TC07796

INCOME TAX – PAYE – HMRC informing Appellant of figure for "previous pay" relating to an employee's earlier employment in previous tax year – Appellant not including that figure on deductions working sheet – Reg 80 determination on basis that tax due under Reg 68 for failure to operate employee's code – Reg 68 only applies to non-RTI employers - whether determination valid – held, no - whether statutory basis for requirement to include previous pay – held, no – reasonable care in any event – appeal allowed – HMRC's provision of out-of-date legislation and post-dated guidance.

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/04655

BETWEEN

SCI-TEMPS LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE ANNE REDSTON

The Tribunal determined the appeal on 22 July 2020 without a hearing with the consent of both parties under the provisions of Rule 29 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The earlier hearing was cancelled because of the coronavirus pandemic and the parties agreed that the appeal should be determined in this way.

DECISION

INTRODUCTION

1. This decision is about a PAYE dispute between Sci-Temps Ltd ("the Company") and HM Revenue and Customs ("HMRC").

2. In 2015-16, an employee ("Ms A") joined the Company. On 8 April 2016, HMRC changed her PAYE code, and the Company implemented that change.

3. On 9 September 2016, HMRC changed Ms A's code again, and this too was implemented by the Company. At the end of the notification was the heading "Previous Pay and Tax Details" followed by "Previous Pay" of £3,144 and "Previous Tax" of £0. These figures related to an earlier employment of Ms A, before she joined the Company.

4. The Company did not include those figures in its deductions working sheet because:

   (1) it had assumed the "previous pay" figure referred to Ms A's earnings from her employment with the Company during the current tax year; and

   (2) given that Ms A had begun work for it in the previous tax year, the Company was not expecting HMRC to provide it with earnings figures for an earlier employment, and to require that those figures be added to its deductions working sheet.

5. Ms A underpaid tax of £629 in 2016-17. HMRC initially sought to collect this sum from Ms A, and subsequently from the Company, by way of a determination made under Reg 80 of the Pay As You Earn Regs 2003 ("the PAYE Regs") for a failure to comply with Reg 68. The Company appealed.

6. I found as follows:

   (1) Reg 68 only applies to employers who are not required to operate Real Time Information ("RTI"). The Company was an RTI employer. HMRC are able to issue Reg 80 determinations to RTI employers, but the legal requirements are different. The determination issued to the Company was therefore invalid;

   (2) Even had that not been the position, the Company had not failed to comply with its obligation to operate the "code" issued in respect of Ms A, as HMRC contended. In the PAYE Regs "code" is a defined term, namely "a combination of letters, numbers or both" or "one of the special codes, whether expressed in words or represented by a combination of letters, numbers or both". The information about previous pay is not part of the code. HMRC provided no statutory basis to support their case that, in addition to operating the code, an employer also has a legal obligation to include in its deductions working sheet, the employee's pay and tax for a previous tax year. From my own review of the regulations, I identified two situations where that was the position, but neither was relevant on the facts of this case.

   (3) Had the determination been valid, and had the Company failed to comply with a legal obligation, I would in any event have cancelled the determination and required HMRC to issue a direction under Reg 72 on the basis that the Company had acted in good faith and taken reasonable care.

7. Pending the resolution of this dispute, the Company paid HMRC the tax of £629 and asked for it to be refunded were to succeed before the Tribunal. The Company has now won its appeal and the £629 is therefore to be repaid by HMRC to the Company.

HMRC's legislation and documents

8. I was not assisted in coming to my decision by the Bundle of authorities provided by HMRC. This contained the originally published legislation and regulations, rather than those which applied at the relevant time, despite each document being headed with the warning that "this is the original version (as it was originally enacted)".

9. In particular I was provided with extracts from:

(1) the 1970 version of the Taxes Management Act ("TMA"), including:

(a) the original six year ordinary time limit under TMA s 34 (changed to a four year time limit by Finance Act 2008);

(b) references to hearings before the General and Special Commissioners (rather than hearings before the Tribunal) under TMA s 50; and

(2) the 2003 version of the PAYE Regs, despite the fact that these Regulations have been frequently amended. One of these amendments was Reg 72A, introduced by SI 2004/851 with effect from 12 April 2004, which was in issue between the parties. No copy of that Regulation was provided. Although HMRC's skeleton included the heading "Regulation 72A Income Tax (PAYE) Regulations 2003", this was followed by a citation from Reg 72, not Reg 72A.

