TC07820

Income Tax *– application to strike out appeal on basis that no appealable decision – incorrect tax deducted under PAYE – assessments raised on basis of self-assessment tax returns – underpayments for 2009-10 and 2012-13 – no disagreement as to tax liability – whether or not taxpayer can appeal against own self-assessment – held not – whether or not tribunal can consider application of PAYE regulations – held not – no appealable decision – appeal struck out*

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/02442

BETWEEN

LAURA BELL **Appellant**

-and-

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

TRIBUNAL: JUDGE PHILIP GILLETT

The Tribunal determined the appeal on 16 July 2020 without a hearing under the provisions of Rule 29 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, having received the consent of both parties that the appeal should be determined on the basis of the papers presented to the Tribunal.

The Tribunal determined this case on the basis of written submissions from Mary Donnelly, litigator of the Solicitor's Office of HMRC, dated 22 May 2020 and submissions from Ms Bell dated 5 June 2020 together with other correspondence.

DECISION

1. This was an application by HMRC for the strike out of an appeal by Ms Bell on the ground that there was no appealable decision.

SUMMARY OF DECISION

2. The tribunal decided that there was no appealable decision before it and that the appeal should therefore be struck out in accordance with Rule 8(2)(a) Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009.

THE FACTS

3. I received submissions from both parties containing representations of fact, but there is no material disagreement between the parties as to the underlying facts and I find the following as matters of fact.

4. During 2009-10 and 2012-13 Ms Bell was employed by the National Health Service ("NHS"). She was made redundant and received termination payments from the NHS in both years.

5. On receipt of the 2009-10 NHS end of year returns HMRC carried out a reconciliation with Ms Bell's PAYE records and determined that there was an underpayment in respect of 2009-10 of £22,214.45, as Ms Bell's gross income for that year, including the redundancy payment, was £180,056.

6. HMRC could not collect the underpaid amount through subsequent years' PAYE coding because the amount was too large. They therefore issued a tax return to Ms Bell, which they say they issued on 11 August 2011. There is some confusion as to whether or not Ms Bell received this return but she eventually filed her tax return for 2009-10 on 24 January 2014. The figures contained in this return confirmed the underpayment of £22,214.45, and this became the balancing tax payment for 2009-10.

7. The 2012-13 return was issued to Ms Bell on or around 6 April 2013 and this was received on 20 September 2013. The figures in this return showed an underpayment of £3,243, which therefore became the balancing tax payment for 2012-13.

8. In April 2014 HMRC debt management started to pursue Ms Bell for the payment of the outstanding debts.

9. In July 2014 Ms Bell wrote to HMRC stating that in both cases the underpayment arose as a result of her employer failing to deduct the appropriate tax under PAYE.

10. Ms Bell appealed to HMRC, but HMRC treated this as an appeal against late filing penalties in respect of the 2009-10 tax return because they believed that no appeal was possible against the self-assessment balancing liabilities.

11. On 17 December 2014 HMRC asked Ms Bell to provide details of her redundancy payments but in reply Ms Bell said that she was still chasing her employers for details of her contracts. This information is still outstanding but Ms Bell has explained that the entities from which she was made redundant no longer exist, because they ceased to exist as a result of internal NHS reorganisations.

12. The various HMRC decisions were the subject of an internal review by HMRC which upheld the late filing/payment penalties for 2012-13, although it appears that all late filing/payment penalties have now been cancelled by HMRC.

13. HMRC say that at this time they advised Ms Bell that although she could not appeal against tax liabilities arising from her own self-assessment, she could consider applying for

repayment relief under Sch 1A Taxes Management Act 1970. Ms Bell does not have any recollection of this.

14. There is then no further record of correspondence from Ms Bell until April 2017, when HMRC Debt Management Office issued a warning of bankruptcy letter. In August 2017 Ms and HMRC reached a time to pay agreement to clear the outstanding liabilities but this payment plan was terminated in January 2018 because Ms Bell failed to comply with its terms. Ms Bell states that she only missed two payments, but HMRC state that the payments for October, November and December 2017 were all late. Nothing turns on this for the purposes of this appeal.

15. Following the termination of the time to pay agreement Ms Bell appealed to the Tribunal in April 2018.

GROUNDS OF APPEAL

16. Ms Bell's grounds of appeal are set out in various submissions and can be summarised as follows:

(1) Ms Bell had failed to obtain a reasonable explanation from HMRC over a number of years as to how she had come to owe them so much since she had always been employed under PAYE.

(2) When HMRC advised her of the tax she owed in respect of 2009-10 she was not previously aware that her employer had made a mistake in applying PAYE.

(3) The redundancy payment in 2012-13 was paid in March 2013 and was in fact pay in lieu of six months' notice and therefore really related to 2012-13. She had been advised by her employer that as this was pay in lieu of notice she was not allowed to work full time until October 2013.

