



[2022] UKFTT 00027 (TC)

TC 08379

PAYE – appeal against determinations of tax codes issued by HMRC – Appellant seeking reinstatement of code which had been notified prior to beginning of tax year – HMRC agreed to issue similar code following notice of appeal to Tribunal – Appellant decided not to withdraw appeal -HMRC invited Tribunal to determine appeal in Appellant’s favour – code determined by Tribunal as that sought by Appellant

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2021/00277

BETWEEN

RICHARD THOMAS

Appellant

-and-

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

Respondents

TRIBUNAL: JUDGE JEANETTE ZAMAN

The Tribunal determined the appeal on 13 and 14 January 2022 without a hearing with the consent of both parties under the provisions of Rule 29 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 having first read the Notice of Appeal dated 25 January 2021 (with enclosures) and subsequent correspondence between the parties and with the Tribunal, as referred to in this decision notice.

DECISION

INTRODUCTION

1. Mr Thomas has appealed to the Tribunal against PAYE coding notices for the tax year 2020-21 issued by HMRC in November and December 2020. He sought re-instatement of the code (499L) which had previously (in January 2020) been notified to him in respect of his civil service pension for that year.
2. The appeal was notified to the Tribunal on 25 January 2021. HMRC subsequently issued a further change in code (to 498L). HMRC had considered that this would dispose of the matter. Mr Thomas did not agree. HMRC then confirmed on 4 March 2021 that it did not consider itself in dispute with Mr Thomas and invited the Tribunal to determine the code in favour of Mr Thomas and allow the appeal, noting that Mr Thomas' final tax liability will be calculated upon the submission of his tax return for 2020-21. The Tribunal informed the parties that no substantive hearing or paper determination was required and the matter could be disposed of by consent order or by the issue of a short decision.
3. HMRC indicated that they would be content for the matter to be finalised in this way. Mr Thomas has applied for full facts and reasons to be given by the Tribunal in respect of his appeal. That application was referred to me in November 2021 and was listed for determination on the papers on 13 and 14 January 2022.
4. Mr Thomas's position has been set out in his letter of objection to HMRC dated 9 December 2020 and his statement of case accompanying his notice of appeal to the Tribunal on 25 January 2021, as well as in subsequent correspondence (notably his letter of 5 April 2021).
5. HMRC have not prepared a statement of case (nor have they been required by the Tribunal to do so). Their substantive position is set out in the coding notices (of January, November and December 2020) and in correspondence subsequent to the notification of the appeal to the Tribunal.
6. Mr Thomas' appeal asks the Tribunal to determine the relevant code as 499L. He bears the burden of proof to establish, on the balance of probabilities, that such code is in accordance with The Income Tax (Pay As You Earn) Regulations 2003 (the "PAYE Regulations"). On the basis of my findings of fact and for the reasons set out below, the code is so determined.

FACTS

7. The papers as referred to me largely comprised correspondence (both between Mr Thomas and HMRC and, following notification of the appeal to the Tribunal, with the Tribunal). Mr Thomas had prepared a statement of case, which included extracts of the PAYE Regulations and some HMRC commentary thereon. The documentary evidence comprised Mr Thomas' own explanations of what had happened (including as to the timing of his submission of his tax return and his receipt of fee income from the Ministry of Justice) and some, but not all, of the coding notices issued by HMRC. HMRC has provided some explanation of relevant events, most substantively in the context of explaining why they issued code 498L in February 2021 rather than simply re-instating code 499L at that time.
8. Having considered all of the papers before me, I make the findings of fact set out below. I have drawn additional inferences from these facts as set out in the Discussion.
9. Mr Thomas' employment and pension income for the tax year 2020-21 included the state pension, his civil service pension and two judicial pensions.
10. In January 2020 HMRC issued a coding notice to Mr Thomas for the tax year 2020-21. That notice stated that:

