TC04126

Appeal number: TC/2012/01464

PROCEDURE – INCOME TAX – Insufficient tax deducted via PAYE – Whether HMRC finding that Appellant liable to pay the difference is an "assessment" with a right of appeal to the Tribunal – No – TMA s 31(1)(d) – Appeal struck out

FIRST-TIER TRIBUNAL
TAX CHAMBER

JAMES MOYES **Appellant**

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER STAKER
MS SONIA GABLE

Sitting in public in London on 3 October 2014

Ms Rebecca Murray, counsel, for the Appellant

Mr Tony Burke for the Respondents

DECISION

Introduction

1. The Appellant seeks to appeal against a finding contained in a letter from HMRC dated 8 November 2011. The finding is that the Appellant is liable to pay the difference between the amount of tax to which he liable in accordance with his self-assessment tax returns as submitted by him for tax years 2002-03 to 2004-05 inclusive, and the amount of tax for those years that was deducted by his employer from his earnings pursuant to the PAYE system. It is common ground that during those tax years the Appellant's employer applied a tax code for the Appellant that resulted in him paying less tax under the PAYE system than the tax to which he was liable in accordance with his self-assessment tax returns.

2. HMRC dispute the jurisdiction of the Tribunal to hear the appeal, on the basis that there has been no decision by HMRC in respect of which there is a statutory right of appeal to the Tribunal. HMRC also argue in the alternative that the subject matter of this appeal has already been determined by the Tribunal in an earlier appeal, such that the matter is *res judicata,* and that any possible appeal is in any event out of time.

Legislation relied upon by the Appellant

3. The principal legislative provisions relied upon by the Appellant are set out in the annex to this decision.

Background facts

4. Save in respect of the specific matters referred to below, there was little dispute between the parties in relation to the facts. On the basis of the evidence, the Tribunal makes the following background findings of fact.

5. In about December 2001, the Appellant, who had previously worked for a different employer, took up employment with Collins Stewart Europe Ltd ("Collins Stewart"). From the time of commencement of the new employment until the end of the 2001-02 tax year, Collins Stewart deducted PAYE tax from the Appellant's pay, operating tax code "BR M1". Thereafter, until June 2005, Collins Stewart operated tax code "BR". From July until September 2005, Collins Stewart operated tax code "489L", and then from October 2005 until the end of the 2005-06 tax year operated tax code "433L".

6. The effect of tax codes "BR M1" and "BR" was that PAYE tax was deducted from all of the Appellant's earnings at the basic rate. In the case of a taxpayer who is not a higher rate taxpayer, this tax code can result in an overpayment of tax by the employee, since it does not take into account the tax-free personal allowance. In the case of this Appellant, it resulted in a significant underpayment of tax, as it did not take into account that a portion of his earnings was taxable at the higher rate.

7. On 28 April 2005, the Appellant's newly appointed agent telephoned HMRC. An HMRC file note indicates that in this telephone call the agent stated that he was "surprised to know extent of outstanding matters".

8. On 6 May 2005, the agent rang HMRC again, noting that the Appellant was on tax code "BR" and requesting that a new tax code "489L" be issued. This was done: as noted above, the Appellant's employer began operating the latter tax code from July 2005.

9. The Appellant's self-assessment tax returns for 2002-03 and 2003-04 were submitted on 29 July 2005. His self-assessment tax return for 2004-05 was submitted on 18 January 2006.

10. In a letter to HMRC dated 16 May 2006, the Appellant's solicitor took the position that the Appellant was not liable to account for the under-deduction of tax by Collins Stewart, and that Collins Stewart was liable for clearing the outstanding amount. The letter argued that Condition A in reg 72(3) of the Income Tax (Pay As You Earn) Regulations 2003 (the "2003 Regulations") was not satisfied because the operation by the employer of PAYE on a BR code for such a long period was inconsistent with the exercise of due care, given that the Appellant was obviously a higher rate taxpayer. The letter further argued that Condition B in reg 72(4) of the 2003 Regulations was not satisfied because the Appellant was unaware of his employer's failure to deduct the correct amount of tax until he instructed his new agent for the completion of his 2004-05 tax return.

11. In a letter to Collins Stewart dated 7 August 2006, HMRC stated that they had no evidence that HMRC had ever issued code "BR" to Collins Stewart in respect of the Appellant, stated that "indeed the correct code of 461L was in operation for 2002-2003", and requested "an explanation as to how the code BR came to be operated for the 2001-02 tax year as it is imperative that I get to the bottom of the matter".

12. In a letter to HMRC dated 17 August 2006, Collins Stewart responded that "I am afraid that I cannot find any documentation to explain why a tax code BR was used in the 2001-02 tax year", and observed that HMRC had requested Collins Stewart to change the Appellant's tax code in June 2005 and October 2005.

