TC05660

Appeal number: TC/2016/03870

TYPE OF TAX – income tax-assessment-Determination under Regulation 80, vacated and Direction under Regulation72, Condition A satisfied

FIRST-TIER TRIBUNAL
TAX CHAMBER

COS SYSTEMS LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE GETHING
Helen Myerscough

Sitting in public at Fox Court, Court 13, 5th Floor, 30 Brooke Street, London, EC1N 7RS on Wednesday 1 February 2017 at 10am.

The Appellant was not represented or in attendance

Mr Stephen Goulding Presenting Officer of HM Revenue and Customs, for the Respondents

DECISION

1. Neither the Appellant nor the Appellant's agents Raffingers were in attendance. Telephone calls were made to the Appellant and Raffingers. It transpired there had been some correspondence about the date of the hearing which seems not to have been received by the Tribunal. Further Mr Neil Staff of Raffingers was out of the office at an all-day meeting and would not be able to attend the hearing which was fixed for a half day in the morning of 1 February. The Tribunal considered that the case could be dealt with fairly in the absence of the Appellant and their representative because the issue seemed straightforward and we had the benefit of the statements of case of both parties and HMRC employer records for the Appellant. We heard submissions on behalf of HMRC from Mr Goulding.

2. This case concerns an appeal against a Determination issued on 15 February, 2016 under Regulation 80 of the Income Tax (PAYE) Regulations 2003, SI 2003/2682 which we refer to as the "PAYE Regulations". The Appeal follows a review undertaken on 23 June 2016 of a decision dated 4 April 2016. References to Regulations below are references to the PAYE Regulations.

HMRC's case

3. Mr Goulding indicated that:

(1) The amount of the Determination was £1,806.20 and was for the period ended 5 April 2014, this is not disputed.

(2) The Determination had been issued under Regulation 80 because HMRC had issued by an electronic means an amended tax code for Ms Sikopoulis, an employee of the Appellant, which amended code had not been acted upon.

(3) HMRC assert that the Tax Code notice was issued electronically on 31 July 2013.

(4) HMRC assert that the agent to whom the communication was sent was authorised to receive electronic communications.

(5) HMRC rely on Regulation 213 which confirms electronic communication is permitted for notices of coding and Regulation 196(1) which presumes the amended code as having been delivered where the code has been sent by an electronic means, subject to evidence to the contrary.

(6) HMRC requested that the appeal against the Determination be dismissed and the Determination be confirmed.

The Appellant's Statement of Case states that:

(1) The Appellant accepts that had the amended notice of coding been received a further payment of income tax would have been deducted from sums paid to Ms Sikopoulis and paid to HMRC under the PAYE Regulations.

(2) Appellant contends however that neither the Appellant nor its agent Raffingers received the amended notice of coding.

(3) Neither the Appellant nor Raffingers were set up to receive electronic communication in consequence the amended notice of coding could not have been received.

(4) As the Appellant had taken all reasonable care to comply with the PAYE Regulations and the underpayment of tax had arisen through no fault of the Appellant, Condition A of Regulation 72 was satisfied and the correct course is for HMRC to reduce to zero the Regulation 80 Determination and to issue a Direction under Regulation 72(5) which would make Ms Sikopoulis personally responsible for the unpaid tax.

The evidence

4. We reviewed the evidence in the bundle provided by HMRC from their own records. The records comprised:

(1) a number of screen shots taken by HMRC in August 2016 of their own electronic employer records for the Appellant and Miss Sikopoulis,

(2) the Contact History Summary relating to the Appellant which records the dates on which contact is made by HMRC or the Appellant and a very short note of what was send and by what means.

(3) a Notice of Coding,

(4) the text of Selected Notes sent to Ms Sikopoulis; and

(5) a record of Ms Sikopoulis' employment and coding history.

The facts

5. We find the following facts based on the information contained in HMRC's records in the bundle, save where a different source is mentioned below:

(1) On 20 September 2012 the Appellant's agent was Sarah Allingham at Connor Warrin, a firm of accountants.

(2) On 2 October 2012 Connor Warrin were authorised to receive electronic communications in respect of Payroll Taxes on behalf of the Appellant.

(3) On 19 July 2013 HMRC received Form 64-8 recording the appointment of Raffingers Stuart as PAYE agent for the Appellant. The firm is now known as Raffingers.

