



TC02556

Appeal number: TC/2012/9859

Income Tax – PAYE not deducted by employer – treated as deducted by reg 185 PAYE Regs – appeal against HMRC’s tax calculation in self assessment – whether appeal should be taken as amendment to self assessment – appeal against closure notice
Income Tax – penalty for late payment of tax – reasonable excuse – appeal allowed.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

DR ANIRUDDHA GAYEN

Appellant

- and -

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

**TRIBUNAL: JUDGE CHARLES HELLIER
PHILIP GILLET FCA**

Sitting in public at Brighton on 4 February 2013

The Appellant in person

Gloria Orimoloye, for the Respondents

DECISION

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1. In his notice of appeal Dr. Gayen states his appeal as being against: (1) a penalty of £303 imposed under schedule 56 Finance Act 2009 for the late payment of tax for the year ended 5 April 2011; and (2) HMRC's request for payment of £6076.28 of tax for the year 2010/11.

10 2. Background

3. In 2010/11 Dr. Gayen worked for a number of hospitals in and around Sussex. In February 2010 he started to work for Brighton and Sussex University Hospitals NHS trust ("BSUH"), and later in that year notified HMRC that BSUH was his main employer. On 2 May 2010 HMRC sent BSUH a coding notification showing a code of 745L. On 14 January 2011 HMRC sent BSUH in new code for Dr. Gayen of 738L specifying that it was to be applied on a "week 1/month 1 non-cumulative basis".

4. It appears that BSUH did not deduct tax in accordance with the 745L code, but instead deducted tax only at the basic rate until January 2011 when it received the 738L code.

20 5. Dr Gayen made his tax return for 2010/11 on time on 31 October 2011. HMRC, under section 9(3) taxes Management Act 1970 ("TMA") computed the tax due and sent a copy of their calculation to Dr. Gayen. That was followed by a statement of account sent him on 8 December 2011 showing £6076 .28 tax due. A large part of this balance arose because BSUH had deducted tax at the basic rate only until January 25 2011 and then using the 738L code, on a non-cumulative basis, thereafter, and not at the higher rates that would have applied had it used the 745L code from May 2010.

6. There followed some correspondence between Dr Gayen and HMRC to which we shall return later.

30 7. On 12 September 2012 HMRC opened an enquiry into Dr. Gayen's return which they closed on 20 September 2012 with a closure notice showing a conclusion that income tax due was increased by £568 to £4,644 40.

Correspondence following 8 December 2011 statement of account

35 8. On 20 December 2011 Dr. Gayen wrote to HMRC indicating his shock at the £6076.28 liability and saying that he had thought BSUH would have deducted tax at appropriate rates under the PAYE system.

9. On 5 January 2011 Dr Gayen phoned HMRC to say that he could not pay the £6,076 all at one go. He was referred to HMRC's Debt Management Unit (see below).

10. On 6 January 2011 Dr. Gayen wrote to HMRC appealing against the "demand for £6076.28" and noting that he had told HMRC about his employment with BSUH.
11. On 19 January 2012 Miss Brown of HMRC replied indicating that she had written to BSUH to clarify the figures.
- 5 12. BSUH replied to HMRC on 30 January 2012 saying that after Dr. Gayen had started with them in February 2010 they had applied a basic rate tax code until 16 January 2011 when they had used 738L. The letter says they had no instructions from HMRC to change the code from the basic rate code until that later date, but they were not asked whether they had received the 745L code issued to them by HMRC on 2
10 May 2010.
13. On 24 February 2012 HMRC wrote to Dr. Gayen saying that the calculation of the tax due was correct.
14. Dr Gayen replied on 12 March complaining about the lack of PAYE deductions and asking if the £6,046 could be collected through his PAYE code.
- 15 15. On 23 April 2012 HMRC replied:
- "we are unable to collect the outstanding amount tax through your PAYE code as the amount is too large, we can possibly arrange a payment plan to collect this."
16. On 2 May 2011 Dr. Gayen contacted HMRC (Debt management Unit) to
20 arrange a payment plan which was confirmed to him by letter on 3 May 2012.
17. On 6 July 2012 Dawn Gardiner from HMRC wrote to Dr. Gayen indicating that a late payment penalty of £303 would not be remitted.
18. On 31 July 2012 Dr. Gayen wrote to HMRC to appeal against the tax and the penalty.
- 25 19. On 12 September 2012 HMRC wrote opening an enquiry into Dr. Gayen's 2010/11 tax return under section 9A TMA. A closure letter was sent to him on 20 September 2012 showing a conclusion that a tax liability of £6,644.88 was due and amending his return in that respect.
20. Dr. Gayen lodged his appeal to the tribunal on 22 October 2012 appealing both
30 against the £303 penalty and the tax underpayment £6076.