10. As a result I had to locate for myself the legislation and regulations in force at the relevant time.

11. The Bundle also included a page from HMRC guidance dated 2 April 2020, on which HMRC sought to rely in the context of its submissions on whether the Company had taken reasonable care. I have placed no reliance on that guidance, which was published after the date of all the events with which this appeal is concerned.

Hearing on the papers and anonymisation

12. The original hearing of the Company's appeal was cancelled because of the CV19 pandemic. Both parties consented to the appeal being determined on the papers. I considered that the matter was one which could be so decided, and that it was in the interests of justice do so.

13. Neither party suggested that the employee whose tax was underpaid should be joined to this appeal. I agreed that this was not necessary, as the issues to be decided concerned the legal obligations on the Company, and whether it had acted reasonably. However, as the employee was not a party to the appeal, I also decided that it was not in the interests of justice for her to be named in this decision and have therefore referred to her as "Ms A" throughout.

THE DOCUMENTS

14. HMRC provided with a Bundle of documents which contained 62 numbered pages. These included:

(1) various communications between HMRC and the Company, many of which are referred to in the main body of this decision notice; and

(2) the Company's grounds of appeal and HMRC's Statement of Case.

15. On the basis of the evidence within those documents, I make the findings of fact set out in the following part of this decision.

FINDINGS OF FACT

16. The Company is an employment agency. It began operating PAYE from 1 October 2003 and has an exemplary record. From 2014-15 the Company had to comply with its PAYE obligations using RTI and so became a "RTI employer".

17. Ms A joined the Company as an employee on 16 November 2015, so in the course of the tax year 2015-16. This was her only employment during the remainder of that tax year and all of 2016-17.

18. On 8 April 2016, HMRC issued the Company with notice in relation to Ms A for the tax year 2016-17. The notice stated that it was a "manual code change" and required that a tax code of 303T be operated on a cumulative basis. It also said that that Ms A's "estimated pay" was £3,034 and the "balance of tax allowances" was also £3,034. The Company correctly operated code 303T in relation to Ms A from April 2016.

19. On 9 September 2016, Ms A called HMRC. The Company asked HMRC what had occurred during this call, but HMRC refused to reveal this, citing data protection law. The Tribunal infers from the facts found in the following paragraph that Ms A informed HMRC that her annual earnings from the Company were likely to be £6,178.

20. As a result of that call, HMRC made an internal note that Ms A's "estimated pay" had been "updated" and a "new tax code issued". On the same day, HMRC issued the Company with a further "manual code change". This amended Ms A's code from 303T to 1100L Under the heading "allowances" was "personal allowances £11,000", and "estimated pay" was increased to £6,178. At the bottom of the document is the following:

> **"Previous Pay and Tax Details**
>
> Previous Pay 3144
>
> Previous tax 0.00"

21. The Company changed Ms A's tax code from 303T to 1100L, but the employee responsible for operating the payroll did not include the "previous pay" in the deductions working sheet. This was because that person:

(1) took the figure to be a reference to Ms A's pay to date in her employment with the Company during the first part of 2016-17; and

(2) was not expecting the coding notice to include "previous pay" from an earlier employment, given that Ms A had been with the Company for the whole of the current tax year.

22. After the end of the 2016-17 tax year, HMRC identified a shortfall of £629 in Ms A's tax for that year and sought to recover that sum from her. On 9 November 2016, Ms A called HMRC and said she was not responsible for the underpayment.

23. On 28 March 2018, HMRC wrote to the Company, saying "it appears you didn't take off enough PAYE tax from the earnings paid to Ms A for the tax year 2016 to 2017". Under that text is the box set out overleaf:

Description	Amount	Tax
In previous employment	£3,144	£0.00
In this employment	£12,638	£325.60
Total employment	**£15,782**	**£325.60**
Less tax allowances	£11,000	
Taxable pay	£4,782	
Total tax due		£954.60
Less tax already paid		£325.60
Tax still owed		**£629.00**

24. The letter continued:

> "we think this [shortfall] is because you failed to operate an authorised tax code. We sent tax code 1100L with previous pay and tax on 11 September 2016. You operated tax code 1100L but omitted the previous pay and tax."