(4) The Form 64-8 was not in the bundle or the correspondence. From a review of a specimen form 64-8 on HMRC's website we noted that the Form 64-8 records the appointment of an agent dealing with a particular tax. Mr Goulding accepted that there are never two agents appointed to deal with a single tax. The form authorises HMRC to correspond with the named agent on all matters covered by the form and the receipt of a new form appointing a

new agent revokes any prior authority. The Note at the top of the form reads as follows:

> ***"Please read the notes on the back before completing this authority.*** *This authority allows us to exchange and disclose information about you with your agent and to deal with them on matters within the responsibility of HM Revenue and Customs (HMRC), as specified on this form.* ***This overrides any earlier authority given to HMRC.*** *We will hold this authority until you tell us that the details have changed." [Emphasis added]*

We also noted that the details to be given on the form do not include an email address for the employer or the agent.

(5) A record made by HMRC on 19 July 2013 under the Appellant's employer reference records Raffingers Stuart in the box headed "Employer", the Appellant in this case.

(6) On 31 July 2013 HMRC record that contact was made by HMRC with the employer ***"by internet access"*** and the document sent by that means is a notice of coding P6T.

(7) A notice of Coding P6/P9 dated 31 July 2013 shows the revised code intended to be applied from 31 July 2013 in relation to earnings of Ms Sikopoulis. Her tax code had been amended to 485L.

(8) On 31 July 2013 HMRC record that they also made contact with an individual. The revised Notice of coding P2 was sent to the individual. The Selected Notes of correspondence with Ms Sikopoulis show that HMRC sent notes to Ms Sikopoulis which indicated that:

> (1) HMRC had been informed by her employer that she now has a company car which she uses for private use. This will reduce her tax free amount and HMRC were calculating that amount.
>
> (2) HMRC advised her that tax code had now changed and that the Appellant will not have deducted sufficient tax using her old code. The Appellant will use the new tax code and any deficit will be picked up at the end of the tax year.

(9) A 2016 screen shot of HMRC's customer records names the payroll agent as Raffingers Stuart but the contact details recorded are those of Connor Warrin.

(10) HMRC had no evidence that Raffingers Stuart had consented to receive electronic form communications. HMRC did not challenge the statements made by the Appellant in its Statement of Case to the effect that neither the Appellant nor Raffingers Stuart has internet access and had not consented to communicate electronically with HMRC. We find as a fact that the Appellant had not consented to receive the electronic communications.

(11) On 1 September 2015 Ms Sikopoulis left the employment of the Appellant.

(12) We understand that for an employer or its agent to have had internet access to HMRC's employer records HMRC would have to have an email address to send the relevant link to the employer/agent.

(13) There was no email address of the Appellant or Raffingers Stuart in HMRC's records.

(14) The Regulation 80 Determination was issued on 11 February 2016 in the sum £1,806.20.

(15) The amended code had not been received by the employer before Ms Sikopoulis left the employment.

(16) It seems that HMRC had sent the amended code by electronic means on 31 July 2013 but it had not been received by the Appellant or its agent at that date. Raffingers Stuart were not equipped to receive such communications and had not consented to receive them.

(17) The message was sent to the former agent Connor Warrin as HMRC's records still showed Connor Warrin's email address in August 2016. HMRC's statement accepts that this was the case.

The Regulations

6. The Regulations under consideration are Regulations 72, 72A, 80, 196 and 213 of the PAYE Regulations. To the extent relevant and in the form in 2013/14 these Regulations are set out in the Appendix to this decision.

The issues

7. The issues are as follows:

(1) Whether Regulation 196 may be relied upon by HMRC as proof of delivery by electronic means of the amended notice of coding.

(2) Whether Condition A in Regulation 72(3) was satisfied.

(3) Whether, if Condition A is satisfied and if requested to do so, HMRC are required to issue a Direction exonerating the employer of the liability to pay the tax.

(4) Whether HMRC are enabled to issue a Direction under Regulation 72 if a Determination had been made under Regulation 80.

Our discussion

Regulation 196- the presumption of delivery

8. It is absolutely clear from the terms of Regulation 196(1) that the general presumption is that HMRC's use of an approved method of electronic communication is presumed to have resulted in delivery of any document if HMRC has a record of such a communication on an official computer system. That presumption can be rebutted if the contrary is proved.

