return for the year 2004-05, submitted on 11 January 2011.

2. HMRC apply to strike out the appeal under Rule 8(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009.

3. The issue is whether the Appellant submitted a P35 End of Year Return on 11 January 2011 and if so whether the Tribunal has any jurisdiction over the matter.

4. HMRC contends that there is no right of appeal against the tax underpayment identified by the Appellant's submission of the amended P35 End of Year return. Further, there is no right of appeal against statutory interest charged as a result of the late payment of tax due.

5. HMRC also contends that the Tribunal also has no jurisdiction over the application of ESC A19 or the charging of statutory interest.

Background facts

6. An amendment to the Appellant's annual P35 Return for the year 2004-05 was filed with HMRC on 11th January 2011. This amendment led to an underpayment under Regulation 73 and 73a, Income Tax (PAYE) Regulations 2003 of PAYE and also of Class 1 National Insurance Contributions, the total underpayments being £3,138.99.

7. The Appellant was then subject to bankruptcy proceedings which prevented HMRC from pursuing the underpayment that arose as a result of the amendment.

8. The bankruptcy proceedings were subsequently annulled on 13th September 2011.

9. HMRC then resumed pursuit of the outstanding debt and issued a demand notice to the Appellant on 19th February 2014.

10. On 18th March 2014 the Appellant's advisors queried the tax liability, advising that the Appellant had ceased trading in 2008 and since then had been an employee of a private company. They said that he had "always believed his affairs were in order". He "could not afford to repay the money". The agent asked HMRC to apply extra statutory concession A19 for the following reasons:

- HMRC notified the arrears more than eight years after the end of tax year in which HMRC received information indicating PAYE tax was due.
- HMRC allowed the arrears to build up over those eight years by failing to make proper and timely use of information previously given.

- The Appellant is an employee with five children

11. HMRC responded to the agent on 17 April 2014 advising that the underpayment for 2004-05 arose as a result of the Appellant filing an amendment to the annual P35 End of Year Return for that period. The underpayment did not arise as a result of a decision by HMRC. HMRC also advised the Appellant that an objection could be raised to the interest charged, but only once full payment had been received of the tax due.

12. On 19 January 2015, the Appellant's advisors lodged an appeal with the First-tier Tribunal.

13. On 21st May 2015, HMRC wrote to the Appellant's advisors advising that the matter in question was not an appealable matter and that that the issue in dispute was more of a complaint.

14. HMRC applied to the Tribunal on 21 May 2015 for an order that the appeal be struck on the basis that the Tribunal had no jurisdiction over the matters in dispute.

The Law

Section 31 Taxes Management Act 1970

Regulation 73 Income Tax (PAYE) Regulations 2003

Regulation 73a Income Tax (PAYE) Regulations 2003

Rule 8 the Tribunal Procedure (FTT) (Tax Chamber) Rules 2009

Extra Statutory Concession A19

Case law Authorities

HMRC v Prince & Others (2012 UK FTT 157 TC01852)

HMRC v Christine Perrin (2014 UKFTT 488 TC03614)

The Appellant's case

15. The grounds of appeal are as set out in the agent's letter of 18 March 2014 and related correspondence. In summary:

- The Appellant says that he was not made aware of the PAYE arrears for more than eight years after the end of the tax year in which HMRC received information indicating that PAYE was still due. Prior to this the Appellant believed his affairs to be up to date.
- HMRC failed to make timely use of information and allowed interest to build up over eight years.

iii. HMRC should apply Extra Statutory Concession A19.

HMRC's case

16. HMRC contends that the Tribunal has no jurisdiction over the Appellant's appeal.

5 17. HMRC relies in this instance on Rule 8(2)(a) of the Tribunal Procedure Rules 2009 which states that:

“The Tribunal must strike out the whole or a part of the proceedings if the Tribunal —
(a) does not have jurisdiction in relation to the proceedings, or that part of them.”