25. The letter went on to say that the £629 was to be paid to HMRC by the Company. Various correspondence ensued, throughout which HMRC consistently referred to the Company having failed to comply with Reg 68 of the PAYE Regs.

26. On 9 August 2019, Mr Ewan Eaton, director of the Company, wrote to HMRC, saying that Ms A:

> "had been employed by us since before the start of the 2016/17 tax year, so we are still at a loss as to why any previous earnings should appear on the tax code notice we received at all, as all her earnings from 6 April onwards would be accounted for in our payroll."

27. As the Company did not pay the £629, on 26 February 2019, HMRC issued a determination under Reg 80 of the PAYE Regs. This gives a figure of £629 and then says:

> "the tax due under Regulation 68 of the Income Tax (Pay As You Earn) Regulations 2003 is shown above. The tax has not been paid to HMRC…"

28. The Company appealed, the appeal was rejected, and on statutory review, HMRC upheld the decision to issue the determination, saying "you did not comply with your responsibilities to…make the required payments in accordance with Regulation 68 of the PAYE Regulations". The Company notified its appeal to the Tribunal within the statutory time limit.

THE TRIBUNAL'S JURISDICTION AND THE ISSUES

29. I first set out the Tribunal's jurisdiction in relation to appeals against Reg 80 determinations and then the issues for consideration.

The Tribunal's jurisdiction

30. Reg 80(5) provides that:

> "A determination under this regulation is subject to Parts 4, 5, 5A and 6 of TMA (assessment, appeals, collection and recovery) as if
>
> (*a*) the determination were an assessment, and

(*b*) the amount of tax determined were income tax charged on the employer,

and those Parts of that Act apply accordingly with any necessary modifications."

31. Part V of Taxes Management Act 1970 ("TMA") includes s 50, and that section therefore applies to the determination. It provides, so far as relevant to this case, as follows:

"(6) If, on an appeal notified to the tribunal, the tribunal decides

(a)-(b) …

(c) that the appellant is overcharged by an assessment other than a self-assessment,

the assessment…shall be reduced accordingly, but otherwise the assessment…shall stand good.

(7) If, on an appeal notified to the tribunal, the tribunal decides

(a)-(b) …

(c) that the appellant is undercharged by an assessment other than a self-assessment,

the assessment…shall be increased accordingly."

32. The Tribunal therefore has the duty to decide whether the Company has been overcharged by the determination, undercharged by the determination, or neither, and to reduce, increase or confirm the determination in consequence.

The issues

33. I considered three issues:

(1) whether the determination was legally valid;

(2) whether the Company had failed to comply with a relevant PAYE obligation; and

(3) whether the Company acted with reasonable care.

WHETHER THE DETERMINATION WAS VALID

34. The determination was made under Reg 80, and the text refers to a failure to comply with Reg 68. However, that Regulation only applies to non-RTI employers, and the Company was an RTI employer.

35. Neither party had made any submissions on this point. I considered whether to remit the case back to the parties, but decided it was not in the interests of justice to do so, given the relatively low amount involved, and that, whether or not I am right in my analysis below, the Appellant would in any event have succeeded in its appeal for the reasons given later in this judgment.

Regulation 80

36. The determination was made under Reg 80. This reads:

"Determination of unpaid tax and appeal against determination

(1) This regulation applies if it appears to HMRC that there may be tax payable for a tax year under regulation 67G, as adjusted by regulation 67H(2) where appropriate, or 68 by an employer which has neither been—

(*a*) paid to HMRC, nor

(*b*) certified by HMRC under regulation 75A, 76, 77, 78 or 79.

(1A) In paragraph (1), the reference to tax payable for a tax year under regulation 67G includes a reference to any amount the employer was liable to deduct from employees during the tax year whether or not that amount was included in any return under regulation 67B (real time returns of information about relevant payments) or 67D (exceptions to regulation 67B)

(2) HMRC may determine the amount of that tax to the best of their judgment, and serve notice of their determination on the employer.

