TC01852

INCOME TAX — PAYE — taxpayers with too little tax deducted at source — HMRC seeking underpaid tax by means of Form P800 — ESC A19 — whether First-tier Tribunal has jurisdiction to consider discretionary concession — no — whether P800 an assessment susceptible of appeal — no — appeals struck out

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal numbers TC/2011/03594
TC/2011/03891
TC/2011/04331

MICHAEL PRINCE
SUSAN BUNCE
KEVIN COAKER **Appellants**

- and -

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

Tribunal: Judge Colin Bishopp, Chamber President

Sitting in public in London on 12 December 2011

The first appellant did not appear but made written submissions; the second appellant appeared in person; the third appellant did not appear and was not represented.

Mrs Alison Shaw, interested person, appeared in person

Mr Richard Vallat, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

Mr Keith Gordon and Ms Ximena Montes Manzano, counsel, appeared as advocates to the Tribunal

DECISION

Introduction

1. The appellants in these, and in a large number of similar appeals pending before this tribunal, are all individuals whose income is subject to the deduction of tax at source, by means of the PAYE system. That system depends for its working on the notification by HMRC to the person making relevant payments (ordinarily an employer or a pension provider) of a code. In the simplest of cases, where a taxpayer has a single source of income, the combination of the code and tables, also provided by HMRC, enables the payer to determine precisely the amount of tax which must be deducted from the gross payment before it is handed to the recipient. The code reflects the taxpayer's personal allowance and any other deductions to which he or she may be entitled; the tables (nowadays usually represented by a computer program which makes the calculations automatically) reflect the current rates of tax at differing levels of income. In this simple case the correct amount of tax is deducted as payments are made during the course of a tax year (and handed over by the payer to HMRC), and the taxpayer has no more to pay. Commonly, he or she has no need even 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 payer, and the tables are revised to reflect changes in tax rates and thresholds. The process is then repeated in the following tax year.

2. Not all taxpayers' affairs are so simple. Some have more than one source of income, derived from different payers, each of whom must be provided with a code in order to operate the PAYE system. Again, in a simple case, it may be possible to include all of a taxpayer's allowances in the determination of one code, and none in the other or others: the code allocated instead requires tax to be deducted at, most commonly, the basic rate from the entire payment. Provided the amount due to the taxpayer from the person to whom the first code has been sent exceeds the basic rate threshold (after taking account of any allowances) and the aggregate amount due from all payers does not exceed the upper limit of the basic rate band, the correct amount will be deducted; but if either of those conditions is not satisfied, there may be an over- or under-payment. Codes can sometimes be generated to cover such situations, but as it is impossible to predict every eventuality, some taxpayers must make an additional payment after the end of the tax year, or may be entitled to a refund. Such events as changes of employment introduce other complications which may necessitate adjustments at the end of a tax year.

3. In addition, mistakes occur. Taxpayers may, sometimes quite innocently, claim allowances to which they are not entitled (or fail to claim allowances to which they are entitled). And sometimes HMRC issue incorrect codes. That is the position in most of the appeals before the tribunal—typically, the taxpayer has been given the benefit of a personal allowance in more than one code. As a result, although each payer has operated the PAYE system correctly, by deducting the tax determined by the combination of the code provided and the tables, the taxpayer has, overall, paid too little.

4. In June 2009 HMRC introduced a new PAYE computer system. One of its functions was to reconcile taxpayers' tax records, with the consequential result that many errors which might otherwise have gone undetected were discovered. The first reconciliation was not run until September 2010, when the new system had been tested to HMRC's satisfaction, and it was applied to the tax years 2008-09 and 2009-10. The exercise was announced in Parliament in advance, and it received a good deal of media publicity, both when it was announced and as its results became clear. More than a million taxpayers were found to be affected: some were due a refund, but the majority had underpaid tax. There were some modest concessions where the amount of tax was small, or hardship could be established, but those concessions are not relevant to these cases.