9. It is also clear from Regulation 213(1) that to comply with their obligations HMRC may use the methods of communication shown in Table 11 and that electronic communications may be used to deliver to an employer or agent notices of coding and amendments to notices of coding. But HMRC may only deliver the information by an approved method of communication if the employer or the employer's agent has consented to delivery in that way and HMRC has not been notified that the consent has been withdrawn.

10. It is clear that HMRC received Form 64-8 appointing Raffingers Stuart as agent on 19 July 2013. HMRC's Contact History Summary records that fact. It is apparent from the terms of the declaration at the top of Form 64-8 that the appointment of Raffingers Stuart authorised HMRC to communicate with Raffingers Stuart as agent for the purposes of PAYE and that any earlier authority to communicate with Connor Warrin was overridden by that appointment on 19 July 2013.

11. Form 64-8 does not contain any reference to acceptance of electronic communications. Nor is there a place to record an email address.

12. We understand that HMRC require an email address for the agent to enable an agent to access HMRC's electronic employer records. The only email address in HMRC's Employer records for the Appellant is the email address of Connor Warrin, the **former** agent.

13. The Appellant and Raffingers Stuart have not (we have found) agreed to accept electronic communication.

14. A screenshot taken in August 2016 shows (as we have found) HMRC's records were updated to record the name of the agent but the contact details have not been updated. The email address in the record is that of Connor Warrin.

15. We find that the presumption of delivery of the revised coding notice has been rebutted in this case by:

(1) The absence of consent to use the electronic form of communication by Raffingers Stuart or the Appellant.

(2) The absence of any email address for Raffingers Stuart or the Appellant in the HMRC's employer record for the Appellant.

(3) The presence of the former agent's email address in HMRC's employer records for the Appellant.

(4) The fact that the electronic communication on 31 July 2013 can only have been made with the former agent, Connor Warrin with whom, as we have found, HMRC were no longer authorised to communicate from 19 July 2013.

(5) HMRC accept the communication was made to Connor Warrin and by implication not to Raffingers Stuart.

Condition A Regulation 72

16. It is accepted by the Appellant that as a result of the non application of the revised code the amount of tax that would have been deducted had the revised Code been applied to Ms Sikopoulis' earnings in 2013/14 would have exceeded the sum that was actually deducted as specified in Regulation 72(1) and (2). The difference is referred to as "the excess".

17. Where however Condition A is satisfied as set out in Regulation 72(3) and a notice of request is made by the Appellant under Regulation 72A(1), HMRC may issue a Direction that the employer is not liable to pay the excess. Condition A is satisfied where HMRC are satisfied that:

(1) The employer took reasonable care to comply with the Regulations, and

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

18. HMRC say that neither condition is met because:

(1) if the Appellant wished Connor Warrin not to receive electronic communications on its behalf in respect of payroll services it should have notified HMRC,

(2) If the Appellant no longer wished Connor Warrin to receive electronic communications in respect of payroll services on its behalf it should have ensured coding notices issued by HMRC (by electronic means) could be checked, and

(3) The form 64-8 did not constitute a notification to HMRC that the Appellant no longer wished HMRC to send electronic communications to Connor Warrin.

HMRC do not assert that the Appellant acted in bad faith.

19. In view of following facts:

(1) The Form 68-4 filed on 19 July 2013 revoked HMRC's authority to communicate with a prior agent by any means,

(2) Regulation 213 requires an express consent for HMRC to communicate by electronic means with an agent which consent had not given by the Appellant,

(3) HMRC was obliged to send the amended notice of coding on 31 July 2013 by a non-electronic means to the new agent, and

(4) HMRC accept that the amended coding notice was sent to Conor Warrin (not Raffingers Stuart),

we do not accept HMRC's assertions about the Appellant's failure to take reasonable care. The Appellant had done all that was required of it to effect a change in its agent. The Appellant did not in fact receive the amended notice of coding and the failure to

deduct the correct amount of tax was not due to its failure to take reasonable care or bad faith. The failure in this case is not on the part of the Appellant. HMRC's records were not updated upon the receipt of the form 64-8 on 19 July 2013. As late as August 2016 the screenshots of HMRC's employer record for the Appellant still show Connor Warrin's email and telephone contact details. We therefore conclude that Condition A was satisfied. HMRC are able to issue a direction under Regulation 72.

Are HMRC required to issue a Regulation 72 direction?