(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.

(3A) A determination under this regulation must not include tax in respect of which a direction under regulation 72F has been made.

(4) A determination under this regulation may—

(a) cover the tax payable by the employer under regulation 67G as adjusted by regulation 67H(2) where appropriate, or 68 for any one or more tax periods in a tax year, and

(b) extend to the whole of that tax, or to such part of it as is payable in respect of—

(i) a class or classes of employees specified in the notice of determination (without naming the individual employees), or

(ii) one or more named employees specified in the notice.

(5) A determination under this regulation is subject to Parts 4, 5, 5A and 6 of TMA (assessment, appeals, collection and recovery) as if—

(a) the determination were an assessment, and

(b) the amount of tax determined were income tax charged on the employer,

and those Parts of that Act apply accordingly with any necessary modifications."

37. Reg 80(1) and (4)(a) provide that a determination can be made under this regulation for either a failure to comply with Reg 67G, or a failure to comply with Reg 68. As is clear from the text of the regulations set out below, Reg 67G applies to RTI employers and Reg 68 applies to non-RTI employers. Before the introduction of RTI, Reg 68 applied to all employers.

Regulation 68

38. Reg 68 is headed "Periodic payments to and recoveries from HMRC: non-Real Time Information employers" and reads:

"(1) This regulation applies to determine how much a non-Real Time Information employer must pay or can recover for a tax period.

(2) If A exceeds B, the employer must pay the excess to the Inland Revenue.

(3) …

(4) In this Regulation—

A is—

(*a*) the total amount of tax which the employer was liable to deduct from relevant payments made by the employer in the tax period…

B is the total amount which the employer was liable to repay in the tax period."

39. This is straightforward: an employer who does not pay HMRC the amount which he is "liable to deduct" from the employee's earnings must pay that excess to HMRC.

Reg 67G

40. Reg 67G is headed "Payments to and recoveries from HMRC for each tax period by Real Time Information employers". It reads:

"(1) For each tax period, a Real Time Information employer must pay to, or may recover from, HMRC the amount arrived at under the formula in paragraph (4).

(2) If the amount arrived at under the formula in paragraph (4) is a positive amount, the employer must pay the excess to HMRC.

(3) …

(4) The formula in this paragraph is A–B, where—

A is the sum total of the relevant amounts for each of the employer's employees, and

B is amount A for the previous tax period in the tax year, if any.

(5) For the purposes of paragraph (4), a 'relevant amount' is the amount shown under paragraph 17 of Schedule A1 (real time returns) for an employee in the most recent return made in the tax year by the employer under regulation 67B (real time returns of information about relevant payments) or 67D (exceptions to regulation 67B) which contains information about that employee).

(5A)-(6)…

(7) This regulation is subject to regulations 67H (payments to and recoveries from HMRC for each tax period by Real Time Information employers: returns under regulation 67E(6))…and 75B (certificates under regulation 75A: excess payments)."

41. Reg 67G(1) thus provides that RTI employers must pay HMRC "the sum total of the relevant amounts" for each employee. Reg 67(5) defines the term "relevant amount" as "the amount shown under paragraph 17 of Schedule A1". That Schedule sets out the information required to be provided by the employer on a RTI return, and the amount at para 17 is "the total net tax **deducted** in relation to this employment" (my emphasis). Thus, to comply with this part of Reg 67G, it is only necessary that the employer pay over the tax actually deducted, not the amount the employer is liable to deduct.

42. However, para (7) of the Regulation makes it also subject to Reg 75A. This is headed "Power of HMRC to issue a notice and certificate in cases where regulation 67B or 67D returns are not made, etc" and includes the following provisions (again, my emphasis):

"(1) This regulation applies if, 17 days or more after the end of a tax period, condition A or B or C is met.