5. Those who had underpaid (or, to be more precise, those HMRC believed had underpaid) were notified of the fact and the amount of the underpayment by means of a form commonly known by its stationery number, P800. A typical P800 identifies the taxpayer to whom it is addressed, the HMRC office by which it was issued and the tax year to which it relates, with various reference numbers, and bears the date of issue. That formal information is followed by a box in which text, substantially in the form of a letter, is set out. An example provided to me for the purpose of these appeals, relating to the tax year 2009-10 and issued on 5 January 2011, is as follows:

> "Dear [taxpayer]
>
> I have reviewed your income tax liability for the year shown above to see whether you have underpaid or overpaid tax for that year.
>
> My calculation is given on the enclosed sheet. The calculation result is given near the foot of that page.
>
> The '*See notes*' column refers to the numbered notes in the guidance leaflet '*Understanding your Tax Calculation*' which I also enclose.
>
> This underpayment is already being collected through your tax code during this year 2010 [I assume this is a mistake for 2010-11] and a revised notice of coding will be issued to you within the next few days.
>
> Your PAYE code was reduced during the year and you were notified of an estimated amount underpaid. The actual amount is greater. Your PAYE code for this year will not be revised and the balance will be collected in the tax year starting next 6 April and your new code will be sent to you nearer the time.
>
> This calculation includes an underpayment for an earlier year.
>
> The reason for the underpayment basic rate tax deducted when higher rate."

6. A calculation of the underpaid tax was attached, as the form P800 indicated.

7. The text included in the box has been carelessly prepared and is confusing and self-contradictory, factors which cannot have improved the humour of the recipient, but the essential effect of the notification is nevertheless clear enough: HMRC have detected an underpayment which they intend to collect, not by demanding an immediate payment, but by means of the PAYE system.

The appeals before me

8. Although more than a million taxpayers received notifications of underpayments, I was told that only about 14% had challenged their liability to pay. No doubt in many cases the amount was too modest to warrant a challenge, and some taxpayers may have realised they had underpaid so that the P800 they received came as no surprise. I was not told how many taxpayers had disputed the calculation; it was, however, clear that the majority of those who challenged their liability to pay did so not because they believed the tax was not due at all, or had been incorrectly calculated, but because, they said, they were entitled to the benefit of an extra-statutory concession, or ESC, known as A19. I will come to the terms of the ESC shortly; for the moment it is sufficient to say that, if the ESC does apply, HMRC forego collection of the tax.

9. There were, originally, four appeals listed to be heard together, not as formal lead appeals in accordance with rule 18 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, but nevertheless as typical of those before the tribunal and whose outcome would serve as a guide to others. One of the four appeals was compromised, and I shall say no more about it. The detail of the remaining three, so far as it is necessary for this decision, is as follows:

(a) **Michael Prince**: Mr Prince was in receipt of both earnings from current employment and a pension from a former employer. For part of the tax years 2007-08 and 2008-09 he also had a second employment: that employer had received a code requiring it to deduct tax at the basic rate. As Mr Prince was in fact a higher-rate taxpayer, the second employer deducted too little tax. A P800 relating to 2008-09 was sent to Mr Prince at the end of December 2010, and another relating to 2007-08 in March 2011. He does not challenge the calculations but relies on the ESC, which HMRC say does not apply to his case. Mr Prince did not attend the hearing, but sent in clear and detailed written submissions, to which I will come later, and indicated that he was content that the hearing should proceed in his absence.

(b) **Susan Bunce**: Miss Bunce had only one employer, but for reasons which are not entirely clear to me (and I think unclear to Miss Bunce too) the employer treated her as if she had two separate employments. The employer was not issued with a code for the (notional) second employment, and instead applied the default code, which resulted in deduction of tax only at the basic rate. As Miss Bunce too is liable to tax at the higher rate, she underpaid in the years 2008-09 and 2009-10, although the code was corrected part way through the later year. HMRC then adjusted her code again in order to recover the underpaid tax, but neglected to tell her that that was what they were doing. There were a number of further mistakes on HMRC's part and it was not until January 2011 that P800s for what Miss Bunce accepts are arithmetically correct underpayments for the years 2008-09 and 2009-10 were issued. Miss Bunce too relies on the ESC, while HMRC say it does not apply to her case. She attended the hearing and made submissions to me, with which I shall also deal later.