- (1) Code 499L would be applied to his civil service pension. The tax-free amount available against that pension was calculated as the personal allowance plus gift aid (of £195) less state pension.
 - (2) The two judicial pensions are coded D0. This D0 coding shows that this income is taxed at the 40% higher rate.
11. No changes were subsequently made to the D0 coding applied to Mr Thomas' judicial pensions.
12. On 30 September 2020, the Ministry of Justice paid Mr Thomas a fee of £2,087.25 for a hearing at the First-Tier Tribunal (Tax Chamber) which Mr Thomas had conducted after his retirement as a tribunal judge. £1,669.80 was paid to Mr Thomas' bank account, and tax of £417.45 was deducted.
13. Mr Thomas posted his (paper) tax return for the tax year 2019-20 to HMRC on 20 October 2020.
14. On 26 November 2020 HMRC issued a coding notice for the tax year 2020-21 stating that £2,037 of his civil service pension is tax-free and tax code 203L X replaces 499L for this income. Within that coding notice:
 - (1) The calculation of the tax-free amount sets out the personal allowance plus gift aid of £190, less state pension and an "adjustment for estimated tax you owe (this year)" of £2,949, resulting in the tax-free amount above.
 - (2) The estimated tax owed this year is stated to be £420.20. That is explained in note 7 as "Due to an in year adjustment to your tax code(s) we think you will owe HMRC £420.20" and that the adjustment to reduce his tax-free allowance by £2,949 has been made to collect that £420.20.
15. Mr Thomas wrote to HMRC on 9 December 2020 objecting to that code "on the grounds that the adjustment for tax said to be owing is fictitious and manufactured by HMRC, and does not conform with any of the factors that HMRC may take into account". He asked that HMRC amend the code number as soon as possible. The matters asserted by Mr Thomas in that letter include:
 - (1) he cannot understand why HMRC thinks that the right tax for the year will be £420.20 more than it would have been if code 499L had continued to apply – such amount cannot be known until the end of the tax year and he has filed his tax return;
 - (2) HMRC had referred in an entry after Note 7 to the code being changed because of information in his tax return, but what information given about 2019-20 can affect the coding for 2020-21;
 - (3) code 499L takes into account the state pension (the amount of which is known and cannot change) and applies the balance of the personal allowance and an estimate of gift aid payments to the civil service pension. His two judicial pensions are taxed correctly at 40% through a D0 coding; and
 - (4) it is not clear how reducing the allowances by £2,949 collects £420.20 of tax; HMRC is asked to explain this amount.
16. On 30 December 2020 HMRC issued a further coding notice for the tax year 2020-21, changing the code applicable to his civil service pension to 192L X. This code was worked out using an adjustment for estimated tax owed this year of £3,066, resulting in a lower total tax-free amount (of £1,920), which would be applied to Mr Thomas' civil service pension. Note 7 to this coding notice explains the estimated tax owed as "Due to an in year adjustment

to your tax code(s) we think that you will owe HMRC £322.60”, and that this will be collected by reducing his tax-free allowance. There was no further explanation and no express reference to Mr Thomas’ letter of objection.

17. Mr Thomas wrote to HMRC on 22 January 2021 to appeal against the determination of both of these codes (ie 203L X and 192L X). That letter stated that he was not seeking a review of the decision, would decline an offer of a review and that he would issue a notice of appeal to the Tribunal.

18. Mr Thomas gave notice of appeal to the Tribunal on 25 January 2021. The grounds of appeal accompanied that notice together with a statement of case. Mr Thomas’ position is that code 499L, and the calculations which had been made to determine the tax-free amount available against the civil service pension, correctly reflected his expected circumstances and the determinations of his code on 23 November 2020 and 30 December 2020 are not ones that HMRC is authorised to make.

19. On 22 February 2021 HMRC wrote to Mr Thomas stating that they had processed his request and applied code 498L for the remainder of the tax year 2020-21. The slight difference from that applied at the start of the tax year was said to result from the confirmation of gift aid contributions with the submission of his 2019-20 tax return in October 2020. That letter invited Mr Thomas to confirm how he wished to proceed in respect of his appeal.

20. Neither party provided a copy of the coding notice which was issued in February 2021. However, HMRC did, in the course of the further correspondence described below, provide a copy of a Coding History List for Mr Thomas which stated that the tax code 498L was issued on 18 February 2021. I am satisfied, on the basis of this evidence, that this change was made and the notice was issued.

21. Mr Thomas responded that same day, 22 February 2021, reiterating his request for an explanation of HMRC’s actions in issuing the coding notice (in November 2020).

22. On 25 February 2021 HMRC stated that as the relevant tax code had been changed and Mr Thomas had indicated he was satisfied with the amendment, HMRC considered that there was no matter within the Tribunal’s jurisdiction for the Tribunal to determine.

23. Mr Thomas stated in his letter of 26 February 2021 that he had no intention of withdrawing his appeal. He also added that he had not said he was satisfied with the amended code, rather that he was pleased it had been done.

24. On 4 March 2021 HMRC stated that:

- (1) HMRC had considered that its action in changing the code disposed of the matter.
- (2) HMRC does not consider itself in dispute with Mr Thomas regarding the code to be applied to the civil service pension and invited the Tribunal to determine the code in favour of Mr Thomas and allow the appeal

25. Mr Thomas replied the following day stating his position that the matter still fell to be determined by the Tribunal as there was no statutory agreement between himself and HMRC and he was not withdrawing his appeal. He drew attention to the fact that HMRC had not reinstated the code of 499L. On 8 March 2021 he applied for a decision allowing his appeal.