(2) Condition A is that…

(3) Condition B is that—

(a) a Real Time Information employer has paid an amount of tax for that tax period, whether or not the amount is the amount due under regulation 67G (payments to and recoveries from HMRC for each tax period by Real Time Information employers) as adjusted by regulation 67H(2) where appropriate, but

(b) HMRC are not satisfied, after seeking the employer's explanation, **that the amount due under regulation 67G** as adjusted by regulation 67H(2) where appropriate **is the amount which would have been due had any tax returned under regulation 67B** or 67D **as deducted from each of the employer's employees during the period been the amount that the employer was liable to deduct**.

(4) Condition C is that a Real Time Information employer has not paid to HMRC the amount of tax due under regulation 67G…

(5) HMRC, on consideration of the matters specified in paragraph (6), may—

(a) specify to the best of their judgment, the amount of tax, or a combined amount, they consider the employer is liable to pay, and

(b) serve notice on the employer requiring payment of that amount within 7 days of the issue of the notice ("the notice period").

(6) The matters specified in this paragraph are—

(a) the employer's record of past payments, whether of tax or combined amounts,

(b) any returns made by the employer under regulation 67B or 67D in respect of the tax period,

(c) any returns made by the employer under regulation 67B or 67D in respect of earlier tax periods,

(d) any returns made by the employer under regulation 67E(6),

(e) any returns made by the employer under regulation 73 (annual return of relevant payments liable to deduction of tax (Forms P35 and P14)) in relation to previous tax years.

…

(10) If the amount specified in the notice, or any part of it, is not paid during the notice period—

(a) the amount unpaid is treated as an amount of tax or as including an **amount of tax which the employer was liable to pay for that tax period under regulation 67G**, where appropriate, and

(b) HMRC may prepare a certificate showing how much of that amount remains unpaid."

43. Reg 75A Condition B therefore changes the "tax actually deducted" figure arrived at by Reg 67(1) and (4), read with Sch 1A, by deeming it to include the "amount of tax which the employer was **liable to** pay".

44. However, for that deeming provision to take effect, the employer must have (a) received a notice issued under Reg 75A and (b) failed to comply with that notice within the specified 7 day period. It is only after that process has been completed that "an amount of tax which the employer was liable to pay" is added to the amount actually paid for the purposes of Reg 67G,

and those steps are necessary precursors before there can be any failure to comply with Reg 67G. Unless or until there has been such a failure, there is no basis for a Reg 80 determination.

Conclusion

45. HMRC did not go through the process required by Reg 75A and so had not created a deemed liability which could be collected using a Reg 80 determination. It follows that the determination is invalid.

46. As a result, in the exercise of my jurisdiction under TMA s 50(7), I decide that the Company has been " overcharged by an assessment other than a self-assessment" and reduce the Reg 80 determination to nil. The Company's appeal is therefore allowed.

47. However, given the lack of submissions on this issue and in case I am wrong, I have gone on to consider whether the Company did fail to comply with the PAYE Regulations, so as to give HMRC the basis for issuing a Reg 80 determination.

WHETHER THE COMPANY FAILED TO COMPLY WITH THE PAYE REGS

The parties' submissions

48. HMRC's case was that the Company had "failed to correctly operate the tax code issued on 9 September 2016", and as a result had failed to deduct the amount of tax which it was liable to deduct from Ms A's earnings. HMRC relied on Regs 8, 20, 21 of the PAYE Regs: these provisions are set out later in this decision.

49. The Company was unrepresented and did not raise any challenges to these submissions; its defence rested on "reasonable care".

The regulations about codes

50. Reg 2 provides that in the PAYE Regulations, unless the context otherwise requires, the word "code" and "related expressions" have the meanings given in Reg 7, and "employee's code" has the meaning given in Reg 8.

51. Reg 7 is headed "Meaning of 'code' etc", and para 1 reads:

> "In these Regulations, 'code' means
>
> (a) a combination of letters, numbers or both for use in accordance with the tax tables to establish free pay, additional pay, total free pay to date or total additional pay to date;
>
> (b) any of the special codes (whether expressed in words or represented by a combination of letters, numbers or both) for use in accordance with the tax tables or otherwise."

52. The other paragraphs of Reg 7 explain what is meant by a K code, a C code and an S code, and also explain the "special" codes, which include the basic rate code and the higher rate code.

