[2013] UKFTT 341 (TC)

TC02744

Appeal number: TC 2012/05822

INCOME TAX – PAYE – Regulation 72(5) direction – Appeal against refusal to make direction – Failure of Appellant to make proper deductions – Whether Appellant had taken reasonable care to comply with regulations – No – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

PORTSLADE DENTAL CARE LIMITED **Appellant**

- and -

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

TRIBUNAL: SIR STEPHEN OLIVER QC
NIGEL COLLARD

Sitting in public in Brighton on 18 March 2013

No appearance for the Appellant
PA Reeve for the Respondents

DECISION

1. This is an appeal against a decision of HMRC not to make a direction under Regulation 72(5) of the Income Tax (Pay as You Earn) Regulations 2003 ("the Regulations") in respect of tax that the Appellant had been required to deduct from payments to an employee in the tax years 2008/09 and 2009/10.

2. The underdeduction for 2008/09 had been £250.80 and for 2019/10 it had been £912.20.

3. The Tribunal was informed, before the hearing, that the Appellant would neither attend nor be represented at the hearing. HMRC were represented. The Tribunal decided to go ahead and decide the appeal on the basis of material provided in exchanges of correspondence between the parties. Following the hearing, the Tribunal issued a written summary of its decision to refuse the appeal. The Appellant has asked for a full decision setting out the facts and the reasons.

The Facts

4. The facts are drawn entirely from the formal notices and the correspondence provided by HMRC and the payroll agents (i.e. the new agents referred to in paragraph 6 below). We received no direct evidence from the Appellant itself.

5. The underdeducted tax relates to the emolument of a Mrs Corcoran, a member of the Appellant's staff at the time relevant to this appeal. Her employment had started on 1 June 2007.

6. Until August 2008, the Appellant had used an agent to manage its payroll responsibilities. As from September of that year the Appellants had replaced the old agents with a new firm (chartered accountants) which took on all the payroll and compliance responsibilities.

7. On 18 September 2008, HMRC issued tax code (manual code type) details relating to Mrs Corcoran for 2008/09. The code was 256L. The details were addressed to the Appellant. The new agents stated, in a letter of 29 March 2011, that they had never seen notification of the adjusted tax coding for 2008/09 and that the Appellant had not realised that the new agents would need a paper copy of the tax code. For that reason, said the agents, they had not adjusted Mrs Corcoran's PAYE. The new agents suggested that the details of the tax coding might have been sent to the old agents.

8. We see no alternative but to find as a fact that the tax code details for the year 2008/09 were issued by HMRC to the Appellant and that they were not passed on by the Appellant to its new agent. The document containing the tax code details for Mrs Corcoran bears the date 18 September 2008 and it shows the Appellant as the employer. Nothing on the face of that document shows that it was sent to an agent.

Moreover, as already observed, the new agent has written that it has not seen the document. There is no evidence to displace those apparent facts. It was open to the Appellant to produce its own records. At the time of the change-over to the new agents the Appellant might have assembled a list of its employees who were under the PAYE system. It might have had a system for recording the receipt of PAYE notices for all its staff and the manner in which they were dealt with (e.g. by forwarding them to the new agents). As it was, the Appellant itself chose not to attend the hearing and give evidence or by any other means to substantiate its and the new agents' assertions. On that basis, we conclude that the tax coding details relating to Mrs Corcoran for 2008/09 were sent to the Appellant which did not forward them to their new agents.

9. The tax code details for 2009/10 show a tax code of 46L being the annual coding. The employer is recorded as the Appellant and the notice from HMRC was issued on 8 February 2009. The new agent, in its letter to HMRC of 29 March 2011, states that it did not receive a paper copy of the details from the Appellant; nor did it receive e-communications from HMRC. The new agent said that it had not received notification of Mrs Corcoran's tax coding until January 2010. Here again, the evidence is all one way. There are no records kept by the Appellant to indicate, e.g., that it had received the tax code details for Mrs Corcoran and forwarded them to the new agents. No one came to give evidence on behalf of the Appellants. We are bound, therefore, to accept the account given by their new agents in the course of correspondence.

The Law

10. Regulation 68 of the Regulations provides that employers must pay over to HMRC all the tax that they are liable to deduct. The employee is made responsible for any underdeducted tax and can only be relieved of this liability if it can satisfy HMRC that it had taken reasonable care to comply with the Regulations and that the failure to deduct the excess had been due to an error made in good faith. Where those conditions are satisfied, HMRC may (under regulation 72(5)) direct that the employer is not liable to pay the excess to HMRC

The Issue

11. There is no dispute about the figures and the amount of the excess. Nor is there any suggestion that the Appellant's error was made otherwise than in good faith. The only question, therefore, is whether the Appellant had taken reasonable care to comply with the PAYE Regulations.

12. The facts that we have found show that the Appellant failed twice in succession to pass on to its payroll agent the tax code details relating to Mrs Corcoran. Non-compliance with the Regulations, in the form of underdeduction of tax and underpayment to HMRC, was the direct consequence. The only way the Appellant

can avoid liability for the excess is to satisfy HMRC, or this Tribunal on appeal, that it had taken reasonable care to comply and, despite that, an underdeduction and an underpayment had resulted. No evidence has been adduced that in any way

demonstrates reasonable care on the part of the Appellant. The Appellant has not shown any system that had been in place as a means of handling its tax compliance obligations. It has not produced any relevant records of its own. It is in any event reasonable to expect that, on a changeover of payroll agents, an employer would have taken more than usual care to ensure that all relevant material regarding each employee's PAYE coding was drawn to the attention of the new agent. Moreover, the coding details relating to Mrs Corcoran issued in February 2009, were provided by HMRC at a time of the year when many of the other employees of the Appellant must have been affected by new coding notices; had there been even a rudimentary record-keeping system within the Appellant, the fact that Mrs Corcoran's details were not being passed on to the new agents should have shown up.

Conclusion

13. For the reasons given above we do not think that the Appellant can rely on Regulation 72(5). We therefore dismiss the appeal.

14. 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.

SIR STEPHEN OLIVER QC
TRIBUNAL JUDGE

RELEASE DATE: 10 June 2013