20. Regulation 72(5) states that where Condition A or Condition B is satisfied HMRC "**may direct**" that the employer is not liable to pay the excess tax to HMRC. We are aware of a number of First-tier Tribunal decisions on whether the words "may direct" in Regulation 72 confer discretion on HMRC. But I record that Mr Goulding did not rely on these decisions or argue that there was any discretion but rested but rested his case on the simple point that once Regulation 80(1) had been used Regulation 72(5) was inapplicable. We note that when Regulation 72(5) is read in context, in particular in light of Regulations 72A (which provides for the possibility of a request being made by an employer that a direction be issued and sets out the appeal rights of an employer which appeal will be successful if Conditions A or B are satisfied) it is clear the use of the word **may** does not confer any discretion on HMRC. Once the power to issue a Direction is invoked by the making of a request by an employer HMRC must issue a Direction if either of the Conditions A or B is satisfied. This is a fundamental rule of construction, an example of which is given in *Craies* on *"Legislation, A Practitioners Guide to the Nature Process and Interpretation of Legislation"*, Eleventh Edition published by Sweet & Maxwell in 2017 and edited by Daniel Greenberg, at paragraph 12.2.4, we find that the Appellant has invoked the power in its Statement of Case.

May HMRC issue a Regulation 72 Direction when a Regulation 80 Direction has been issued?

21. A Regulation 80(3) Determination must not include tax in respect of which a Direction under regulation 72(5) has been made and Directions under Regulation 72 do not apply to tax determined under Regulation 80. In our opinion it would be a perverse construction of Regulations 72 and 80 to say 72 could only be invoked if there had been no previous Regulation 80 Determination. For three reasons:

(1) The Treasury cannot have intended that an employer's liability to pay under deducted payroll tax should depend on the mere happenstance of the timing of the issue of a Determination. This is particularly so as the employer may not be aware HMRC is about to issue a Determination under regulation 80.

(2) Regulation 80 specifically says that a regulation 80 Determination must not include tax in respect of which a Direction under Regulation 72 has been made. It presupposes that consideration should be given first to whether Regulation 72 is in point.

(3) As both Regulations potentially deal with any excess of tax due over tax paid, to give effect to Regulation 80(3) necessarily requires Regulation 80 Determinations not to apply to the prescribed and narrow category of cases which naturally fall within either Condition A and B of regulation 72 (or Regulation 72F which is not relevant to this case). Where a taxpayer has taken reasonable care, as we find in this case, no Regulation 80 determination ought to be given.

22. As a Determination under Regulation 80 is to be treated as an assessment for the purposes of the Taxes Management Act 1970 we therefore consider that the Regulation 80 Determination should be vacated and that HMRC should issue a Direction under Regulation 72 in relation to the excess tax.

23. We allow the Appeal.

24. 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.

JUDGE HEATHER GETHING
TRIBUNAL JUDGE

RELEASE DATE: 14 FEBRUARY 2017

Appendix

72 Recovery from employee of tax not deducted by employer

(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 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.

(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; or

(5B) A notice need not be issued to the employee under paragraph (5A)(a) if neither the Inland Revenue not the employer are aware of the employee's address or last known address.

72A(1)Employer's request for a direction and appeal against refusal

(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.

80 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…by an employer which has neither been-

(a) paid to HMRC, nor

(b)…

(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…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-

(1) the determination were an assessment, and

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

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

196 Proof of delivery of information sent electronically

(1) The use of an approved method of electronic communications is presumed, unless the contrary is proved, to have resulted in the delivery of information—

(b) by the Inland Revenue, if the despatch of the information has been recorded on an official computer system.

(2) The use of an approved method of electronic communications is presumed, unless the contrary is proved, not to have resulted in the delivery of information—

(b) by the Inland Revenue, if the despatch of the information has not been recorded on an official computer system.

213 How information may be delivered by Inland Revenue

(1) Table 11 applies to determine how the Inland Revenue may comply with requirements of the regulations listed in column 1.

TABLE 11

REGULATIONS WHICH PERMIT ELECTRONIC DELIVERY BY INLAND REVENUE

1 *Regulation*	*2* *Description of information*	*3* *Form number*	*4* *Electronic communications*
8(2), 20(2)	issue of code to employer or agent	Form P6 or P9	Yes

(4) But the Inland Revenue may only deliver information by an approved method of electronic communications if the employer or employer's agent (as the case may be) has consented to delivery of information in that way, and the Inland Revenue have not been notified that the consent has been withdrawn.