



**TC03414**

**Appeal number: TC/2013/02456**

*Employer's PAYE deductions – electronic coding notifications – whether employer's consent to electronic communications given – whether notice of coding delivered to employer electronically - regulations 196 & 213 of PAYE Regulations 2003 – appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**THE MOTHERS' UNION**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE MALACHY CORNWELL-KELLY  
MS REBECCA NEWNS**

**Sitting in public at 45 Bedford Square, London, on 27 February 2014**

**The taxpayer did not appear and was not represented**

**Ms Kate Murphy of HMRC Belfast for the Crown**

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## DECISION

1 We were satisfied under Rule 33 that the taxpayer had been notified of the hearing and that, given that we were in possession of all the taxpayer's written evidence, it was in the interests of justice to proceed with the appeal. The appeal concerns a failure by the taxpayer as employer to apply the correct coding for the year 2010-2011 to an employee's remuneration, and accordingly to deduct the appropriate amount of income tax from the employee's salary.

### *Facts*

2 HMRC's documentary evidence is that a code for the employee in question, a Mrs Karen Higgs, was issued electronically to the Mothers' Union on 30 March 2010. The Mothers' Union have stated that "due to problems with our email server we did not receive the email informing us of the change to this member of staff's PAYE coding" and as a consequence did not deduct enough tax from her wages. The employee had not informed the employer of the change to her coding; she left work in September 2010, and subsequently settled various tax obligations with HMRC but not the underpayment that resulted from the wrong code having been used for 2010-2011 by the Mothers' Union.

3 The Mothers' Union registered online with HMRC on 9 February 2005 and thereafter received all communications with regard to its duties as an employer electronically, not having opted to continue receiving paper notifications - as they could have done. HMRC records showed that, during the calendar year 2010, thirteen tax codes were issued to the Mothers' Union and that all but two of them were correctly applied. The written submissions of the Mothers' Union were that HMRC staff had assisted with the computer problems the Union were encountering and, in a letter dated 6 December 2012 (after HMRC's review decision, but re-iterating points made earlier) the Mothers' Union said this:-

We are set up to receive your coding notification by email alert. As I have already stated in an earlier correspondence, we had problems with your email communications during the time we should have received this notification and one of your own staff had to phone us several times and help us to configure our IT systems so that we could receive these notifications. According to your member of staff who helped us resolve this, the non-receipt was due to the way our systems dealt with cookies. It did take your officer some time to identify and rectify the problems and once this was resolved we did get quite a few backlog notifications that were held on your systems. However, we are unable to locate the email that would have informed us of Mrs Higgs's change of coding.

4 A determination for £647.94 was issued to the taxpayer on 6 July 2012 under regulation 80 of the Income Tax (Pay As You Earn) Regulations 2003. HMRC reviewed their decision by letter dated 21 November 2012 and the appeal to the tribunal was lodged on 18 March 2013. Although this was clearly a late appeal, it has been accepted without objection because the Mothers' Union had initially submitted an appeal in time, but it was unsigned and the form was not fully filled out.

5 When an employer registers with HMRC online the employer has, as has been indicated, an option to request continued communications in hard copy but in default

of exercising that option the employer is treated by HMRC as having consented to receiving them electronically.

### *Legislation*

6 Those of the 2003 Regulations chiefly relevant are as follows-

#### **8 - Employee's code**

- (1) An employee's code is the code—
  - (a) issued to an employer for use in respect of the employee for a tax year,
  - (b) applied by these Regulations for use by an employer in respect of the employee, or
  - (c) issued to an employee in accordance with regulation 142 (direct collection).
- (2) A code is issued to an employer if it is contained in a document that is sent—
  - (a) to the employer, or
  - (b) to a person acting on behalf of the employer,by HMRC, and any code so issued is received by the employer for the purposes of these Regulations.

#### **20 - Notice to employer of amended code**

- (1) If the code for use by an employer in respect of an employee is amended after notice of it has been issued to the employer, HMRC must issue the amended code to the employer.
- (2) An amended code is issued to an employer if it is contained in a document that is sent to the employer or a person acting on behalf of the employer by HMRC, and any code so issued is received by the employer for the purposes of these Regulations.
- (3) On making any subsequent relevant payment to the employee, the employer must deduct or repay tax by reference to the amended code.
- (4) Paragraphs (5) and (6) apply if there is a change or proposed change in the rates of any of the personal reliefs allowable under sections 257 and 257A of ICTA (personal allowance and married couple's allowance).
- (5) If the change or proposed change relates to the current tax year, HMRC may give notice requiring the employer, with effect from the date specified in the notice, to amend specified codes as directed.
- (6) If the change relates to the following tax year, HMRC may give notice requiring the employer to carry forward to the following tax year specified codes of the current tax year and adjust them as directed in the notice.
- (7) A code which has—
  - (a) been amended by virtue of paragraph (5) in respect of the current tax year, or
  - (b) been carried forward to the following tax year and adjusted by virtue of paragraph (6),is treated as having been determined and issued by HMRC as the employee's code for that tax year.
- (8) A notice under paragraphs (5) and (6) may be issued to the employer or to a person acting on behalf of the employer.

#### **21 - Deduction and repayment of tax by reference to employee's code**

- (1) On making a relevant payment to an employee during a tax year, an employer must deduct or repay tax in accordance with these Regulations by reference to the employee's code, if the employer has one for the employee.
- (2) The employer must deduct or repay tax by reference to the employee's code, even if the code is the subject of an objection or appeal.