(c) **Kevin Coaker:** Mr Coaker had a single employment. The code issued to his employer in the years 2008-09 and 2009-10 took account of taxable benefits

paid to him by the employer, and was in each case based upon the expense payments disclosed on the employer's annual return (form P11D) for the year 2007-08. The expenses actually paid in 2008-09 and 2009-10 were significantly higher than those paid in 2007-08, and as a result too little tax was deducted from Mr Coaker's earnings. Forms P800, one for each of the relevant years, were sent to him on 27 December 2010. Like the other appellants, Mr Coaker seeks to rely on the ESC while HMRC say it does not apply in his case, and have refused any relief. Mr Coaker did not attend the hearing but I was satisfied it had been properly notified to him, and that it was in the interests of justice to proceed in his absence. I did not have the benefit of any submissions by him, but I have taken into account what he said in correspondence with HMRC, and in his notice of appeal.

10. The ESC on which the appellants wish to rely has been in place for some years (as its text shows it dates back to Inland Revenue days) and is of general application. It is in these terms:

> "**A19: Giving up tax where there are Revenue delays in using information**
>
> Arrears of income tax or capital gains tax may be given up if they result from the Inland Revenue's failure to make proper and timely use of information supplied by—
>
> - a taxpayer about his or her own income, gains or personal circumstances;
> - an employer, where the information affects a taxpayer's coding; or
> - the Department for Work & Pensions, about a taxpayer's State retirement, disability or widow's pension.
>
> Tax will normally be given up only where the taxpayer—
>
> - could reasonably have believed that his or her tax affairs were in order, and
> - was notified of the arrears more than 12 months after the end of the tax year in which the Revenue received the information indicating that more tax was due; or
> - was notified of an over-repayment after the end of the tax year following the year in which the repayment was made.
>
> In exceptional circumstances arrears of tax notified 12 months or less after the end of the relevant tax year may be given up if the Revenue—
>
> - failed more than once to make proper use of the facts they had been given about one source of income;
> - allowed the arrears to build up over two whole tax years in succession by failing to make proper and timely use of information they had been given."

11. Although the ESC indicates that HMRC "may" give up arrears, in practice arrears are routinely given up if the taxpayer affected can show that he or she comes within the terms of the concession. The essence of the dispute between the appellants and HMRC is whether the appellants do, as a matter of fact, come

within those terms. I am not required at this stage to decide that issue of fact and, although the material provided by the appellants gave a good deal of information about their individual circumstances, and the reasons why they believed the ESC applied to them, I did not hear any formal evidence on the subject. My task is, instead, to determine whether or not the appellants, and others in the same position, may challenge HMRC's rejection of their arguments, and refusal of relief, in this tribunal.

The strike-out application

12. For many years HMRC's position has been that this tribunal and its predecessors, the General and Special Commissioners and, in indirect tax cases, the VAT and Duties Tribunal, has and had no jurisdiction to adjudicate on HMRC's application of, or refusal to apply, an ESC. Any dispute relating to an ESC, they say, is to 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.

13. As none of the appellants challenges the arithmetic of the P800s he or she has received, nor the underlying contention that there has been an underpayment of tax, but relies instead only on the ESC, HMRC argue that this tribunal has no other course open to it than to strike out the appeals 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 …"

14. It was their application that these three appeals be struck out, alone, which came before me. However, in order to provide an answer it is necessary to conduct a close examination of what the First-tier Tribunal may and may not do, and of what it is which is the subject matter of the appeals. In particular I need to determine:

- To what extent, if at all, may the First-tier Tribunal deal with an appeal in which the application of an ESC is the central issue?
- If the First-tier Tribunal has any jurisdiction at all, is it restricted or unrestricted, and if the former what are the restrictions?
- Is it possible to appeal against a P800?
- If so, what is the nature of the First-tier Tribunal's jurisdiction?

