



TC05763

Appeal number: TC/2016/02737

INCOME TAX - PAYE - erroneous rebate of income tax HMRC caused by not applying Appellant's correct PAYE coding – HMRC identified error and revised Appellant's PAYE code for later year to recover rebate/underpaid tax - Appellant asserting that HMRC should waive underpaid tax by applying discretion under Extra Statutory Concession A19 - whether First-tier Tribunal has jurisdiction to consider HMRC's exercise of concession - no - whether HMRC's decision not to apply ESC A19 susceptible of appeal - no - Appeal struck out

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

DEBRA SWALES

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE MICHAEL CONNELL

**Sitting in public at Leeds Appeals Tribunal 4th Floor City Exchange Albion Street Leeds
on 7 February 2017**

The Appellant did not attend

Mr Aidan Boale officer of HM Revenue and Customs, for the Respondents

DECISION

5 1. This is an appeal by Debra Swales ('the Appellant') an individual whose income was, during the appeal period, subject to the deduction of tax at source, by means of the PAYE system. The system requires the allocation and notification by HMRC of a code which enables an employer to determine the amount of tax which must be deducted from the gross payment, before it is paid to the employee. The code reflects the taxpayer's personal allowance and any other
10 deductions to which he or she may be entitled and allows tax to be deducted at, usually, the basic rate. The system obviates the need for the individual to complete a tax return. Before the beginning of each tax year a new code which reflects any change in the personal allowance is automatically issued to the taxpayer and to the employer or other payer.

15 2. The Appellant appeals against an HMRC P800 statement that she has underpaid tax for the year 2014 -15 in the sum of £693.80 and asserts that HMRC should waive any underpaid tax under Extra Statutory Concession A19, on the basis that the underpayment arose as a result of an error on the part of HMRC.

20 3. HMRC assert that it is not appropriate to apply ESC A19 and that under Rule 8(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 the appeal should be struck out on the grounds that the Tribunal has no jurisdiction over the matter.

The background facts

25 4. The Appellant telephoned HMRC on 5 January 2015 to discuss her tax code for the 2014-15 tax year and provided details of her income. HMRC calculated that a tax code of 1000L should be operated on a cumulative basis with previous pay and tax details being taken into consideration. Unfortunately, the details used were incorrect and caused the Appellant to receive a rebate of tax through her pay, to which she was not actually entitled

30 5. In November 2015 HMRC informed the Appellant of the error and issued an amended calculation, which showed that the amount incorrectly rebated was £693.80. HMRC proposed that this amount be recovered via the Appellant's 2017 to 2018 tax code which meant that HMRC would collect approximately £58 additional tax from the Appellant per month between 6 April 2017 and 5 April
35 2018.

6. The amount of underpaid tax is not in dispute. The issue is whether the Tribunal has the jurisdiction to consider HMRC's refusal to grant relief under ESC A19.

40 7. Under ESC A19 arrears of tax may be given up if all of the following criteria are met:

- i. HMRC failed to make timely use of certain information and

- ii. The customer was notified of the arrears more than 12 months after the end of the tax year in which HMRC received the information and
- iii. The customer could reasonably have believed that their tax affairs were in order.

5 8. Even though HMRC have informed an individual within 12 months of the end
of the tax year that they have underpaid tax, in exceptional circumstances HMRC
may nonetheless agree not to collect the tax. The concession is normally applied
if, more than once, HMRC did not use information received about a source of
10 income, and allowed tax owed by the individual to build up over two whole tax
years, so that tax was owed in at least two consecutive years.

15 9. The erroneous rebate/underpayment of tax occurred in the 2014-15 tax year.
HMRC informed the Appellant of the underpayment and issued an amended
calculation in November 2014, which was within 12 months after the end of the
tax year in which they received the information and there are no exceptional
circumstances as previously described. Therefore HMRC say that concession
ESC A19 does not apply and the underpaid tax remains due and payable.