13. In a letter to Collins Stewart dated 11 May 2007, HMRC stated that one explanation was that no P45 was handed in, nor any P46 ever completed for the Appellant. The letter requested Collins Stewart to explain why no P46 was ever submitted for the Appellant, and to explain why tax code "BR" was operated when the Appellant was employed full time.

14. In a letter to HMRC dated 21 May 2007, Collins Stewart stated that it appeared that a P45 was not given to them, nor a P46 completed by the Appellant on taking up his employment with them, and that "I am afraid that I do not have reasons for this as there is no documentation and employees who have been dealing with this at the time have since left the company". The letter added "Also, at the this time our payroll was managed externally so I do not have access to the level of information normally

expected from an in-house department". The letter said that it was company policy to request a P45 or P46 upon joining, but that if none was received code "BR" would be operated, and it was the responsibility of the employee to check that their payslips and P60 were correct.

15. In a letter to the Appellant's agent dated 26 September 2007, HMRC took the position that the Appellant was at fault for not handing in a P45 or completing a P46 when commencing his employment with Collins Stewart, and that in the circumstances Collins Stewart acted correctly in operating code "BR" and was not responsible for the underpayment.

16. In a letter to HMRC dated 17 December 2007, the Appellant's solicitor reiterated the position in their earlier 16 May 2006 letter that the Appellant was not liable for the underpayment. On behalf of the Appellant the position was taken that the employer was at fault for not submitting a P46 in circumstances where there was no P45, and in operating code "BR" when it was obvious to the employer that the Appellant was a full time employee.

17. There followed further exchanges of correspondence and telephone conversations between HMRC and the appellant's agents and solicitors, in which the parties maintained their positions. It is unnecessary to set out details of all of these exchanges. In this correspondence the Appellant's agent began also to press an argument that the statement in the 7 August 2006 HMRC letter, to the effect that "indeed the correct code of 461L was in operation for 2002-2003", suggested that HMRC had in fact issued a tax code to Collins Stewart for that year which Collins Stewart had failed to operate.

18. One of the items in this series of correspondence was a letter from HMRC to the Appellant's agent dated 29 January 2009. That letter took the position that Collins Stewart correctly deducted PAYE at the basic rate by virtue of reg 31 of the Income Tax (Employment) Regulations 1993 (the "1993 Regulations") and that there was therefore no under-deduction of tax by the employer, and that any belief by the Appellant at the time that he was paying the correct amount of tax was not reasonable.

19. On 16 June 2009, the Appellant commenced proceedings in this Tribunal, in matter number TC/2009/10889. In those proceedings, the Appellant was represented by his agent. The grounds of appeal were essentially as follows. The Appellant was not liable for the underpayment of PAYE in the years in question because he was not a tax professional and was not aware of the underpayment. The fault lay either on the part of Collins Stewart, who "failed to follow the correct PAYE procedures", or HMRC who were "in a position to issue the correct tax code during this period". The notice of appeal stated that the appeal was against a decision of HMRC taken in September 2005 (when HMRC processed the tax returns for the three years in question and raised assessments in respect of these three years), and requested permission to bring a late appeal on the ground that there had been lengthy correspondence in the meantime.

20. On 3 August 2009, HMRC applied to strike out that appeal on the ground that there was no appealable decision, and that the Appellant was in effect seeking to appeal against his own self-assessments.

21. In those proceedings, on 6 January 2010, Judge Avery Jones issued a direction striking out that appeal. Judge Avery Jones found as a fact that when the Appellant commenced his employment with Collins Stewart, he did not have a P45 from his previous employer and that Collins Stewart did not complete and send to HMRC any P46. Judge Avery Jones found that in the circumstances Collins Stewart was required by reg 31 of the 2003 Regulations to deduct tax at the basic rate, regs 29 and 30 being inapplicable. Because the employer had therefore deducted PAYE in accordance with the applicable tax code reg 42 was not in point, and as there was no direction under reg 42 the tax was recoverable from the Appellant.

22. The Appellant applied for permission to appeal against the decision of Judge Avery Jones. Permission to appeal was refused by the First-tier Tribunal on 15 March 2010. In April 2010, the Appellant then applied to the Upper Tribunal for permission to appeal against the decision of Judge Avery Jones. It is not clear exactly what happened to that application. The HMRC skeleton argument dated 19 June 2013 says simply (and the Appellant does not suggest otherwise) that "no appeal against the decision was ever heard by the Upper Tribunal", suggesting that either permission to appeal was refused by the Upper Tribunal or that the application was withdrawn or otherwise not pursued.