The right to appeal against a tax calculation.

21. Section 9 TMA requires a return to include a self-assessment of the tax due unless the taxpayer delivers his return before 1 November. Section 9(3) provides that
35 if a person does not include such a calculation in a return delivered on or before 31 October in the relevant year HMRC must make the assessment on his behalf and send him a copy. Subsection (3A) provides:

"an assessment under subsection (3) above is treated for the purposes of this Act as a self-assessment and as included in the return."

22. Section 9A provides for the making of an enquiry into a return, and section 28B for the delivery of a closure notice at the end of the enquiry making amendments to the return (which includes the tax calculation). It was under this provision that the closure notice was received by Dr. Gayen on 20 September 2012.

23. Section 31 provides for appeals:

"(1) An appeal may be brought against:

- (a) [not relevant]
- 10 (b) any conclusion stated or amendments made by the closure notice sent under section 28B of this Act ...
- (c) [not relevant]
- (d) any assessment to tax which is not a self-assessment."

24. (Other provisions permit appeals against penalties).

15 25. In her skeleton argument Mrs Orimoloye seeks a decision of the tribunal (i) confirming the penalty and (ii) striking out the appeal "against the demand for underpayment of £6076.28 tax plus interest ... as it is not an appealable matter."

So far as concerns interest we agree with Mrs Orimoloye, but it seems to us that Dr. Gayen is appealing against the assessment to tax.

20 26. That raises the question as to whether section 31 permits an appeal against the calculation produced by HMRC on 8 December showing £6,076 of tax as due. It seems to us that on its face the Act does not permit such an appeal. That is because such an assessment (the calculation) is not part of a closure notice under section 31 (1)(b) and, because it is deemed to be part of the self-assessment by section 9(3A), it is not within section 31(1) (d): "any assessment which is not a self-assessment".

27. That is an odd conclusion. At first sight it looks as if a taxpayer would have no right of appeal against an error made by HMRC in calculating his tax liability.

28. There is, however, some possibility of relief from such a result for, as long as HMRC make the computation within 12 months of the filing date, section 9ZA provides that a person may amend his tax return (which includes the assessment) if he does so within 12 months of the filing date. Thus a technical route to relief for an error in the calculation would be by making such an amendment to the calculation. (If HMRC were dissatisfied with the correction they could open an enquiry and adjust the return accordingly).

35 29. It may be that a tribunal would treat a notice disputing HMRC's calculation as an amendment to the return in appropriate circumstances.

30. In this case, however HMRC amended the return in their closure notice, and it seems to us proper to take Dr. Gayen's appeal to this tribunal, which was made within the prescribed 30 days after the issue of that closure notice, to be an appeal against that amendment. One of the conclusions stated in the closure notice was that tax of
5 £6,644.88 was due. Dr Gayen is entitled to appeal against that conclusion by virtue of section 31(1)(b), and it seems to us that his notice of appeal is properly to be so taken.