10 18. Legislation at Regulation 73 and 73a of the Income Tax (PAYE) Regulations 2003 does not give any appeal rights against the submission and subsequent tax generated by the filing by the taxpayer of the annual employer's End of Year Return (P35).

15 19. Section 31 Taxes Management Act 1970 provides details of what decisions attract appeal rights. HMRC contends again that the submission of an employer's End of Year Return and any tax due as a result of this submission is not an appealable decision.

20. The Tribunal may only consider an appeal where it is legislatively permitted and appropriate. The Tribunal does not have any regulatory oversight over HMRC and cannot deal with matters in respect of complaints about HMRC procedures.

20 21. HMRC relies in this instance on *HMRC v Christine Perrin* (2014 UKFTT 488 TC 03614) where Judge Redston stated at paragraph 200 of her decision:

“The Tribunal has no jurisdiction over complaints about the behaviour of HMRC's officers. Any such complaints must be made to HMRC in the first instance and can then be escalated to the HMRC Adjudicator.”

25 22. HMRC contends that the submission of an employer's End of Year Return and any subsequent amendments are part of the employer's obligations to HMRC as per the legislation at Regulation 73 Income Tax (PAYE) Regulations 2003. The submission of the End of Year Return is based on figures provided by the employer and those figures are based purely on their records.

30 23. The amended Return submitted in January 2011 by the Appellant would have been based on his own figures and a reasonable person would have submitted the return in the knowledge that an underpayment of tax would arise as a result of the amendment.

35 24. HMRC also contends that the Tribunal has no jurisdiction over Extra Statutory Concession A19 and make reference to the case of *HMRC v Prince and Others [2012] UKFTT 157(TC)*. In paragraph 24 of Judge Bishopp's judgment he states:

5 “I conclude therefore, that this Tribunal has no jurisdiction to consider whether or not HMRC have exercised their discretion correctly, or reasonably, and it would correspondingly be purposeless for it to hear evidence and make findings about whether or not any individual Appellant comes within the ESC as a matter of fact, since it would be unable to give any effect to any such determination.”

10 25. At the hearing Mr Nagle for HMRC acknowledged and apologised for the length of time it has taken HMRC to pursue the debt. He accepted that the Appellant had a valid complaint. The underpayment had arisen in January 2011 but HMRC had not pursued the debt until February 2014. Nonetheless the debt remained due and payable.

15 26. Mr Nagle said that HMRC were unable to produce a copy of the annual P35 return submitted on 11 January 2011, but were able to produce screen prints of HMRC ‘action history entries’ which showed that the return had been received. He accepted that if the Appellant raised a formal complaint, HMRC would have to take a view as to whether to pursue the debt.

27. Mr Nagle said that, irrespective of delays on the part of HMRC, for the purposes of the appeal the Tribunal had no jurisdiction and HMRC had every right to ask that the appeal be struck out.

Conclusion

20 28. The Appellant does not disagree with the amount of underpaid PAYE/NIC for 2004-05. His objection relates entirely to HMRC’s assertion that ESC 19 is not applicable. He also complains that whilst HMRC acknowledge the delays pursuing the debt and interest, they nonetheless refuse to write off the underpaid tax.

25 29. The Tribunal notes HMRC’s position on the matter, in that as Mr Nagle said, if the Appellant wishes to invoke HMRC’s complaints process, HMRC will address his concerns in respect of the delays in issuing a demand and give consideration as to whether to pursue the debt. That however is entirely a matter for HMRC.

30 30. The Appellant’s representations do not give rise to a matter which is within the jurisdiction of this Tribunal. There has been no assessment decision or other matter which gives the Appellant a right of appeal. The Tribunal has no jurisdiction to consider whether or not HMRC has exercised its discretion correctly in deciding not to apply ESC 19. A tax payer’s remedy in such circumstances is by way of a judicial review (*Prince and others [2012] UKFTT 157(TC)*).

31. The appeal is therefore struck out.

35 32. 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.

5

**MICHAEL CONNELL
TRIBUNAL JUDGE**

RELEASE DATE: 24 MAY 2016

10