23. In the meantime, there followed further correspondence between HMRC and the Appellant's agent. A letter from HMRC to the Appellant's agent dated 7 September 2011 stated:

> According to notes on our system and from memory I can confirm that the PAYE errors unit have ruled on 2 separate occasions that your client's former employers were not at fault in operating code BR. You state in your letter that my colleague informed Collins Stewart that a code of 416L had been issued by HMRC for 2002/3. I had already informed your predecessor … however that the letter was incorrect and that we could not have issued coding notices because the PAYE record was not held in this office at the time. … Furthermore, it had been pointed out previously that had your client submitted his 2011/2 Tax Return on time we would have been aware that he worked for Collins Stewart much earlier and would have then taken the correct action to transfer his record here and issue a correct code. Unfortunately your client did not submit his 2001/2 Tax Return until 29 July 2005.

24. A further letter from HMRC to the Appellant's agent dated 8 November 2011 enclosed a copy of the earlier 20 January 2009 HMRC letter, and referred to the contents of the 7 September 2011 HMRC letter. It stated amongst other matters that:

> … my colleague in her letter dated 7 August 2006 was incorrect in stating that a code had been issued of 416L for 2002/3. She appears to have misunderstood an entry on the record.

25. On 8 December 2011, the Appellant represented by his agent then brought the present Tribunal proceedings. The notice of appeal in these proceedings states that the appeal is against the 8 November 2011 letter of HMRC, and indicates that the ground of appeal is that the Appellant is not liable for the underpayment of tax because under s 59B(8) of the Taxes Management Act 1979 ("TMA") and the PAYE Regulations the amounts ought to have been paid under PAYE by the Appellant's employer Collins Stewart.

The proceedings in this appeal

26. In the present proceedings, HMRC applied to strike out the appeal on the ground that there is no appealable decision in the case, and on other grounds. A hearing on jurisdiction was held in this case on 30 August 2012. At that hearing, the Tribunal decided that it would conduct a single hearing at which it would hear all of the parties' evidence and arguments in relation to jurisdiction, time limits, and *res judicata*, as well as in relation to the merits of the case. Directions were issued accordingly. Following a further hearing on 30 October 2013 and further directions, the rolled up hearing that had been directed took place on 3 October 2013. Both parties were invited by the Tribunal to submit post-hearing submissions on *Bartram v HMRC* [2012] UKUT 184 ("*Bartram UT*"). Post-hearing submissions were received from both parties, and these have been taken into account.

The arguments of the parties

27. In relation to jurisdiction, time limits, and *res judicata*, HMRC argued as follows.

28. This matter is *res judicata*. The Appellant's notice of appeal in TC/2009/10889 states the total amount of tax under appeal, which is identical to the amount under appeal as stated in the notice of appeal in the present proceedings. In both appeals, the amount in dispute arises from the same issue. The matter has already been determined by Judge Avery Jones in TC/2009/10889, who concluded that there was no valid appeal and that the matter was struck out.

29. The proceedings in TC/2009/10889 did not relate just to 2001-02. The notice of appeal in those proceedings makes clear that the appeal related also to 2002-03, 2003-04 and 2004-05 and Judge Avery Jones struck that appeal out in its entirety. Judge Avery Jones found that the employer deducted PAYE correctly in accordance with the PAYE Regulations.

30. In any event, the 8 November 2011 HMRC letter is not an "assessment to tax" for purposes of s 31(1)(d) TMA. The amounts of tax due as stated in the Appellant's notice of appeal are the amounts due under the Appellant's self-assessment. There is no right of appeal against a self-assessment. The amounts stated in the 8 November 2011 HMRC letter as being due from the Appellant were not brought into charge by virtue of that letter, but rather became due as a result of the Appellant's self-assessments for the relevant years. The 8 November 2011 HMRC letter does not fulfil the requirements in s 30A for an assessment. In particular, that letter was not

served on the person being assessed but rather on the Appellant's agent, and does not state a time limit for appealing (s 30A(3) TMA). The 8 November 2011 HMRC letter merely reaffirms the view that HMRC had long been taking. Reliance was placed on *Burton v Revenue & Customs* [2009] UKFTT 320 (TC) ("*Burton FTT*"), upheld [2010] UKUT 252 (TCC), [2010] STC 2410 ("*Burton UT*").

31. In relation to jurisdiction, time limits, and *res judicata*, it was argued on behalf of the Appellant as follows.

32. It is acknowledged that it is essential to the Appellant's case that the 8 November 2011 letter against which the Appellant seeks to appeal is an "assessment to tax" for purposes of s 31(1)(d) TMA. If the Tribunal were to find that that is not the case, the Appellant concedes that there is no appealable decision in this case, and that the Tribunal accordingly lacks jurisdiction.