26. On 22 March 2021 the Tribunal informed the parties that as a result of HMRC’s withdrawal the appeal should be determined either by a consent order or a decision notice and that either way the determination will be for the re-instatement of code 499L for the tax year.

27. HMRC replied that same date stating that HMRC confirmed its agreement to the disposal of proceedings by way of a consent order or to a short decision. They also stated that they had

made a request for the change of the code to that which the Tribunal had indicated will be determined, ie 499L, but noted that given the proximity of the end of the tax year the updated tax code may not have an impact.

28. On 5 April 2021 Mr Thomas stated that he did not agree to a consent order nor did he agree to a short decision.

PAYE REGULATIONS

29. Regulation 13 of the PAYE Regulations requires HMRC to determine the code for use by an employer in respect of an employee during the tax year.

30. Regulation 14 provides:

“14 Matters relevant to determination of code

(1) If the Inland Revenue determine a code under this regulation, they must have regard to the following matters so far as known to them—

(a) the reliefs from income tax to which the employee is entitled for the tax year in which the code is determined, so far as the employee's title to those reliefs has been established at the time of the determination;

(b) any PAYE income of the employee (other than the relevant payments in relation to which the code is being determined);

(c) any tax overpaid for any previous tax year which has not been repaid;

(d) any tax remaining unpaid for any previous tax year which is not otherwise recovered;

(e) any tax repaid to the employee in excess of the amount properly due to the employee which may be recovered as if it were unpaid tax under section 30(1) of TMA (recovery of overpayment of tax etc) and which is not otherwise recovered;

(f) unless the employee objects, any other income of the employee which is not PAYE income; and

(g) such other adjustments as may be necessary to secure that, so far as possible, the tax in respect of the employee's income in relation to which the code is determined will be deducted from the relevant payments made during that tax year.

(2) If the Inland Revenue determine the code before the beginning of the tax year for which it is determined, the Inland Revenue—

(a) must have regard to any expected change in the amount of any relief referred to in paragraph (1)(a), but

(b) may disregard any such relief if they are not satisfied that the employee will be entitled to it for the tax year for which the code is determined.

(3) Paragraphs (1)(c) and (d) are subject to regulations 186 and 187 (recovery and repayment: adjustment of employee's code).”

31. Regulation 37 provides:

“37 PAYE income paid after employment ceased

(1) This regulation applies if a relevant payment is made to an employee after the employment has ceased—

(a) by the former employer in respect of the former employment, or

(b) by any other person in respect of an obligation of the former employer,

and the payment has not been included in Form P45.

...

(2) The person making the payment must deduct tax on the non-cumulative basis using the 0T Code.

...”

32. Regulation 18(4) provides that on an appeal that is notified to the Tribunal, the Tribunal must determine the code in accordance with the PAYE Regulations.

33. Regulation 19 then provides:

“19 Amendment of code

(1) Paragraph (2) applies if the code for use by an employer in respect of an employee is found to be inappropriate because the actual circumstances are different from the circumstances by reference to which it was determined, whether by the Inland Revenue or the tribunal.

(2) The Inland Revenue may, and if required by the employee must, amend the code by reference to the actual circumstances.

(3) The Inland Revenue must give notice of the amended code to the employee by the date on which the notice under regulation 20(1) is issued to the employer.

...”

DISCUSSION

34. Mr Thomas submits that HMRC did not have power under Regulation 14 to determine the amended codes which they issued in November or December 2020.

35. Regulation 14(1) sets out the matters to which HMRC must have regard when determining a code. I agree with Mr Thomas that the matters listed in Regulation 14(1) are mandatory (and HMRC have not submitted otherwise). Mr Thomas submits that such a mandatory list necessarily prohibits any matter not listed therein from being taken into account. I disagree; a requirement that specified matters are taken into account does not of itself necessarily mean that no other relevant matters may be taken into account.

36. Mr Thomas’ initial letter to HMRC objecting to the determination of the code had stated that the adjustment for estimated tax used by HMRC when calculating the code set out in their letter of 26 November 2020 was “fictitious and manufactured”. In his (later) statement of case he observed that he had realised when preparing that submission that there was a close correlation between the PAYE deducted from his fee income paid by the Ministry of Justice in September 2020 and the amount of estimated tax shown on the coding notice.

37. I consider that Mr Thomas was correct to make this observation. Mr Thomas was a higher rate taxpayer in the tax year 2020-21. Tax at the basic rate was deducted from the fee income which was paid to Mr Thomas on 30 September 2020. This information would have been sent to HMRC by those responsible for dealing with the Ministry of Justice’s payroll on or shortly after that payment date. I infer that HMRC’s systems would have identified (automatically) that additional tax would be payable by Mr Thomas on this fee income in the tax year 2020-21, and that the amended codes were generated to collect this tax.