15. HMRC were represented before me by Mr Richard Vallat of counsel, who provided skeleton arguments dealing with the individual appeals and the various issues I am required to decide. I had the benefit of a skeleton argument and oral submissions from Mr Keith Gordon, assisted by Ms Ximena Montes Manzano, both of counsel, as advocates to the tribunal; they appeared *pro bono* and I am

extremely grateful to them for their assistance. In addition, Mrs Alison Shaw, who also has a pending appeal of a similar kind (against HMRC's refusal to apply the ESC to her case), though not one listed to be heard with the other three, attended the hearing and asked me to hear submissions, which I agreed to do. I have taken into account what she told me, as well as some written material she produced. I hope all concerned will forgive me if, in the interests of brevity, I do not recite all of their arguments in detail but that they will instead find them incorporated in what follows.

16. I should also add that I have set out the issues above in a different order from that in which they were presented by counsel, because it seems to me more convenient and logical to examine first the appellants' primary argument (that they fall within the ESC) and whether they have any means of pursuing that argument before this tribunal, before coming to what I perceive as the secondary argument, that is whether there is any other means of attacking HMRC's conclusion that the tax is not only technically due, but also payable. I have not dealt with the appellant's comments and submissions about their individual circumstances because I am required at this stage to deal only with the application that the appeals be struck out, and not with their individual merits.

Does the First-tier Tribunal have any jurisdiction in relation to an ESC?

17. It is axiomatic that tax may be imposed only in accordance with statutory authority: there is no common-law or discretionary right to tax. Similarly, and for the same reason, rights of appeal are conferred by statute, and if no right of appeal to it is conferred, this tribunal has no discretion to accept and deal with an appeal, or purported appeal. Statute does, of course, provide for appeals and there are indeed many provisions, helpfully listed by Mr Vallat in an annex to his skeleton argument, which deal with different taxes and with different situations. None of them provides for an appeal against HMRC's refusal of relief in accordance with an ESC. Mr Gordon did not suggest otherwise.

18. The absence of a statutory right of appeal supports HMRC's argument that taxpayers in the position of the appellants must seek a remedy by judicial review. There can, I think, be no room for doubt that this tribunal does not have any judicial review jurisdiction. There is authority of the House of Lords, in *Customs and Excise Commissioners v J H Corbitt (Numismatists) Ltd* [1981] AC 22, and of the High Court, in *Customs and Excise Commissioners v National Westminster Bank plc* [2003] STC 1072, to that effect and it is, moreover, the only conclusion which can be drawn from the structure of the legislation which brought this tribunal into being. The Tribunals, Courts and Enforcement Act 2007 conferred a (limited) judicial review function on the Upper Tribunal, a function it would not have had (as a creature of statute without any inherent jurisdiction) had the Act not done so. 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.

19. The question nevertheless remains, whether there is any other means by which this tribunal may assume jurisdiction, not by arrogating to itself a judicial

review function, but by applying some other principle of law. The possibility that it might was raised by Sales J in *Oxfam v Revenue and Customs Commissioners* [2010] STC 686. That was a case in which Oxfam argued that it was entitled to a greater VAT credit than HMRC had allowed, both as a matter of contract and because of legitimate expectation. Oxfam failed, because it could establish no binding contract and because, on the facts, it had no relevant legitimate expectation. What Sales J said on the matter was, therefore, not necessary for his decision and was in any event of a general rather than specific nature. It is accordingly not binding on me in this tribunal, though I accord it great respect. It must also be borne in mind that the rights of appeal open to taxpayers in respect of VAT differ from those available in an income tax case, and that there are provisions of European law which apply in the case of VAT but which have no application to income tax.