31. The appeal, so understood, is thus within our jurisdiction and to that extent it is an appealable matter.

10 *The effect of the notification of the PAYE code to Dr Gayen's employer*

32. The relevant law

33. Section 59B Taxes Management Act 1970 ("TMA") provides:

"(1) Subject to subsection (2) below, the difference between --

15 (a) the amount of income tax and capital gains tax contained in a person's self-assessment under section 9 of this act any year of assessment, and

(b) the aggregate of any payments made on account made by him in respect of the year... and any income tax which in respect of that year has been deducted at source

20 shall be payable by him or (as the case may be) repayable to him ...

(2) The following, namely --

(a) any amount which, in the year of assessment is deducted at source under PAYE regulations in respect of a previous year, and

25 (b) any amount which, in respect of the year of assessment is to be deducted at source under PAYE regulations in a subsequent year, ...

shall be respectively deducted from and added to the aggregate mentioned in subsection (1) (b) above.

...

30 (7) In this section any reference to income tax deducted at source is a reference to income tax deducted or treated as deducted from any income or treated as paid on any income.

35 (8) PAYE regulations may provide that, for the purposes of determining the amount of the difference mentioned in subsection (1) above, any necessary adjustments in respect of matters prescribed by the regulations shall be made to the amount of tax deducted at source under PAYE regulations.

34. As a result of the combination of subsections (1)(b) and (7) it will be seen that , subject to (8) and the effect of the PAYE Regulations, any amount which is to be

treated as having been deducted under those regulations is to be deducted in computing the net tax due, whether or not that amount has in fact been deducted.

35. The Income Tax (Pay As You Earn) Regulations 2003 (the "PAYE Regulations") provide (Regulation 185):

- 5 “(1) This regulation applies for the purpose of determining
- (a) [irrelevant in this appeal], and
- (b) the difference mentioned in section 59B (1) of TMA ...
- (2) For those purposes the amount of income tax deducted at source under these Regulations is the total net tax deducted during the relevant year ("A") after
- 10 making any additions or subtractions as required by paragraphs (3) to (5).
- (3) Subtract from A any repayments which are made before the taxpayer's return and self-assessment is made ...
- (4) Add to A any overpayment of tax from the previous year ...
- (5) Add to A any tax treated as deducted, other than any direction tax, but --
- 15 (a) only if there would be an amount payable by the taxpayer under section 59B (1) of TMA on the assumption that there are no payments on account and no addition to A under this paragraph, and then
- (b) only to a maximum of that amount.
- (6) In this regulation --
- 20 "direction tax" means any amount of tax which is the subject of a direction made under regulations 72(5) or regulation 81(4) in relation to the taxpayer in respect of one or more tax periods falling within the relevant tax year;
- ...
- "tax treated as deducted" means any tax which in relation to relevant payments
- 25 made by an employer to the taxpayer in relevant year-
- (a) the employer was liable to deduct from payments but failed to do so
- ..."

36. Regulation 72 applies where it appears to HMRC that the amount which employer was liable to deduct from payments exceeded the amount actually deducted.

30 If two conditions are met then by subsection (5) HMRC may direct that the employer is not liable to pay the excess. The conditions are that either (A) the employer took reasonable care to comply with the regulations and the failure to deduct was due to an error made in good faith; and (B) that the employee knew that the employer had wilfully failed to deduct the relevant amount tax.

35 37. Regulation 81 provides for the making of a similar direction where a determination has been served on an employer who has not deducted any tax.

38. In this case HMRC do not assert that any direction under regulation 72 or regulation 81 has been made. As a result of this, the amount of tax which is to be

treated as having been deducted from Dr. Gayen's income is the amount which the employer was liable to deduct from the relevant payments, not the amount actually deducted.

5 39. Regulation 21 of the PAYE regulations provides that on making payment to an employee the employer must deduct tax in accordance with the regulations by reference to the employee's tax Code. By Regulation 8 an employee's Code is the Code issued to the employer for the relevant year, or, if an amended code is issued by HMRC, then it is the amended code (see regulation 20). A code is issued to an employer if it is contained in the documents sent to the employer by HMRC.

