



TC02289

Appeal number: TC/2011/03298

INCOME TAX – PAYE – HMRC seeking underpaid tax by means of Form P800 – ESC A19 – whether First-tier Tribunal has jurisdiction to consider discretionary concession – no – Whether Article 6 infringed – no – appeal struck out

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

PATRICK HILL

Appellant

- and -

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

**TRIBUNAL: JUDGE J. BLEWITT
MRS B. TANNER**

Sitting in public at Manchester on 30 August 2012

Mr Hill, the Appellant, was unrepresented

Ms Whitley, Officer of HM Revenue and Customs, for the Respondents

DECISION

1. By Notice of Appeal dated 20 April 2011, Mr Hill appealed against HMRC's decision, notified to him by letter dated 25 March 2011, not to waive lawfully due tax under the provisions of Extra Statutory Concession (ESC) A19 for the tax year ended 5 April 2010.

2. HMRC contend that its refusal to apply an ESC is not an appealable decision and Mr Hill's appeal should be struck out under Rule 8 of The Tribunal Procedure (First-tier) (Tax Chamber) Rules 2009 which provides that:

8(2) The Tribunal must strike out the whole or a part of the proceedings if the Tribunal—

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

Background

3. During the tax year 2009/2010 the appellant received taxable income from three employers. HMRC received from the employers forms P14 within the tax year ended 5 April 2011. On 18 November 2010 HMRC issued a calculation of underpayment in the sum of £597.60 to Mr Hill; the underpayment had arisen as a result of an incorrect tax code being operated and insufficient tax had been deducted at source.

4. On 9 December 2010 Mr Hill acknowledged receipt of HMRC's calculation and requested that HMRC waive the underpaid tax on the grounds that the mistake was not of Mr Hill's making. By letter dated 25 March 2011 HMRC notified Mr Hill that, having considered his request, it considered that HMRC had used the information provided by the employers timeously and notified Mr Hill of the underpayment within the timeframe laid down in ESC A19 and consequently the underpayment would not be waived.

The Appellant's Case

5. The grounds of appeal relied upon by Mr Hill and set out in his letter to the Tribunal Service dated 6 April 2011 can be summarised as follows:

- (a) That he did all that he could to pay the tax and cannot be blamed for the alleged shortfall;
- (b) As soon as he identified that he was not paying sufficient tax he telephoned the tax office;
- (c) The failure of the tax office to act on the information supplied by Mr Hill resulted in the underpayment;
- (d) The action to recover the underpayment is wrong and cannot be justified.

6. Mr Hill responded to HMRC's Statement of Case by letter to the Tribunals Service dated 25 July 2011. Mr Hill cited the Social Security Commissioner's case *CIS 758/2002* in support of his submission that there is a right of appeal under Article 6 (1) of the Human Rights Act 1998. Mr Hill's letter states:

*"...that those exercising discretion in this **civil obligation** of tax payment must have regard to what appears to be a primary authority; in this case Article 6 (1) HRA...The respondent appears to be relying on nothing more than internal guidance to overcome that protection offered under Article 6(1). The guidance relied upon is simply that; guidance. It would appear not to be enforceable in law and cannot be viewed to be sufficient to overcome primary enforceable legislation...Thus there exists no credible reason for striking out my appeal"*

7. At the hearing, Mr Hill made helpful and concise oral submissions. He accepted that the case of *Prince & Others [2012] UKFTT 157 (TC)*, relied on by HMRC provides clear guidance but Mr Hill noted that Judge Bishopp had not specifically considered the issue of Article 6 and had he done so, he would have found that the Tribunal's hands were not tied and that there is jurisdiction in this type of case.

8. Mr Hill understood that the Tribunal was not considering the merits of the case but rather determining the issue of jurisdiction, however he submitted that where a prima facie case exists on the balance of probabilities, an Appellant should be given the opportunity to appeal.

9. He submitted that whilst judicial review is an alternative avenue which could be pursued, the expense involved is such that it would deny Mr Hill and others in similar positions, the option.

The Respondent's Case

10. Ms Whitley on behalf of HMRC submitted that appeals against direct tax decisions are provided for under Section 49D of the Taxes Management Act 1970 ("TMA"). Section 48 TMA 1970 defines an appeal as any appeal under the Taxes Acts. Not every decision or action has a specified right of appeal and there is no general right of appeal to the First-tier Tribunal set down by statute.