38. Mr Thomas has submitted that Regulation 14(1) does not permit HMRC to determine the code in this way. HMRC have not set out any positive case as to why they were so entitled; they have issued various coding notices and stated (in the context of informing the Tribunal

that they had issued a new code 498L) that they do not consider themselves in dispute with Mr Thomas.

39. Whilst I do not consider that Regulation 14(1) sets out an exhaustive list of matters to be taken into account (albeit that those listed must be taken into account), that does not mean that the specific matters identified in Regulation 14(1)(a) to (g), or other provisions of the PAYE Regulations, can be effectively overridden by HMRC in the exercise of their power to determine the code.

40. Regulation 14(1)(b) and Regulation 37 merit further consideration in this regard.

41. Regulation 14(1)(b) provides that if HMRC determine a code they must have regard to any PAYE income of the employee (other than the relevant payments in relation to which the code is being determined) so far as known to them.

42. The fee income paid to Mr Thomas on 30 September 2020 is PAYE income, and is not excluded by the language in brackets (as the code was being determined in relation to his civil service pension rather than the fee income itself). Looking at this provision in isolation, I am strongly inclined to the conclusion that, once HMRC became aware of the fee income paid to Mr Thomas, then they had to have regard to that income when determining the code applicable to his civil service pension.

43. Mr Thomas' submission is such an approach would override the intended effect of Regulation 37, which provides for a fixed code to operate to post-cessation employment income, irrespective of the circumstances of the employee. I do not accept that submission. Regulation 37 provides that if a relevant payment is made to an employee after the employment has ceased and the payment has not been included in a P45, the person making the payment must deduct tax on the non-cumulative basis using the 0T code. This regulation applied to the fee income received by Mr Thomas from the Ministry of Justice, and the 0T code was correctly applied. However, Regulation 37 only instructs the former employer (or any other person making a payment in respect of an obligation of the former employer) which code to use and thus how much tax to deduct. It does not purport to apply to prevent this income from being taken into account when determining the tax to be deducted by other employers from other PAYE income of the employee. Regulation 37 does not therefore exclude any income to which it applies from being a relevant matter for the purposes of Regulation 14(1)(b) and the determination of a code applicable to other PAYE income (such as the civil service pension).

44. I therefore consider that when HMRC determined the code applicable to Mr Thomas' civil service pension in November 2020 they were both entitled and required to have regard to the fee income of Mr Thomas which was paid in September 2020. On the basis of my findings of fact and inferences drawn therefrom, I have concluded that HMRC did have such regard.

45. The difficulty is that this conclusion on a point of principle does not provide much assistance as regards the substantive issue before me, which is the requirement (in Regulation 18(4)) that the Tribunal determines the code in accordance with the PAYE Regulations. Four codes have been issued by HMRC at different times: 499L (before the beginning of the tax year), 203L X, 199L X and 498L. The circumstances in which this appeal is being determined (which are set out fully above) means that I have minimal evidence from which to determine which of these codes (if any) complies with the requirements of the PAYE Regulations. In particular, and by way of illustration, there is minimal evidence which explains how the adjustments proposed by HMRC to be made to the personal allowance will collect specified amounts of tax and thus how each or any of these codes would operate to collect particular amounts of tax.

46. Having regard to the overriding objective in the Tribunal rules, the timing of this appeal (ie that this appeal is being determined after the end of the tax year in which the code applied) and HMRC's position, I considered it would not be proportionate to request or require the parties to provide additional evidence to the Tribunal.

47. Mr Thomas' objection to HMRC and his subsequent appeal to this Tribunal were both made on the express basis that code 499L, which had been determined by HMRC in January 2020, was correct. HMRC have said they are not in dispute with him and invite me to allow the appeal. The timing of issue of that code means that it cannot have taken into account the receipt of any fee income of Mr Thomas at that time; the fact of such receipt cannot have been known. However, codes determined by the PAYE Regulations are merely a mechanism for the collection of tax rather than an assessment of liability. A code which has been issued may become "out-of-date" by reference to the actual circumstances which occur, and in such a situation HMRC have power to amend the code (under Regulation 19(2)) but are not required to do so, unless required by the employee.

48. On the basis of the evidence and submissions before me, I determine the code as 499L, ie that initially issued by HMRC before the start of the tax year and the re-instatement of which is sought by Mr Thomas. I consider that HMRC had power to determine an amended code (which may well have been one of those they did issue during the tax year) once they became aware of the payment of the fee income in September 2020 but they were not required to do so (as Mr Thomas's submissions make it clear that he is not requiring HMRC to amend the code by reference to these actual circumstances). As HMRC were not required to amend the code, I consider that neither is this Tribunal required to determine what that amended code might have been.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

49. 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.

**JEANETTE ZAMAN
TRIBUNAL JUDGE**

Release date: 17 JANUARY 2022