53. Reg 8 is headed "Employee's code" and reads:

> "(1) An employee's code is the code
>
> (a) issued to an employer for use in respect of the employee for a tax year,
>
> (b) applied by these Regulations for use by an employer in respect of the employee, or

(c) issued to an employee in accordance with regulation 142 (direct collection).

(2) A code is issued to an employer if it is contained in a document that is sent

(a) to the employer, or

(b) to a person acting on behalf of the employer,

by the Inland Revenue, and any code so issued is received by the employer for the purposes of these Regulations."

54. Reg 19 is headed "Amendment of code" and reads:

"(1) Paragraph (2) applies if the code for use by an employer in respect of an employee is found to be inappropriate because the actual circumstances are different from the circumstances by reference to which it was determined, whether by the Inland Revenue or the tribunal.

(2) The Inland Revenue may, and if required by the employee must, amend the code by reference to the actual circumstances."

55. Reg 20 is headed "Notice to employer of amended code" and reads:

"(1) If the code for use by an employer in respect of an employee is amended after notice of it has been issued to the employer, the Inland Revenue must issue the amended code to the employer.

(2) An amended code is issued to an employer if it is contained in a document that is sent to the employer or a person acting on behalf of the employer by the Inland Revenue, and any code so issued is received by the employer for the purposes of these Regulations.

(3) On making any subsequent relevant payment to the employee, the employer must deduct or repay tax by reference to the amended code."

56. Reg 21 is headed "Deduction and repayment of tax by reference to employee's code" and reads:

"(1) On making a relevant payment to an employee during a tax year, an employer must deduct or repay tax in accordance with these Regulations by reference to the employee's code, if the employer has one for the employee.

(2) The employer must deduct or repay tax by reference to the employee's code, even if the code is the subject of an objection or appeal."

What these provisions require

57. The above provisions require the employer to use the "code" provided by HMRC when making any payment of earnings to an employee. It is clear from Regs 1, 7 and 8 that the "code" is "a combination of letters, numbers or both" or "one of the special codes, whether expressed in words or represented by a combination of letters, numbers or both". The information about "previous pay and tax details" is not part of the "code".

58. The code provided for Ms A on 8 April 2016 was 303T; the amended code issued on 11 September 2016 was 1100L. Those codes were implemented by the Company, as required by the PAYE Regs.

59. All of the provisions on which HMRC relied in putting their case to the Tribunal relate to the Company's alleged failure to apply the code, and there was no such failure.

Other provisions

60. I also considered other provisions within the PAYE Regs, in addition to those on which reliance was placed by HMRC.

Reg 43

61. Reg 43 is headed "Form P45 for current tax year". Reg 43(3) provides that when a new employee is taken on part way through a tax year, the employer is required to "record in the deductions working sheet the total payments to date (if any) shown in Parts 2 and 3 of Form P45", providing that the P45 also shows that the cumulative basis was being used. By Reg 43(9), these previous earnings are to be treated "as if they were relevant payments made to the employee by, and tax deducted by, the new employer".

62. Thus, in the tax year an employee begins her employment, the employer has a statutory obligation to include the previous pay shown on her P45 in the deductions working sheet, and having done so, those earlier earnings payments are deemed to have been made by the new employer.

Reg 53

63. Reg 53 is headed "No P45: subsequent procedure on issue of employee's code". As that heading indicates, it applies where the employee did not provide a P45, so that the employer operates an emergency code, and HMRC subsequently provide the employer with the first code for that employee.

64. Reg 53(2) requires the employer record on the deductions working sheet "any total payments to date notified to the employer by the Inland Revenue", which are then "treated as if they represented relevant payments made by the employer".

65. The purpose of that provision is thus to put the employee in essentially similar position to one who had provided the employer with a P45, but with the previous earnings figure provided by HMRC along with the initial code.

Reg 66

66. Reg 66 is headed "Deductions working sheets" and sets out detailed provisions about how they are to be operated in order to work out how much tax to deduct from the employee's earnings. There is no requirement to take into account earnings notified to the employer by HMRC which arose in that previous year.