### **80 - Determination of unpaid tax and appeal against determination**

(1) This regulation applies if it appears to HMRC that there may be tax payable for a tax year under regulation 67G, as adjusted by regulation 67H(2) where appropriate, or regulation 68 by an employer which has neither been—

- (a) paid to HMRC, nor
- (b) certified by HMRC under regulation 75A, 76, 77, 78 or 79.

(1A) In paragraph (1), the reference to tax payable for a tax year under regulation 67G includes a reference to any amount the employer was liable to deduct from employees during the tax year whether or not that amount was included in any return under regulation 67B (real time returns of information about relevant payments) or 67D (exceptions to regulation 67B).

(2) HMRC may determine the amount of that tax to the best of their judgment, and serve notice of their determination on the employer.

(3) A determination under this regulation must not include tax in respect of which a direction under regulation 72(5) has been made; and directions under that regulation do not apply to tax determined under this regulation.

(3A) A determination under this regulation must not include tax in respect of which a direction under regulation 72F has been made.

(4) A determination under this regulation may—

- (a) cover the tax payable by the employer under regulation 67G, as adjusted by regulation 67H(2) where appropriate, or 68 for any one or more tax periods in a tax year, and

- (b) extend to the whole of that tax, or to such part of it as is payable in respect of—

- (i) a class or classes of employees specified in the notice of determination (without naming the individual employees), or
- (ii) one or more named employees specified in the notice.

(5) A determination under this regulation is subject to Parts 4, 5, 5A and 6 of TMA (assessment, appeals, collection and recovery) as if—

- (a) the determination were an assessment, and
- (b) the amount of tax determined were income tax charged on the employer, and those Parts of that Act apply accordingly with any necessary modifications.

### **196 – Proof of delivery of information sent electronically**

(1) The use of an approved method of electronic communications is presumed, unless the contrary is proved, to have resulted in the delivery of information—

- (a) to HMRC, if the delivery of the information has been recorded on an official computer system;
- (b) by HMRC, if the despatch of the information has been recorded on an official computer system.

(2) The use of an approved method of electronic communications is presumed, unless the contrary is proved, not to have resulted in the delivery of information—

- (a) to HMRC, if the delivery of the information has not been recorded on an official computer system;
- (b) by HMRC, if the despatch of the information has not been recorded on an official computer system.

(3) The time of receipt or despatch of any information delivered by an approved method of electronic communications is presumed, unless the contrary is proved, to be the time recorded on an official computer system.

### 213 - How information may be delivered by HMRC

(1) Table 11 applies to determine how HMRC may comply with requirements of the regulations listed in column 1.

(2) Instead of sending a document to the employer or (where relevant) the employer's agent, the requirements of the regulation may be complied with by HMRC arranging for the information it would contain to be delivered to the employer or (where relevant) the employer's agent by an approved method of electronic communications if so indicated in column 4.

(3) The relevant form number is listed in column 3.

Table 11

Regulations which permit electronic delivery by HMRC

1.	2.	3.	4.
<i>Regulation</i>	<i>Description of information</i>	<i>Form number</i>	<i>Electronic communications</i>
8(2), 20(2)	issue of code to employer or agent	Form P6 or P9	Yes
20(5), (6)	notice to employer to amend codes	Form P7X or P9X	Yes
53(2)	notice to employer of payments and total net tax deducted	Form P6	Yes
61(2)	notice to pension payer of payment and total net tax deducted	Form P6	Yes

(4) But HMRC may only deliver information by an approved method of electronic communications if the employer or employer's agent (as the case may be) has consented to delivery of information in that way, and HMRC have not been notified that the consent has been withdrawn.

(5) References in paragraphs (2) and (4) to an employer's agent are to a person acting on behalf of the employer.

#### *Submissions*

7 HMRC's case is thus that by registering for on-line filing the employer was accepting the terms specified, including the statement that communications would be made electronically unless the opt-out facility was adopted. The taxpayer does not contest this and we are satisfied that, even if no explicit consent to receiving communications electronically is in evidence, the Mothers' Union's adoption of the system and their efforts to make it work for them amount to acceptance of it, and thus to the consent required. We draw attention, however, to the tribunal's decision in *Andrew Paul (Mortgage and Insurance Services) Limited v RCC* TC/2012/08268 on the matter of the taxpayer's consent and the need to establish that it has really been given, rather than assumed by default.

#### *Conclusion*

8 Regulation 196(1)(b) deems communications of which there is an official computer record of their being sent to have been *delivered* to the taxpayer "unless the contrary is proved". The burden of proof of non-delivery is on the taxpayer; such evidence as

there is suggests that the code for Mrs Higgs was received in the Mothers' Union computer system but for some reason was not retrieved, or was not retrievable, from it after the difficulties with it had been resolved.

9 Since, however, there was no appearance at the hearing on behalf of the Mothers' Union we cannot take the matter any further, and we find on the evidence available that it has not been proved that the coding notice in question was not delivered - albeit that it may not actually have been *received* by the Mothers' Union staff who would normally have acted on it. The effect is that the taxpayer employer remains responsible for the failure which occurred to deduct the correct tax.

*Further appeal rights*

10 The taxpayer, not having been present or represented at the hearing of this appeal, is entitled pursuant to Rule 38 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 to make an application in writing to be received by the tribunal no later than 28 days after this Decision is sent to it for the Decision to be set aside and remade.

11 Any party dissatisfied with this decision has a right to apply in writing 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 the tribunal no 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.

**MALACHY CORNWELL-KELLY  
TRIBUNAL JUDGE**

**RELEASE DATE: 19 March 2014**