11. Extra Statutory Concessions ("ESC") are made under the care and management powers of the Board of HMRC. There is no provision for appeal against an ESC in the Taxes Acts or other legislation. The guidance on HMRC's website that sets out the procedure for requesting an ESC starts with the words: *"Please note that there is no legal right of appeal..."*

12. In the absence of a statutory right of appeal, Mr Hill's appeal does not lie within the jurisdiction of the First-tier Tribunal.

13. Mr Hill could apply for judicial review of HMRC's decision not to apply ESC A19, but such a matter could not be heard by the First-tier Tribunal.

14. In support of HMRC's application to strike out Mr Hill's appeal, Ms Whitley cited the case of *Steibelt v Paling* 71 TC 376, in which it was stated:

"No criteria are expressed in the subsection as to when the power should or should not be exercised. The matter is left entirely to the discretion of the Revenue. The exercise of that power by the Revenue would be susceptible to challenge by judicial review on the grounds of unreasonableness or any other suitable ground, but it is not a power that can be exercised by the Commissioners. In my judgment the decision of the Revenue as to whether or not to exercise its subsection (3) discretion is not reviewable by the Commissioners on appeal."

15. A P800 is a calculation of tax due, and not a statutory notice carrying a right of appeal. It does not fall within the category of "decisions" specified in Section 31 TMA 1970, against which appeals may be brought.

16. HMRC relied on the recent authority of *Prince and Others* [2012] UKFTT (TC) in which the issue as to whether there is any right of appeal against a P800 calculation was considered, more about which we will say in due course.

17. Ms Whitley submitted that the application or otherwise of ESCs is a matter for the Board under its Collection and Management responsibilities in Section 1 TMA 1970 and that Mr Hill's case must be struck out as the First-tier Tribunal does not have jurisdiction to hear a case where there is no right of appeal.

Authority of Prince & Others v HMRC

18. It was agreed by both parties that the recent case of *Prince & Others* provides a detailed examination of issues closely related to this appeal and it may be helpful at this point to set out some of the relevant extracts:

"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... More than a million taxpayers were found to be affected: some were due a refund, but the majority had underpaid tax... 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.... 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 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.”*

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.

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

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...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...

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.

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.

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.

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...

Discussion and Decision

19. We considered the submissions of Mr Hill carefully. We should make clear that we did not consider the issue of fact and the reasons why Mr Hill believed the ESC applied to him; the issue for us to determine is whether HMRC's decision not to apply the ESC is an appealable decision which this Tribunal has jurisdiction to hear.

20. We did not find the Social Security Commissioner's case *CIS 758/2002* assisted us in determining the issue in this case; in our view the case is distinguishable both in law and on its facts. However, it seems to us that the issues examined in the case of *Prince and Others* were identical and applicable to this case. We respectfully agree with the view taken by Judge Bishopp that:

“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.”

21. Having reached this preliminary view, we went on to consider Mr Hill's principle argument, namely whether Article 6 is infringed.

22. Article 6 HRA 1998 provides the right to a fair trial as follows:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

23. Mr Hill sought to persuade the Tribunal that HMRC's use of its discretion in respect of the application of ESC relates to the civil obligation of tax payment and consequently the rights provided by Article 6 must be viewed as primary legislation.

24. We did not accept Mr Hill's submission. In our view HMRC's decision to seek repayment of taxes lawfully due cannot be considered to be a determination of “civil rights or obligations” and we therefore found as a fact that Mr Hill's tax obligations could not fall within the ambit of Article 6. Our view was reinforced by having regard to the First Protocol which makes clear that the legislation is not intended to impede the collection of taxes:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

25. Whilst we were sympathetic to Mr Hill's sense of grievance, we did not accept that he has been denied a fair trial but rather he has raised an issue which cannot be decided by this Tribunal. Other avenues remain open to Mr Hill such as judicial review, HMRC's complaints department or the Independent Adjudicator and we are confident that Mr Hill would not be prevented from pursuing any of these options, should he choose to so do, by cost implications.

26. In those circumstances, there being nothing which is within the tribunal's jurisdiction, we strike out the appeal.

27. 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.

**J. BLEWITT
TRIBUNAL JUDGE**

RELEASE DATE: 26 September 2012