20 10. On 5 May 2016, HMRC informed the Appellant that they would collect the
underpaid tax over a period of one full tax year. This meant that £58 would be
collected via her 2017 to 2018 tax code, commencing 6 April 2017. HMRC
alternatively proposed that if payment over one tax year caused an issue for the
Appellant, the amount due could be collected over 2 years at £29 per month from
6 April 2017 until 5 April 2019.

25 11. The Appellant took the view that she should not have to pay back the
erroneous rebate and on 13 May 2016 submitted a Notice of Appeal to the
Tribunal. The Appellant argues that the underpayment arose because of a mistake
on the part of HMRC and that she should not be prejudiced by that error.
Effectively the Appellant presents an argument of legitimate expectation. The
Appellant also argues that the principles established by the case of *Prince and
Others* [TC 2011/03594] (see below) do not apply to her case.

30 12. On 2 September 2016, (the Appellant having failed to reply to a letter from
the Tribunal dated 13 June 2016 within the times stipulated therein or at all), the
Tribunal issued a Direction that unless the Appellant, no later than 5pm on the
date two weeks thereafter, confirmed to the Tribunal in writing that she wished to
proceed with her appeal and provided the Tribunal with a Written Statement of
35 Reasons as to why the decision in *Prince and Others* does not or should not apply
to her case then these proceedings may be struck out without further reference to
the parties.

HMRC's Case

40 13. HMRC's case is that this Tribunal has no jurisdiction to adjudicate on
HMRC's application of, or refusal to apply, ESC A19. Any dispute relating to an
Extra Statutory Concession, they say, must be determined by way of Judicial

Review, either in the High Court or, in some circumstances, by the Upper Tribunal. They maintain that position both in relation to matters of law or principle, such as whether an ESC is capable of applying in particular circumstances, and in relation to matters of fact, that is whether an individual taxpayer falls within the scope of a concession.

14. As the Appellant does not challenge HMRC's the underlying contention that there has been an underpayment of tax or their calculations of the amount of tax due, but relies instead only on her contention that she should not have to pay back the under deducted tax, HMRC argue that this Tribunal has no other course open to it than to strike out the appeal in accordance with rule 8(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, which provides that

"The Tribunal must strike out the whole or part of the proceedings if the Tribunal—

(a) does not have jurisdiction in relation to the proceedings or that part of them ..."

15. HMRC therefore apply for the appeal to be struck out and in support of their application refer to the case of *Prince and others*. Judge Colin Bishopp in that case was forceful in his conclusion that the First-tier Tribunal had no such jurisdiction when he said at paragraph 18 line 40:

"It is perfectly plain, from perusal of the Act itself, that Parliament did not intend to confer a judicial review jurisdiction on the First-tier Tribunal, and there is nothing in the more detailed legislation relating to tax appeals, the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009, which points to a contrary conclusion."

Conclusion

16. In this case, HMRC informed the Appellant that they would issue her with a restricted PAYE coding notice for the 2017/18 and/or 2018/19 tax years in order to collect tax which they argue is due. This is not an appealable decision.

17. There is no right of appeal against the issue of a P800 to collect underpaid tax, because it is no more than an administrative measure and a means of reconciling PAYE records after the end of each tax year. It does not, have any statutory basis, and does not determine a tax liability - that is done only when HMRC issue a coding notice which gives effect to the P800. It is at that point, that a taxpayer may appeal, using the statutory route prescribed for that purpose by regs 18 and 19 of the Income Tax (PAYE) Regulations 2003. However in this case there is no dispute as to the amount of the underpaid tax, nor any suggestion that the proposed codings for 2017-18 and/or 2018-19 and method of collection of the underpaid tax are incorrect.

18. There is nothing in the relevant legislation that could be construed as conferring any jurisdiction to determine the issue in this appeal. The Tribunal

does not have jurisdiction to consider an argument of legitimate expectation. This Tribunal has no jurisdiction to consider whether or not HMRC have exercised their ESC A19 discretion correctly, or reasonably. There is no jurisdiction in the Tribunal in relation to an ESC.

5 19. The Appeal is accordingly struck out.

20. 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
10 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.

15 **MICHAEL CONNELL**
TRIBUNAL JUDGE

RELEASE DATE: 22 MARCH 2017