10 40. In Dr. Gayen's case HMRC say that the tax code of 745L was issued on 2 May 2010 to Brighton & Sussex University Hospitals Trust. They say that the trust appears not to have received that notification. On the other hand they say that the appellant would have received a copy of the coding notice. A letter of 30 July 2012 from Brighton and Sussex University Hospitals Trust says that:

15 "When the new tax year 2010 - 11 started, the BR code was continued as we had no further instruction from HMRC until a P6 download from HMRC on 16 Jan 11 for us to operate a 738 L non cum code."

20 41. It seems to us likely that if HMRC's systems indicated that a coding notice had been sent, it was received by the hospital. As a result we conclude that the hospital was obliged to deduct in accordance with 745L. That means that because no direction under regulation 72 or 81 was issued to the hospital, the tax which should have been deducted on the operation of that code should be treated as paid for the purposes of the calculation in section 59B.

25 42. We conclude therefore that the conclusion in the Closure Notice of 20 September 2012 as to the amount of tax due for the year should be varied so that amount of tax unpaid should be reduced by the amount of tax BSUH should have deducted and did not.

43. The Penalty

30 44. We went on to consider the position of Dr Gayen if any of the income tax of £6,076.28 had been properly recoverable from Dr Gayen, and whether or not in such circumstances he had a reasonable excuse for paying the tax late.

35 45. Dr Gayen explained to us that he had always paid his tax under the PAYE system and had relied on it to satisfy his income tax obligations in full. He had filed his tax return for 2010/11 on time, by 31 October 2011, believing his tax liabilities to have been met in full via the PAYE system. He stated that he was therefore "shocked" (according to his letter to HMRC dated 20 December 2011) to receive a demand for £6,076.28 in December 2011.

40 46. He challenged this demand, in a timely fashion, and after an exchange of correspondence, he received a letter from HMRC dated 19 January 2012. This letter makes what we believe to be two relevant points. Firstly it refers to underpaid tax

from 2008/09 of £1,427.60 and states that this will be recovered via Dr Gayen's tax code for the year 2012/13. It then refers to the underpayment of £6,076.28 for the year 2010/11 and states that HMRC have written to BSUH to clarify the figures used on Dr Gayen's P60 for the year. At no point does it state that Dr Gayen should pay the £6,076.28 by 31 January 2012. On the contrary it gives every impression that HMRC are trying to resolve the position via correspondence.

47. Dr Gayen stated to us that he believed that even if the £6,076.28 was properly owed by him that this would be paid by adjusting his tax code for the following year. We consider that this is a perfectly reasonable assumption based on the letter of 19 January 2012. He had no reason to be aware of the £2,000 limitation placed on this course of action by HMRC, and had every reason to believe that the position would be resolved by correspondence between HMRC and BSUH.

48. Following the refusal by HMRC to recover the £6,076.28 via Dr Gayen's tax code he entered into an agreement to pay the tax due in monthly instalments between May and September 2012, and again appears to have acted promptly and reasonably to settle this debt.

49. We therefore consider that Dr Gayen acted reasonably at all stages of this process and that he relied on the implicit reassurances provided in HMRC's letter of 19 January 2012 when deciding not to pay the £6,076.28 due on 31 January 2012.

50. We therefore find that he had a reasonable excuse for paying the tax late and therefore cancel the late payment penalty of £303.

51. We have noted that HMRC's letter 27 April 2012 said that they were unable to collect the tax through the PAYE system because it was too large. This seems to us to be an unnecessarily restrictive reading of their powers and duties under regulation 14 and regulation 186 of the PAYE regulations. We do not read those regulations as proscribing adjustment through the PAYE return where the amount involved is more than £2000.

52. 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.

CHARLES HELLIER
TRIBUNAL JUDGE

RELEASE DATE: 18 February 2013