Conclusions from the above

67. It follows from the above that there is no legal obligation on an employer to include "previous pay" in a deductions working sheet unless either (a) the figure has come from the employee's P45 in relation to the previous employment, or (b) there is no P45, in which case the figure is provided to the employer by HMRC at the same time as they provide the first code..

68. Neither of these situations applied to the "previous pay" figure provided to the Company by HMRC on 9 September 2016 because:

(1) the figure self-evidently was not extracted by the Company from Ms A's P45; and

(2) the code issued on 9 September 2016 was not the first HMRC code issued for this employment, but instead a "manual code change" following one issued on 8 April 2016, and that itself was a manual code change from an earlier code.

69. It follows from the above that the Company had no legal obligation to include the previous pay figure notified on 9 September 2016 in its deductions working sheet.

Other powers

70. Reg 14(1)(d) gives HMRC a specific power to amend coding notices so as to collect tax on a previous year's earnings. Once HMRC had identified that Ms A had 2015-16 earnings which had not been taxed, HMRC could have used that power to change her tax code so as to collect the underpaid tax. The Company would then have been required to use that code in making deductions from Ms A's earnings.

Conclusion

71. It follows from the above that the PAYE Regs did not contain a requirement that the Company include Ms A's previous year's earnings in its deductions working sheet, and thus there was no failure to comply with those regulations, and no basis for the Reg 80 determination.

72. Had I not already decided that the determination was invalid, I would have exercised my jurisdiction under TMA s 50(7), to decide that the Company had been " overcharged by an assessment other than a self-assessment", and reduced the Reg 80 determination to nil, so as to allow the Company's appeal.

REASONABLE CARE

73. As a result of the above analysis of the technical provisions, the issue of whether the Company exercised reasonable care falls away. However, as both parties made submissions on that issues, I deal with them briefly, on the assumption that there was (contrary to my findings above) both a valid Reg 80 determination and an obligation on the Company include Ms A's previous year's pay in the deductions working sheet.

Regulations 72 and 72A

74. Reg 72 is headed "Recovery from employee of tax not deducted by employer" and reads:

> "(1) This regulation applies if—
>
> (a) it appears to the Inland Revenue that the deductible amount exceeds the amount actually deducted, and
>
> (b) condition A or B is met.
>
> (2) In this regulation…
>
> 'the deductible amount' is the amount which an employer was liable to deduct from relevant payments made to an employee in a tax period;
>
> 'the amount actually deducted' is the amount actually deducted by the employer from relevant payments made to that employee during that tax period;
>
> 'the excess' means the amount by which the deductible amount exceeds the amount actually deducted.
>
> (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….

(5) The Inland Revenue may direct that the employer is not liable to pay the excess to the Inland Revenue.

(5A) Any direction under paragraph (5) must be made by notice ('the direction notice'), stating the date the notice was issued, to—

(a) the employer and the employee if condition A is met; …

(b) the employee if condition B is met.

(5B) A notice need not be issued to the employee under paragraph (5A)(*a*) if neither the Inland Revenue nor the employer are aware of the employee's address or last known address…"

75. Reg 72A is headed "Employer's request for a direction and appeal against refusal" and reads:

"(1) In relation to condition A in regulation 72(3), the employer may by notice to the Inland Revenue ('the notice of request') request that the Inland Revenue make a direction under regulation 72(5).

(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.

(3) The Inland Revenue may refuse the employer's request under paragraph (1) by notice to the employer ('the refusal notice') stating—

(a) the grounds for the refusal, and

(b) the date on which the refusal notice was issued.

(4) The employer may appeal against the refusal notice—

(a) by notice to the Inland Revenue,

(b) within 30 days of the issue of the refusal notice,

(c) specifying the grounds of the appeal.

(5) For the purpose of paragraph (4) the grounds of appeal are that—

(a) the employer did take reasonable care to comply with these Regulations, and

(b) the failure to deduct the excess was due to an error made in good faith.

(6) If on appeal under paragraph (4) that is notified to the tribunal it appears to the tribunal that the refusal notice should not have been issued the tribunal may direct that the Inland Revenue make a direction under regulation 72(5) in an amount the tribunal determines is the excess for one or more tax periods falling within the relevant tax year."

