



TC02997

Appeal number: TC/2012/07925

PAYE – incomplete P46 forms for new employees - employer’s failure to deduct basic rate tax - appeal against determination under regulation 80 Income Tax (PAYE) Regulations 2003 - – appeal dismissed.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MARC KEENAN TRADING AS REAL CLEAN Appellant

- and -

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

**TRIBUNAL: JUDGE ALISON MCKENNA
ANTHONY HUGHES**

Sitting in public at Bedford Square on 1 October 2013

Ben Terrett, Chartered Accountant for the Appellant

Mr Donnelly of HMRC for the Respondents

DECISION

1. This appeal concerns the Appellant's appeal against a determination under regulation 80 of the Income Tax (PAYE) Regulations 2003 of his liability to tax in respect of a failure to deduct basic rate tax for certain employees. He also appeals the tax-gear penalties imposed and confirmed in HMRC's review letter dated 17 May 2012 on the basis that the underlying liability is wrong. The percentage loading of the penalty was agreed and was not an issue before the Tribunal.

2. The Appellant trades as "Real Clean", which is a business providing cleaning services for offices and other commercial premises. It employs fewer than twenty cleaners at any one time and has a relatively high staff turnover. The Tribunal heard from Mr Keenan that his employees tend to work just a few hours a week, and are often students, retired people, or combining part-time work with family commitments.

3. Mr Terrett very fairly accepted on behalf of his client that the paperwork of the business was not always correct and indeed Mr Keenan accepted this himself when he gave his evidence to the Tribunal. In relation to the hiring of new employees, the Tribunal heard from Mr Keenan that he is unfamiliar with the rules and that he relies on Mr Terrett to give him the relevant forms and to deal with the forms once completed.

4. Mr Keenan told the Tribunal that he is familiar with the circumstances of his employees because they have to be available for work very early in the morning and late at night, so he asks them a lot of questions when he takes them on. He was quite certain in his evidence to the Tribunal that all of the former employees in respect of whom HMRC says he should have deducted basic rate tax were in fact below the income tax threshold. On this basis, Mr Terrett argued, whilst it was accepted that the P46 procedure had not been followed correctly, it was unfair to penalise the business for not having deducted basic rate tax which would never have been payable if HMRC had known of the individuals' circumstances.

5. Mr Donnelly, on behalf of HMRC, directed the Tribunal to regulation 49 of the Income Tax (PAYE) Regulations 2003. He submitted that the legislative scheme approved by Parliament did not allow an employer to make his or her own judgment as to whether tax was payable by an employee or not. The legislation requires an employee who does not have a P45 to complete a P46 and to tick box a, b or c in section 1 of that form. If either box c or none of the boxes is ticked, then regulation 49 requires the employer to deduct basic rate tax for that employee. If the tax deduction proves to be inappropriate then the employee can apply for a tax rebate but it is not open to the employer to decide for themselves whether the tax is payable.

6. Ms Fennelly gave evidence on behalf of HMRC and explained that she had tried to trace a number of Real Clean's former employees in order to ascertain their situation and if possible to eliminate them from the dispute between the parties. The Tribunal was shown one example of an employee whom Ms Fennelly had successfully traced, confirmed that tax was not due, and the sum originally assessed

5 as being due had been duly removed from HMRC's computation. The Tribunal saw correspondence between the parties eliminating certain employees, but there were others in respect of which no details were held by Real Clean or insufficient details (e.g. a first name only). In view of the lack of information held, Ms Fennelly had been unable to make further checks on HMRC's computer system. Ms Fennelly told the Tribunal that she had done all she could to reduce the Appellant's liability and to produce a fair determination figure.

10 7. The Tribunal was impressed by Mr Keenan's detailed knowledge of his workforce and accepted his evidence that he had made an honest mistake with regards to the P46 procedures. We accept that Mr Keenan is unfamiliar with tax law, but he does have certain legal responsibilities as an employer. He has the benefit of professional advice from Mr Terrett, and there is also information available in the Employers' handbook on HMRC's website, so we consider that he could have taken steps to ascertain the right procedure. We are unable to accept Mr Terrett's submission that the determination is incorrect because tax was not due for these employees. This would involve an employer making his or her own judgment about tax liability, whereas the law requires an employer to deduct basic rate tax if regulation 49 applies, leaving it to the relevant employee to claim a rebate if appropriate. In all the circumstances and for these reasons we must dismiss this appeal.

15 20 8. 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.

30 **ALISON MCKENNA**
TRIBUNAL JUDGE

RELEASE DATE: 21 October 2013

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