33. The expression "assessment to tax" in s 31(1)(d) TMA should be given its natural and ordinary meaning, so that a taxpayer has the right to challenge any decision by HMRC that an amount of tax is due and payable, by appealing against that decision to the specialist Tax Tribunal. Otherwise the taxpayer would have no right to challenge an incorrect decision that tax is payable. The possibility of judicial review or of defending bankruptcy proceedings cannot possibly be regarded as a remedy for this purpose. Reliance was placed on *Prince & Ors v Revenue & Customs* [2012] UKFTT 157 (TC) ("*Prince*") at [30].

34. An "assessment" may be a mere calculation of the tax due and payable. Reliance was placed on *Vickerman (Inspector of Taxes) v Mason's Personal Representatives* [1984] STC 231 ("*Vickerman*") and *Hallamshire Industrial Finance Trust v Inland Revenue Commissioners* [1979] 1 WLR 620 ("*Hallamshire*"). It is a "bootstraps" argument for HMRC to contend that the 8 November 2011 letter is not an assessment because it was not notified in accordance with the procedural requirements laid down in s 30 TMA. The provisions specifying the required form for an assessment are for the protection of the taxpayer and should not be used against a taxpayer. Section 114(1) TMA makes clear that it is the effect of an assessment and not its form which matters. It is irrelevant what justification is given by HMRC to explain the assessment or that HMRC relied on the wrong statutory provision (relying on *Smith v Revenue & Customs* [2008] UKSPC SPC00680 and *Vickerman*). The form and statutory justification for the 8 November 2011 HMRC letter are therefore irrelevant.

35. This matter is not *res judicata*. The earlier Tribunal appeal TC/2009/10889 related to a different tax year (2001-02), did not concern tax that should have been deducted in accordance with a PAYE code in force, and was reached on the papers without the benefit of the arguments in the present proceedings.

36. In relation to the merits of the proposed appeal, it was argued on behalf of the Appellant as follows.

37. It is acknowledged that the appeal can succeed on its merits only if the Tribunal finds as a fact that in 2002-03 HMRC issued tax code 416L to the Appellant's employer in relation to the Appellant.

38. If the Tribunal makes this finding of fact, the following consequences flow. If the appropriate PAYE code was issued by HMRC in 2002-03, then as a matter of law, s 59B TMA and regulation 185 of the 2003 Regulations treat the Appellant as having paid the tax that his employer ought to have deducted under PAYE, whether the tax was in fact deducted or not.

39. The Appellant submits that the Tribunal should make this finding of fact on the evidence. In particular, the 7 August 2006 letter from HMRC to the Appellant's employer states that the correct PAYE code of 461L was in operation for 2002-03.

40. In relation to the merits of the proposed appeal, HMRC argued as follows.

41. HMRC do not dispute that if the appropriate PAYE code was in force, then as a matter of law the Appellant would be treated as having paid the tax that his employer ought to have deducted.

42. HMRC also accept that the 7 August 2006 letter from HMRC to the Appellant's employer stated that "indeed the correct code of 461L was in operation for 2002-2003". However, the HMRC position is that this statement was incorrect and arose because the officer who wrote that letter misinterpreted an entry in HMRC records. No code was issued by HMRC to Collins Stewart until 22 May 2005.

The Tribunal's findings

43. It is common ground between the parties that, unless the 8 November 2011 HMRC letter is an "assessment" for purposes of s 31(1)(d) TMA, there is no appealable decision in this case, and that the Tribunal is accordingly without jurisdiction. That is the initial question that the Tribunal must determine.

44. In *Prince*, the First-tier Tribunal found at [25]-[32] that a P800 form is not an "assessment" for purposes of s 31(1)(d) TMA. A P800 is a form issued by HMRC to taxpayers who are found to have underpaid tax through the PAYE system, which advises the taxpayer of that fact and of the amount of the underpayment. As the Tribunal noted in *Prince* at [1]-[5], such underpayments have occurred in many cases, sometimes because of an unpredictable mismatch between the PAYE tax code issued and the personal circumstances of the taxpayer, and sometimes because HMRC had simply issued the wrong tax code. At [30], the Tribunal said that "At first sight it would be odd" if HMRC were correct that a taxpayer who disputed the calculation in a P800 had no remedy. However, the Tribunal went on to note that the taxpayer in such a situation could challenge the calculation by appealing against a new or amended notice of coding, in accordance with reg 18 or 19 of the PAYE Regulations.

45. Ms Murray argues that there is no such possibility for the Appellant in the present case, and that he will be left without any remedy if the 8 November 2011

HMRC letter is found not to be an assessment (paragraph 33 above). It is because of that argument that the Tribunal decided to conduct a rolled up hearing of the jurisdictional issues and the merits, in order that the jurisdictional issues could be determined in the context of the full details of the case.