20. The relevant part of his judgment is as follows:

> "[66] … the parties thought that the tribunal did not have jurisdiction to consider Oxfam's alternative legitimate expectation argument. In my view, this is not correct. By the same construction of s 83(1)(c) [of the Value Added Tax Act 1994] and the same reasoning which led to the conclusion that Oxfam's contract claim was within the jurisdiction of the tribunal, Oxfam's legitimate expectation argument also fell within the jurisdiction of the tribunal. I can see no sensible basis in the language of that provision for differentiating between Oxfam's contract claim and its legitimate expectation claim. In both cases, if Oxfam's claim had been made out, an error of law on the part of HMRC in arriving at its decision on the amount of input tax to be credited to Oxfam would have been established (either a failure to respect Oxfam's contractual rights or a failure to treat Oxfam fairly, in breach of Oxfam's legitimate expectation) which would, on the face of it, be a proper basis for an appeal to the tribunal against HMRC's decision within the terms of s 83(1)(c).
>
> [67] Usually, of course, an appeal under one of the sub-paragraphs of s 83(1) will be on the merits of decision taken by HMRC, and questions of private law or public law (such as whether HMRC took into account irrelevant considerations or failed to take account of relevant considerations) will simply not be relevant to the tribunal's task on the appeal. But in my view it does not follow from this that the tribunal will never have jurisdiction to consider issues of general private law and general public law where that is necessary for it to determine the outcome of an appeal against a decision of HMRC whose subject matter falls within one of the sub-paragraphs of s 83(1).
>
> [68] I do not think that it is a valid objection to this straightforward interpretation of s 83(1)(c) according to its natural meaning that it has the effect that sometimes the tribunal will have to apply public law concepts in order to determine cases before it. It happens regularly elsewhere in the legal system that courts or tribunals with jurisdiction defined in statute by general words have jurisdiction to decide issues of public law which may be relevant to determination of questions falling within their statutorily defined jurisdiction. No special language is required to achieve that effect. Where they are themselves independent and impartial courts or tribunals (as the tribunal is) there is no presumption that public law issues are reserved to the

> High Court in the exercise of its judicial review jurisdiction. So, for example, a county court may have to consider whether possession proceedings issued by a local authority have been issued in breach of its public law obligations (*Wandsworth London BC v Winder* [1994] 3 All ER 976, [1985] AC 461); magistrates' courts and the Crown Court may have to decide issues of public law in so far as they arise in relation to criminal proceedings (*eg* to determine if a byelaw is a valid and proper foundation for a criminal charge: *Boddington v British Transport Police* [1998] 2 All ER 203, [1999] 2 AC 143 or to determine the validity of a formal instrument which is in some way a necessary foundation for the criminal charge: *DPP v Head* [1958] 1 All ER 679, [1959] AC 83); and employment tribunals may have to decide issues of public law in employment proceedings (*eg* to determine whether a contract of employment with a public authority is vitiated as having been made *ultra vires*).
>
> [69] I cannot see any good reason for adopting a different approach to the interpretation of the jurisdiction of the tribunal in s 83 of VATA. The tribunal is used to dealing with complex issues of tax law. There is no reason to think that it would not be competent to deal with issues of public law, in so far as they might be relevant to determine the outcome of any appeal. That view is reinforced by the fact that the tribunal may have to deal with complex public law arguments in relation to Convention rights when construing legislation under s 3 of the Human Rights Act 1998, and is recognised by Parliament as being competent to do so.
>
> [70] Moreover, there is a clear public benefit in construing s 83 by reference to its ordinary and natural meaning which strongly supports that construction. It is desirable for the tribunal to hear all matters relevant to determination of a question under s 83 (here, the amount of input tax to be credited to a taxpayer) because (a) it is a specialist tribunal which is particularly well positioned to make judgments about the fair treatment of taxpayers by HMRC and (b) it avoids the cost, delay and potential injustice and confusion associated with proliferation of proceedings and ensures that all issues relevant to determine the one thing the HMRC and taxpayer are interested in (in this case, the amount of input tax to be recovered) are resolved on one occasion in one place. It seems plausible to suppose that Parliament would have had these public benefits in mind when legislating in the wide terms of s 83.
>
> [71] Therefore, apart from any authority on this question, I would hold that s 83(1)(c) bears its ordinary and natural meaning, so that resolution of the issue of legitimate expectation which arose between Oxfam and HMRC fell within the tribunal's jurisdiction."