(4) The redundancy payment in 2009-10 was paid by South West Essex Primary Care Trust and was paid in two instalments because of an error with her electronic employment record. This resulted in her employer failing to make the correct PAYE deductions. This mistake was made by Ms Bell's employer and therefore it is unfair that she should be responsible for the underpayment because she had no way of knowing that she had paid the wrong amount of tax.

(5) Ms Bell has been harassed by HMRC debt collection agents which has impacted her mental health.

(6) Ms Bell feels that she has been treated unfairly by HMRC and that her dispute with HMRC will not be resolved by further correspondence with them. She therefore feels that her only course of action is to appeal to the Tribunal.

DISCUSSION

17. HMRC contend that Ms Bell has no appealable decision and that therefore this appeal should be struck out in accordance with the Tribunal's Rules. They acknowledge that Ms Bell has raised concerns about her treatment but they state that this is a customer service matter which should be raised with HMRC through the relevant HMRC department.

Application of PAYE

18. Ms Bell has always argued that the fault lay with her employers, who had both failed to calculate her PAYE tax deduction correctly. It may have been possible to resolve this issue earlier had Ms Bell been able to provide HMRC with details of her contract and redundancy payments but Ms Bell states that this was not possible because the employers in question no longer existed.

19. The taxation of redundancy payments and payments in lieu of notice can be complex, and is not always well suited to the mechanics of the PAYE legislation. In the case of the 2012-13 payment this took Ms Bell's earnings for the 2012-13 tax year to over £100,000, at which point she lost her entitlement to a personal allowance deduction for that year. As a consequence Ms Bell lost a tax deduction of £8,105, and the additional earnings were then subject to tax at 40%. 40% of £8,105 is £3,242, which is the amount of the underpayment claimed by HMRC. This interaction with a reduced personal allowance is not something which the PAYE system can handle easily.

20. Ms Bell argues that the payment made in March 2013 was a payment in lieu of notice for the next six months and that therefore this payment should be taxed in 2013-14 and not in 2012-13. She submits that since she was unable to work for the first six months of 2013-14 she would not have fallen foul of this problem of the loss of her personal allowance had the payment been taxed in 2013-14, which is where they really belonged.

21. If she had been placed on "garden leave" and had continued to receive her normal salary until the end of that period, she may be correct that the payments should have been taxed in the following tax year. However, the evidence is that she was paid a lump sum at the termination of her employment and that her employment did not continue into the following year.

22. The timing of the taxation of termination payments is set out in s403 Income Tax (Earnings and Pensions) Act 2003 ("ITEPA") as follows:

> **"403 Charge on payment or other benefit**
>
> (1) The amount of a payment or benefit to which this Chapter applies counts as employment income of the employee or former employee for the relevant tax year if and to the extent that it exceeds the £30,000 threshold.
>
> (2) In this section "the relevant tax year" means the **tax year in which the payment or other benefit is received**.
>
> (3) For the purposes of this Chapter—
>
> (a) a cash benefit is treated as received—
>
> (i) when it is paid or a payment is made on account of it, or
>
> (ii) when the recipient becomes entitled to require payment of or on account of it, and
>
> (b) a non-cash benefit is treated as received when it is used or enjoyed.
>
> (4) For the purposes of this Chapter the amount of a payment or benefit in respect of an employee or former employee exceeds the £30,000 threshold if and to the extent that, when it is aggregated with other such payments or benefits to which this Chapter applies, it exceeds £30,000 according to the rules in section 404 (how the £30,000 threshold applies).
>
> (5) If it is received after the death of the employee or former employee—
>
> (a) the amount of a payment or benefit to which this Chapter applies counts as the employment income of the personal representatives for the relevant year if or to the extent that it exceeds £30,000 according to the rules in section 404, and
>
> (b) the tax is accordingly to be assessed and charged on them and is a debt due from and payable out of the estate.
>
> (6) In this Chapter references to the taxable person are to the person in relation to whom subsection (1) or (5) provides for an amount to count as employment income."

23. Unfortunately therefore such payments are taxable **when they are received** or when they are made available to the employee, and although this may seem unfair to Ms Bell, it is quite clear from s403 ITEPA that this is the way the law works and I cannot interfere with that, even if I were able to in the context of this appeal.

24. Under s403(1) ITEPA, the first £30,000 of a redundancy payment or a payment in lieu of notice is not taxable, which confers a very significant tax benefit on the employee, and it may be that Ms Bell expected to be taxed only lightly on her redundancy payment in 2009-10, and that she did not therefore look too closely at the PAYE calculations which had been applied to the payments by her employer. Nevertheless, this does not change the fact that she received a significant redundancy payment on which she did not suffer the correct amount of tax. She does not dispute that these were earnings which she received.