46. In *Prince* at [31], the Tribunal suggested that an "assessment" is the result of "the ordinary assessment process, by which—quite outside the PAYE system—a taxpayer's income, gains, allowances and reliefs are determined, a calculation of the tax is made, the calculation is notified to the taxpayer and (subject to appeal) the amount so calculated becomes payable". The Tribunal there drew a distinction between an "assessment" on the one hand, and, on the other, an "adjustment made in the course of the mechanical process … by which the PAYE system attempts to deduct the correct amount of tax over the course of a tax year". The Tribunal in *Prince* considered that a P800 fell into the latter category. The Tribunal observed that although there was no appeal against a P800 because it was not an "assessment", there could nonetheless be an appeal against a new or revised tax code intended to give effect to the P800. The issuing of a tax code is not an "assessment", but there are separate statutory provisions that specifically provide for appeals against a tax code.

47. The Tribunal considers that there is a distinction to be drawn between:

(1) a determination of the amount of tax that a taxpayer is liable to pay under substantive provisions of tax legislation (that is to say, a determination of the taxpayer's income, gains, allowances and reliefs, and a calculation of the tax payable based upon that determination); and

(2) a determination of the amount of tax so assessed that remains unpaid, and issues such as whether it is the taxpayer personally, or the taxpayer's employer, who is liable to pay any or all of an outstanding amount of tax assessed.

48. For convenience, and for purposes of the present decision only, the Tribunal will refer to the former category as "substantive determinations" and to the latter as "administrative determinations".

49. The case law indicates that not every substantive determination is an "assessment". For instance, in *Bartram UT*, the Upper Tribunal found that a determination under s 28C TMA is not an "assessment". That section provides that where a taxpayer has been given notice to submit a tax return but has not done so within the relevant time limit, an officer of the Board may make a best of information and belief determination of "the amounts in which the person who should have made the return is chargeable to income tax and capital gains tax for the year of assessment" and "the amount which is payable by him by way of income tax for that year". A determination of "the amounts in which the person who should have made the return is chargeable to income tax and capital gains tax for the year of assessment" is clearly a substantive determination. In concluding that a s 28C determination is not an "assessment", the Upper Tribunal at [57] agreed with the reasoning of the First-tier Tribunal below in *Bartram v HMRC* [2011] UKFTT 471 (TC) ("*Bartram FTT*") at [28]-[33]. In *Bartram FTT* at [27], the Tribunal noted that there was no need for an

appeal against a s 28C determination, since a person in respect of whom such a determination is made can simply file a self-assessment tax return which would supersede and cancel out the determination. However, that was not the Tribunal's sole reason for concluding that a s 28C determination is not an "assessment". Other reasons were given by the Tribunal at [18]-[26], where it was noted that the legislation drew a distinction between an "assessment" and a "determination". The Tribunal also noted at [28] that the possibility of the taxpayer filing a self-assessment tax return did not answer the question of "what remedy a taxpayer has if a determination is purportedly issued when the conditions for its issue are not fulfilled". The Tribunal answered that particular question as follows:

> 29 It seems to us that a 'determination' so issued would be a nullity. It could not be and is not a determination within section 28C. As a result the provision of Parts VA (payment of tax), Part VI (collection and recovery of tax) Part IX (interest on overdue tax) and Part XI could not apply to it: no tax would become payable by virtue of such a determination, no distraint would be legal, no interest could be due.
>
> 30 But what can a taxpayer do when the officers of HMRC seek to collect the tax they say is due under an invalid determination. How does he resist their predations?
>
> 31 The answer, it seems to us, is the same as would be the case for any other illegal demand. He may contest the demand in the forum HMRC seek to enforce it. If necessary he might institute judicial review proceedings in the High Court for a declaration that the determination is a nullity. He has a remedy. That remedy may be more formal than making an appeal to this tribunal but it is a certain remedy.
>
> 32 Thus it seems to us that there is no general need (from a Human Rights Convention approach or otherwise) to treat section 31 as providing a right of appeal against an unlawful determination.

50. Thus, in *Bartram FTT* the Tribunal did not consider that the potential lack of a remedy (other than judicial review proceedings) is a reason for finding that a substantive determination is an "assessment".

51. It is also noted that although a P800 may be an administrative determination, in order to issue a P800, HMRC is required to be satisfied of the substantive amount of tax that the relevant taxpayer is required to pay, since otherwise HMRC could not reach the conclusion stated in the P800 that insufficient tax had been collected through the PAYE system. A P800 therefore also incorporates a substantive determination. Despite this, in *Prince* the Tribunal was satisfied that a P800 is not an "assessment".