21. The learned judge went on to consider the authorities to which he had alluded at [71] (including the *Corbitt* and *National Westminster Bank* cases mentioned above) and came to the conclusion that they did not undermine his reasoning. Thus if taxpayers in the position of the appellants can demonstrate a relevant legitimate expectation, they have at least the beginnings of an argument that this tribunal can consider it.

22. Unfortunately, however, it does not seem to me that they get beyond the beginnings. The issue in *Oxfam* was, as s 83(1)(c) of VATA puts it, "the amount of any input tax which may be credited to a person", and the appeal originated in a

dispute about the application of a very technical area of VAT law, the use of a partial exemption special method, that is a negotiated arrangement by which a partially exempt trader (one who makes supplies, some of which are subject to VAT and some not) calculates the proportion of the input tax he has incurred for which he may receive credit. It is plain from the wording of s 83(1)(c) that the tribunal's essential task is to determine precisely that, the amount of input tax for which credit is due; and it is in my view unsurprising, against that background, that the judge considered it legitimate for the tribunal to consider any factor which might bear on that determination.

23. The position here is very different. The tribunal is not being asked, as in *Oxfam*, to determine how much tax is due—that has already been agreed—but whether HMRC should be required to exercise their discretion not to collect the tax. That is not a tax dispute at all, but a matter governed by public or administrative law, and precisely the kind of issue which must be determined by judicial review. Nothing in the legislation could be construed as conferring any jurisdiction to determine such an issue on this tribunal, nor do I see any basis on which an argument of legitimate expectation that a statutory duty (as HMRC's obligation to collect tax which is due is) will, or should, be waived could properly be regarded as the province of a tribunal whose task is to determine the amount of tax which is due: in that, there is a clear distinction to be drawn between this case and *Oxfam*.

24. I conclude, therefore, that this tribunal has no jurisdiction to consider whether or not HMRC have exercised their discretion correctly, or reasonably, and it would correspondingly be purposeless for it to hear evidence and make findings about whether or not any individual appellant comes within the ESC as a matter of fact, since it would be unable to give effect to any such determination. In addition, as I have concluded that there is no jurisdiction in the tribunal in relation to an ESC, I see little purpose in my speculating what the jurisdiction might have been had I come to the opposite conclusion.

Is it possible to challenge a P800 before the First-tier Tribunal?

25. I start by repeating that the appellants in these cases do not disagree with the calculations of the tax said to be due from them and accordingly do not themselves challenge the P800s. What follows is therefore to some extent academic, but I heard argument from both Mr Vallat and Mr Gordon, and the point may be important in other cases; it is therefore appropriate that I deal with it.

26. Mr Vallat's argument, and the second limb of HMRC's application, is that there is no right of appeal against a P800, because it is no more than an administrative measure, a means of reconciling PAYE records after the end of each tax year. It does not, they say, have any statutory basis, and does not determine a liability—that is done only when they issue a coding notice which gives effect to the P800. It is at this point, but not before, that the taxpayer may appeal, using the statutory route prescribed for that purpose by regs 18 and 19 of the Income Tax (PAYE) Regulations 2003.

27. Since there is no statutory basis for a P800, there is, Mr Vallat also says, no statutory avenue of appeal. The only way in which an appeal could be mounted

would be to satisfy the tribunal first that a disputed P800 amounted to an assessment. HMRC accept that in one decision of this tribunal (*Robert E Clark*, TC01164) it was decided, also in the context of an application to strike out an appeal, that it was "clearly arguable" that a P800 was an assessment. If it is, HMRC concede that there would be a right of appeal in accordance with s 31(1)(a) of the Taxes Management Act 1970 ("TMA"), which provides for an appeal against "any assessment which is not a self-assessment", it being accepted that a P800 cannot be a self-assessment. But, say HMRC, a P800 cannot be an assessment of any kind because it does not satisfy the requirements of s 30A of TMA which, so far as relevant for present purposes, 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.
>
> (4) After the notice of any such assessment has been served on the person assessed, the assessment shall not be altered except in accordance with the express provisions of the Taxes Acts.
>
> (5) Assessments to tax which under any provision in the Taxes Acts are to be made by the Board shall be made in accordance with this section."