25. If Ms Bell's employers did indeed calculate the PAYE deductions incorrectly this does not change the fact that she, as the employee, is liable for income tax on her earnings. This is clear from s13 ITEPA, as set out below:

> "**13 Person liable for tax**
>
> (1) The person liable for any tax on employment income under this Part is the taxable person mentioned in subsection (2) or (3). This is subject to subsection (4).
>
> (2) If the tax is on general earnings, "the taxable person" is the person to whose employment the earnings relate.
>
> (3) If the tax is on specific employment income, "the taxable person" is the person in relation to whom the income is, by virtue of Part 6 or any other enactment, to count as employment income.
>
> (4) … "

26. The question then arises as to whether or not I am able to interfere with the operation of the PAYE provisions. This issue has been discussed by the courts on a number of previous occasions and I consider the position to be well summarised in *McCarthy v McCarthy & Stone plc* [2007] EWCA Civ 664, at [42] to [45]:

> "42. As is well known the PAYE system is designed to recover tax due on income of an employee from its source, that is the employer, and in anticipation of the liability which arises at the end of the year of assessment in which it is paid. Accordingly it is hardly surprising that the PAYE regulations do not impose any liability on the employee. That is done by the primary legislation, namely ITEPA, to which I have referred, and the general machinery for collection contained in the Taxes Management Act 1970 ("TMA"), to which I now turn.
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> 43. Part VI of TMA deals with "Payment of Tax". S.59A deals with payments on account of tax. It imposes the now familiar requirement to pay tax on 31st January and 31st July, the first of which is payable during the relevant year of assessment and the second only three months after its conclusion. It applies if in the previous year of assessment the tax on the income of the taxpayer from all sources exceeded the amount of tax deducted at source by a fraction to be prescribed by regulations. Thus a liability is imposed on a taxpayer in respect of his income in excess of that from which tax has been deducted at source. This section was referred to by Peter Smith J in paragraph 72 of his judgment as reinforcing the position that the Claimant "is liable to pay tax on his own earnings if it is not deducted".
>
> 44. The matter is put beyond doubt by the provisions of s.59B. That provides that the amount shown in a taxpayer's self-assessment under s.9 TMA for any year of

assessment less (1) the aggregate of payments on account made by him under s.59A or otherwise in respect of that year and (2) any income tax deducted at source "shall be payable by him as mentioned in subsections (3) or (4) below". Those subsections deal with the time of payment by reference to notices given under ss. 7 or 8 TMA. But all of them recognise that the sums "payable by" the taxpayer are recoverable by the normal assessment procedures.

45. Counsel for the Claimant seeks to avoid what appear to me to be the obvious consequences of the legislative provisions to which I have referred on the grounds that s.59B is concerned with the mechanics of calculation of the liability, not its imposition. In one sense, of course, it is. It provides the mechanics for recovering the sums due in respect of the liabilities imposed by ITEPA in the provisions to which I have already referred. What it does not show is that an employee is not liable for tax on his employment income, including gains arising from the exercise of share options."

27. It is clear therefore that the application of the PAYE Regulations is not something which I can consider. The PAYE regulations are concerned with the collection of income tax. They do not alter the chargeability of income tax, which is the only issue within my jurisdiction.

Is there an Appealable Decision?

28. I then return to the issue which is at the heart of this appeal, which is whether or not there can be a valid appeal against additional liabilities to income tax which arise from a taxpayer's own tax returns. The simple answer is that there is no such appeal. The First Tier Tribunal is a creature of statute and it can only consider matters which are stated by statute to be within its jurisdiction and the legislation simply does not provide a right of appeal against a person's own self-assessment tax return.

29. A taxpayer is permitted to amend her tax return but this must be done within a year after the relevant filing date. If this deadline is missed then the only recourse open to a taxpayer is to apply for repayment under Sch 1A Taxes Management Act 1970.

30. Again however there are time limits on making such an application. It may be that Ms Bell might have been in time to make a repayment claim when these issues first came to light in 2014 to 2015, but she did not.

31. There was then very limited contact with HMRC until April 2017, when she was threatened with bankruptcy by HMRC. I suspect that any claim for repayment under Sch 1A is now out of time, but since this issue is not before me I cannot make any definitive finding on that.

32. However, at the heart of this case is the fact that Ms Bell did not pay the correct amount of income tax on her two redundancy payments. Any claim to repayment under Sch 1A can only realistically be made if the taxpayer paid the incorrect amount of tax, and this is simply not the case here. Her only real defence is that she did not realise until much later that the correct amount of tax had not been deducted under PAYE and, when she was made aware of the liabilities, she wanted to understand how they had come about, a process which she found very confusing. This does not however change the fact that the income tax under-deducted is still due.

DECISION

33. For the reasons given above I have decided that there is no appealable decision before me. I must therefore, in accordance with Rule 8(2)(a) The Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009, STRIKE OUT this appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

34. 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.

PHILIP GILLETT

TRIBUNAL JUDGE

RELEASE DATE: 20 AUGUST 2020