52. The Appellant relies on *Vickerman* and *Hallamshire*. In *Vickerman*, it was held that an additional assessment, correcting an arithmetical error in an original assessment, was itself an assessment. The issue was whether it was an assessment for purposes of then s 29(3) TMA. There was no question that the original assessment was an "assessment". It is therefore unsurprising that a further assessment correcting an arithmetical error in that original assessment was similarly an assessment. Both were substantive determinations.

53. As to *Hallamshire*, the relevance of this case is difficult to see. In that case, the Special Commissioners had issued a determination stating the amounts of the appellant's income assessable to tax rather than the amounts of tax payable. The then Inland Revenue then issued revised assessments giving effect to that determination. The appellant in that case argued that the Special Commissioners could not be taken to have finally determined the appeal before them as they had not determined the amount of tax payable. Browne-Wilkinson J rejected this argument, finding that the Special Commissioners had determined all of the issues before them, and that it was for the Inland Revenue to assess the amount of tax payable in the light of the decision of the Special Commissioners. Browne-Wilkinson J found that an "assessment" had to include a statement of the tax to be paid ("A man should be told what tax he has to pay, not merely given the information from which a skilled adviser would be able to decide the tax eventually to be demanded"), but he did not suggest that every statement or claim by HMRC that a taxpayer was required to pay a certain amount of tax is an "assessment".

54. The Tribunal has not been pointed to any case where an administrative determination of the kind referred to in paragraph 47(2) above has been held to be an "assessment" for purposes of s 31(1)(d) TMA, or any other purpose.

55. In circumstances where an employer under-deducts the amount of PAYE tax that the employer is required to deduct, it is normally the employer who is required to pay the difference to HMRC. However, if certain conditions are met, reg 72 of the 2003 Regulations empowers HMRC to issue a "direction" that the employer is not liable to pay the excess. In that event, the employee will be liable to the excess. Such a direction is not of a kind referred to in paragraph 47(1) above: such a direction does not alter the overall substantive amount of tax to which the employee is liable. Rather, such a direction is of a kind referred to in paragraph 47(2) above. It determines whether a certain portion of the tax to which the employee is liable is to be paid, in the circumstances, by the employee or the employer. Such a direction is not an "assessment" for purposes of s 31(1)(d) TMA. If it was, there would be no need for regs 72B and 72C of the 2003 Regulations, conferring an express right of appeal on the employee in respect of a reg 72 direction.

56. In cases where the employee has paid too little tax, not because the employer has under-deducted the amount of PAYE that the employer was required to deduct, but because the tax code that the employer was required to operate did not lead to sufficient tax being deducted, the employee will be liable for the amount of the underpayment: see for instance *Burton FTT* and *Burton UT*. However, in this situation, a conclusion by HMRC that a certain portion of the tax liability is to be paid by the employee rather than the employer is no more an "assessment" than in the situation referred to in the previous paragraph. If the legislation had intended that there should be a right of appeal to the Tribunal in this situation, it would have so provided. If the legislation has not so provided, then the Tribunal simply has no jurisdiction to entertain such an appeal.

57. As noted above, the Appellant has conceded that he has no right of appeal if the 8 November 2011 HMRC letter is not an "assessment" for purposes of s 31(1)(d)

TMA. The Tribunal finds that it is not. Accordingly, there is no valid appeal before the Tribunal, and the Tribunal lacks jurisdiction to determine the merits of the claim that the Appellant seeks to make.

58. In view of this conclusion, it is unnecessary for the Tribunal to consider HMRC's other objections to the hearing of the Appellant's claim. However, for completeness, the Tribunal would add the following.

59. In the Appellant's notice of appeal in appeal number TC/2009/10889, the grounds of appeal in box 6 of the form referred to the underpayments of tax in the four tax years 2001-02 to 2004-05, referred to the circumstances of the case, and then stated that the Appellant "is therefore not liable for the underpayments of PAYE in these years". The Tribunal is satisfied that the earlier appeal related to all four of those tax years. The Tribunal is therefore satisfied that the subject matter of that earlier appeal is the same as the subject matter of the present appeal, namely the liability of the Appellant to pay the difference between the tax due for those years and the amounts deducted for those years through the PAYE system.

60. The Appellant argues that the present appeal is based on alleged facts and arguments that were not in issue in the earlier appeal, such as the claimed fact that in 2002-03 HMRC issued tax code 416L to the Appellant's employer in relation to the Appellant, and the argument that the 8 November 2011 HMRC letter is an "assessment".