28. That section makes it clear that, if a notice is to have the status of an assessment, it must satisfy certain formal requirements, not least the obligation to advise the taxpayer affected of the right of appeal. Moreover, s 113(3) of TMA requires that every assessment "shall be in accordance with the forms prescribed from time to time … by the Board". As a P800 does not state the time within which an appeal must be made, and is not one of the forms prescribed for the making or notification of an assessment, it does not satisfy the requirements, and cannot be regarded or treated as an assessment, or even as if it were an assessment.

29. Mr Gordon argues, by contrast, that a P800 may well be an assessment, susceptible of appeal in accordance with s 31(1)(a). He points out that the purpose of ss 30A and 113(3) is to protect the taxpayer from assessments which do not clearly identify themselves as such and should be considered in that light, rather than as a means of preventing appeals, and that s 114(1) makes it clear that the apparently rigid requirements of form are not in truth rigid:

> "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."

30. At first sight it would be odd if HMRC were right. Here, the taxpayers do not challenge the calculation of the tax said to be due, but one has to ask, what would be their position if they did? There may be a multitude of reasons why

HMRC have miscalculated the tax, by using incorrect figures, by failing to take account of a relief or allowance to which the taxpayer is entitled, or by reason of an arithmetical error, to identify only obvious examples. No doubt in many cases the astute taxpayer would write to HMRC with the necessary information or corrections, and the disagreement would be resolved in correspondence, but if there remained a disagreement it is difficult to accept that the taxpayer would be left with no remedy. I have concluded, however, that he is not, and that Mr Vallat is right to say that his course is to appeal against a new or amended notice of coding, in accordance with reg 18 or 19 of the PAYE Regulations.

31. I reach that conclusion by taking into account the context in which a P800 is issued. It reflects, as Mr Vallat rightly said, a reconciliation of the taxpayer's PAYE record. It is not 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; nor is it akin to the adjustment of a self-assessment return, by closure notice or discovery assessment. It is, rather, an adjustment made in the course of the mechanical process I described at the beginning of this decision by which the PAYE system attempts to deduct the correct amount of tax over the course of a tax year. That some of that tax may be due in respect of a previous year seems to me irrelevant, since it is one function of the PAYE system to recover such under-payments.

32. As the challenge of an aggrieved taxpayer is to the manner in which the PAYE system is being applied to his affairs, it seems to me appropriate that his appeal route should be one provided for by the same system. Regulations 18 and 19 provide such a route, and it is adequate—indeed, the facts and matters to be taken into account by a tribunal dealing with an appeal under one of those regulations are exactly the same as those which would be taken into account in an appeal under s 31.

Conclusions

33. I have concluded that this tribunal has no jurisdiction to deal with an appeal against HMRC's decision that none of the present appellants is entitled to the benefit of ESC A19. Whether that is an altogether satisfactory outcome may be a matter which merits earnest consideration elsewhere, particularly bearing in mind that factual matters of that kind are part of the daily diet of this tribunal, and manifestly do not warrant the taking up of the time of the High Court. The tribunal already has a quasi-judicial review function in some cases (see, for example, s 16 of the Finance Act 1994), and I echo what was said by Sales J in *Oxfam*, at [69] and [70], set out above, about what this tribunal is called upon to decide in other contexts. I observe also that there is a programme of converting ESCs into statutory provisions (and thus conferring rights of appeal to this tribunal), and it is unfortunate from these appellants' point of view that ESC A19 has not been so converted.

34. As matters stand, however, the only course open to me is plain. The tribunal cannot entertain a challenge to the refusal to apply ESC A19 and, the tax due as a matter of law being undisputed, there is nothing which is within the tribunal's

jurisdiction. I must, and do, strike out the appeals. I should make it clear, for completeness, that nothing I have said bears upon the merits of each taxpayer's position which, for the reasons I have given, I have not considered in depth. I should nevertheless add that if what they say is correct, I understand their sense of grievance.

35. This document contains full 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 45 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 Colin Bishopp
Chamber President

Release Date: 23 February 2012