Reasonable care

76. In *Perrin v HMRC* [2018] UKUT 156 ("*Perrin*") the Upper Tribunal ("UT") considered whether the appellant had a "reasonable excuse" in the context of a penalty issued under Finance Act 2009, Schedule 55. At [81] of that judgment, the UT also set out a recommended process for this Tribunal when considering whether a person has a reasonable excuse:

> (1) First, establish what facts the taxpayer asserts give rise to a reasonable excuse (this may include the belief, acts or omissions of the taxpayer or any other person, the taxpayer's own experience or relevant attributes, the situation of the taxpayer at any relevant time and any other relevant external facts).
>
> (2) Second, decide which of those facts are proven.
>
> (3) Third, decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default and the time when that objectively reasonable excuse ceased. In doing so, the Tribunal should take into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times. It might assist the Tribunal, in this context, to ask itself the question "was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?"

77. At [82] the UT added:

> "One situation that can sometimes cause difficulties is when the taxpayer's asserted reasonable excuse is purely that he/she did not know of the particular requirement that has been shown to have been breached. It is a much-cited aphorism that "ignorance of the law is no excuse", and on occasion this has been given as a reason why the defence of reasonable excuse cannot be available in such circumstances. We see no basis for this argument. Some requirements of the law are well-known, simple and straightforward but others are much less so. It will be a matter of judgment for the FTT in each case whether it was objectively reasonable for the particular taxpayer, in the circumstances of the case, to have been ignorant of the requirement in question, and for how long."

78. In *Perrin* the UT was considering whether there was a "reasonable excuse". The wording used in Reg 72 and 72A is "reasonable care" but the two concepts are essentially identical, and so the same approach should be applied.

Application to the Company

79. It was common ground that the Company had acted in good faith. The issue was whether it had taken reasonable care to comply with the PAYE Regulations. Steps 1 and 2 have been addressed by way of the findings of fact made earlier in this decision.

80. Turning to Step 3, I find that the reasonable person in the position of the Company, whose payroll operative was familiar with PAYE and had diligently applied the provisions for many years, would not have expected HMRC to provide, at the end of a coding notice for a current employee, a figure for an employee's pay in a earlier tax year for a previous employment, and require that the figure be included in the employer's current year's deduction working sheet.

81. That is because a person with experience of PAYE knows that that income tax is an annual tax, calculated on the basis of earnings for each tax year. Although there are specific provisions which, for example, allow losses to be offset against earlier or later years, the normal position is that each year is treated separately.

82. That reasonable person would also know that HMRC has powers to collect tax underpaid in relation to previous year's earnings by making a change to a person's tax code. That person would not expect HMRC to direct such a radical departure from those principles, by way of unexplained figures at the end of a coding notice.

83. If, contrary to my analysis of the law earlier in this decision, the PAYE Regulations contain a requirement that an employer is required to include previous year's earnings from a different employment in its deductions working sheet, I would have found it reasonable for the operative (and thus the Company) to be ignorant of that provision. No such regulation was identified by HMRC officers who communicated with the Company, or by HMRC's Solicitor's Office which drafted the Statement of Case and the skeleton argument for this appeal; it has also eluded me.

84. The operative in this case also had a reasonable basis for assuming that the figure of £3,144 referred to Ms A's earnings from the Company in that tax year. It was approximately 50% of the £6,178 annual pay Ms A was expecting to receive in 2016-17, and the new coding notice arrived in September, almost half way through the tax year.

85. Thus, had it been necessary to do so, I would have directed that HMRC vacate the Reg 80 determination, and instead make a direction under Reg 72(5) on the basis that the Company had taken reasonable care to comply with the PAYE regulations and had acted in good faith, and so has no liability to pay HMRC the amount of £629.

DECISION AND APPEAL RIGHTS

86. For the reasons set out above, the Company's appeal is allowed. The Reg 80 assessment is set aside.

87. This document contains full findings of fact and reasons for the decision. If HMRC are dissatisfied with this decision, they have 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.

ANNE REDSTON

TRIBUNAL JUDGE

RELEASE DATE: 31 JULY 2020