61. The Tribunal considers that the 8 November 2011 HMRC letter in substance took the view that the Appellant was required to pay the difference between the amount of PAYE that had been deducted by his employer and the amount of tax to which he was liable in accordance with his own self-assessments. That position had previously been taken by HMRC in letters dated 26 September 2007, 15 April 2008, 20 January 2009 and 7 September 2011, and it is that HMRC position that the Appellant sought to challenge in the earlier appeal. Even if the Appellant could establish that he has some right to appeal to the Tribunal against the position taken by HMRC, the present appeal is out of time because HMRC took that position long before 8 November 2011. There is no reason why anything that the Appellant wishes to raise in this case could not have been raised in the earlier appeal proceedings before Mr Avery Jones. In the present case, the Appellant did not request permission to bring a late appeal, and the Tribunal is not persuaded that any grounds have been established that would justify a late appeal even if the Tribunal had jurisdiction.

Conclusion

62. For the reasons above, this appeal is struck out.

63. 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.

DR CHRISTOPHER STAKER
TRIBUNAL JUDGE

RELEASE DATE: 11 November 2014

ANNEX

Principal legislative provisions relied upon by the Appellant

64. Section 30A(1) of the Taxes Management Act 1979 ("TMA") provides that:

> (1) Except as otherwise provided, all assessments to tax which are not self-assessments shall be made by an officer of the Board.
>
> …
>
> (3) Notice of any such assessment shall be served on the person assessed and shall state the date on which it is issued and the time within which any appeal against the assessment may be made.

65. Section 31(1) of the Taxes Management Act 1979 ("TMA") provides that:

> (1) An appeal may be brought against–
>
> (a) any amendment of a self-assessment under section 9C of this Act (amendment by Revenue during enquiry to prevent loss of tax),
>
> (b) any conclusion stated or amendment made by a closure notice under section 28A or 28B of this Act (amendment by Revenue on completion of enquiry into return),
>
> (c) any amendment of a partnership return under section 30B(1) of this Act (amendment by Revenue where loss of tax discovered), or
>
> (d) any assessment to tax which is not a self-assessment.

66. Section 59B TMA provides in part that:

> (1) Subject to subsection (2) below, the difference between—
>
> (a) the amount of income tax and capital gains tax contained in a person's self-assessment under section 9 of this Act for any year of assessment, and
>
> (b) the aggregate of any payments on account made by him in respect of that year (whether under section 59A of this Act or otherwise) and any income tax which in respect of that year has been deducted at source,
>
> shall be payable by him or (as the case may be) repayable to him as mentioned in subsection (3) or (4) below but nothing in this subsection shall require the repayment of any income tax treated as deducted or paid by virtue of section 246D(1) of the principal Act, section 626 of ITEPA 2003 or section 399(2), 400(2), 414(1), 421(1) or 530(1) of ITTOIA 2005.
>
> …
>
> (8) PAYE regulations may provide that, for the purpose of determining the amount of the difference mentioned in subsection (1) above, any necessary adjustments in respect of matters

prescribed by the regulations shall be made to the amount of tax deducted at source under PAYE regulations.

67. Section 114(1) TMA provides that:

> (1) An assessment or determination, warrant or other proceeding which purports to be made in pursuance of any provision of the Taxes Acts shall not be quashed, or deemed to be void or voidable, for want of form, or be affected by reason of a mistake, defect or omission therein, if the same is in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts, and if the person or property charged or intended to be charged or affected thereby is designated therein according to common intent and understanding.

68. Regulation 6 of the Income Tax (Employment) Regulations 1993 SI 1993/74 (the "1993 Regulations", which were repealed on 6 April 2004, but which applied in this case in tax years 2002-03 and 2003-04) provided in part that:

> (1) Subject to the conditions specified in Paragraph (2), every employer, on making any payment of emoluments to any employee during any year, shall deduct or repay tax in accordance with these Regulations by reference to the appropriate code.
>
> …
>
> (3) The employer shall act in accordance with this regulation and shall deduct or repay tax by reference to the appropriate code, notwithstanding that that code, as determined by the inspector, may be the subject of an objection or appeal.
>
> (4) A code authorisation is issued and received for the purposes of these Regulations if either—
>
> (a) it is contained in a document that is sent to the employer by the inspector, …

69. Regulation 7(1) of the 1993 Regulations provided in part that:

> (1) The appropriate code shall be determined by the inspector, ...

70. Regulation 8 of the 1993 Regulations provided in part that:

> (1) Where, under regulation 7, the inspector determines that the appropriate code for any year is not different from the code for the preceding year, he shall not be obliged to issue a code authorisation to the employer.
>
> (2) Subject to Paragraphs (3) and (5), if for any year, the employer does not receive a code authorisation for an employee who was in his employment on the 5th April in the year preceding that year, a code authorisation shall be deemed to have been issued by the inspector specifying the code which was appropriate on that 5th April as the appropriate code, and the employer shall act in accordance with regulations 6(1) and 38(1).

(3) If for the year ending on 5th April 1994 the employer does not receive a code authorisation for an employee who was in his employment on 5th April 1993 and the code which was appropriate on that date is no longer valid, a code authorisation shall be deemed to have been issued by the inspector specifying as the appropriate code the code which effects deduction of tax with no personal reliefs at one or more of the rates referred to in Paragraph (4), and the employer shall act in accordance with regulations 6(1) and 38(1).

71. Regulation 101 of the 1993 Regulations relevantly provided in part that:

(2) If the tax payable under the assessment exceeds the total net tax deducted from the employee's emoluments during the year less any subsequent repayments made, the inspector may require the person assessed to pay the excess to the collector instead of taking it into account in determining the appropriate code for a subsequent year, and where the inspector so requires the person assessed shall pay the excess accordingly.

(3) Subject to paragraphs (5) and (6), for the purpose of determining the amount of the difference mentioned in paragraph (1) or the excess mentioned in paragraph (2), any necessary adjustment shall be made to the total net tax deducted in respect of the matters specified in paragraph (4).

(4) The matters specified in this paragraph are—

(a) any tax which the employer was liable to deduct from the employee's emoluments but failed so to deduct;

(b) any shortfall in deductions made in accordance with these Regulations from the employee, where—

(i) payments of profit-related pay have been made to the employee in accordance with a profit-related pay scheme registered under Chapter III of Part V of the Taxes Act,

(ii) in consequence of the relief given by that Chapter less tax has been deducted from those payments than would have been deducted if the scheme had not been registered, and

(iii) the registration of the scheme has subsequently been cancelled with effect from a time before that relevant for the purposes of the relief;

(c) any tax overpaid or remaining unpaid for any year; and

(d) any amount to be recovered as if it were unpaid tax under section 30(1) of the Management Act, being an amount of tax repaid to the employee in excess of the amount properly due to him, to the extent that the inspector took that amount to be recovered into account in determining the appropriate code and the total net tax deducted was in consequence greater than it would otherwise have been.

(5) An adjustment under sub-paragraph (a) or (b) of paragraph (4) shall be disregarded for the purposes of determining the amount of the difference mentioned in paragraph (1) and of computing any tax overpaid under sub-paragraph (c) of paragraph (4).

(6) Where a direction is made by the collector under regulation 42(2), or by the Board under regulation 42(3) or 49(5), in relation to the employee and in respect of one or more income tax periods falling within the year-

(a) the employee shall not be entitled to include the amount of tax which is the subject of the direction in calculating the amount of tax referred to in paragraph (4)(a);

(b) if the direction follows the making of the assessment, the amount (if any) shown in the notice of assessment as a deduction from, or a credit against, the tax payable under the assessment shall be taken as reduced by the amount of tax which is the subject of the direction.

72. Regulation 101A of the 1993 Regulations provided in part that:

(1) For the purpose of determining in respect of the year ended 5th April 1997 or any subsequent year-

(a) the amount of any such excess as is mentioned in section 59A(1) of the Management Act, or

(b) the amount of the difference mentioned in section 59B(1) of that Act,

any necessary adjustments in respect of the matters prescribed by paragraph (2) shall be made to the amount of tax deducted at source in accordance with these Regulations in that year.

(2) The matters prescribed are-

(a) the aggregate amount of any repayments of tax deducted at source made to the employee;

(b) the like matters as are specified in paragraph (4) of regulation 101, having regard to paragraphs (5) and (6) of that regulation.

(3) Where the amount of the difference mentioned in section 59B(1) of the Management Act is payable by the employee as mentioned in that section, the inspector or other officer of the Board may-

(a) require the employee to pay that amount to the collector, or

(b) take that amount into account in determining the appropriate code for a subsequent year.

(4) In paragraph (2)(a) the reference to repayments of tax is a reference to any repayments made in the year in which the tax was deducted at source, or after the end of that year but before the employee's return containing his self-assessment is made under section 8 or 8A of the Management Act.

73. Regulation 8(2) of the Income Tax (Pay As You Earn) Regulations 2003 SI 2003/2682 (the "2003 Regulations", which were in force from 6 April 2004) provides that:

> (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.

74. Regulation 16(2) of the 2003 Regulations provides that:

> (2) If for any tax year the employer does not receive a code for an employee who was in that employer's employment on the previous 5th April, the code which applied on that date is treated as having been issued by the Inland Revenue for the tax year in question.

75. Regulation 21(1) of the 2003 Regulations provides that:

> (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.

76. Regulation 72 of the 2003 Regulations provides in part that:

> (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 and regulations 72A and 72B–
>
> *"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 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.

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

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