



TC04274

Appeal number: TC/2014/02437

INCOME TAX – PAYE – underpayment of income taxed at source caused by error in PAYE coding – car benefits not taxed – HMRC seeking underpaid tax by means of self-assessment return – ESC A19 – whether First-tier Tribunal has jurisdiction to consider discretionary concession – no – Appeal struck out

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MOHAMMED ISUF ALI

Appellant

- and -

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

**TRIBUNAL: JUDGE MICHAEL S CONNELL
 MR MICHAEL SHARP FCA**

Sitting in public at 45 Bedford Square London on 4 November 2014

The Appellant in person

Mr Anjum Khanar, Officer of HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal by Mohammed Isuf Ali (“the Appellant”) against tax which was underpaid through PAYE for the years 2008-09, 2009-10 and 2010-11.
- 5 2. The Appellant says that that he should be relieved of the obligation to pay tax calculated through his self-assessment for the year ended 5 April 2009 of £867.56, for the year ended 5 April 2010 of £4,562.20 and for the year ended 5 April 2011 of £2,967.60, under Extra Statutory Concession A19 (“ESC A19”).
- 10 3. HMRC applies for the appeal to be struck out on the basis that the Tribunal does not have the jurisdiction to consider HMRC’s decision to refuse an ESC A19 claim.

The background facts

4. The Appellant is an individual whose income was, during the appeal periods, subject to the deduction of tax at source by means of the PAYE system. The system requires the allocation and notification by HMRC of a code, which enables an employer to determine the amount of tax which must be deducted from the gross payment before it is paid to the employee. The code reflects the taxpayer’s personal allowance and any other deductions to which he or she may be entitled and allows tax to be deducted at, usually, the basic rate. The system obviates the need for the individual to complete a tax return. Before the beginning of each tax year a new code, which reflects any change in the personal allowance, is automatically issued to the taxpayer and to the employer or other payer.

5. Tax was underpaid by the Appellant in the following years:

2008-09

- (1) Tax was underpaid due to the Appellant receiving car benefits from his employment with L L Inc Ltd during the year which were not collected through the tax code in operation. At the start of the 2008-09 year, the tax code in operation included a restriction for car benefits received. Due to an automatic code change on 14 November 2008 the Appellant’s coding was adjusted to 407L which removed all car benefits coded. The tax code was changed five times and the changes were all due to the Budget or following amendments to the P11D submitted by the employer. The amount of tax underpaid was £867.56.

- (2) HMRC have twelve months from the end of the tax year in which information is received to make use of it and to notify a taxpayer of any additional tax due. (In exceptional circumstances, even though HMRC have informed an individual within twelve months of the end of the tax year that they have underpaid tax, HMRC may agree not to collect the tax. The concession is normally applied if HMRC did not use information received about a source of income more than once, and allowed tax owed by the individual to build up over two whole tax years, so that tax is owed in at least two consecutive years).

(3) HMRC needed the Appellant's 2008-09 P11 from his employer, which gave details of taxable expenses, payments and benefits received. The P11D was received from the employer on 6 July 2009, that is in the tax year 2009-10, which meant that they had until 5 April 2011 to review and make use of the information given.

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(4) The 2008-09 calculation was originally issued to the Appellant on 17 September 2011, advising him of tax underpaid. Therefore it is arguable that HMRC failed to make proper use of information received within the permitted time limits. However, before HMRC can give up arrears they also have to consider whether it would have been reasonable for the Appellant to believe his tax affairs were in order.

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(5) HMRC say that when considering this condition they are concerned not with what a customer actually believed but whether it was reasonable for him to hold that belief. HMRC expect a taxpayer to have a basic understanding of how the tax system works and to take an interest in and responsibility for their own tax affairs, to check their tax codes and any coding notices or tax calculations.

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(6) HMRC say that their records show that the Appellant's 2008-09 tax code was adjusted on 14 November 2008 to 407L. A P2 notification of coding was issued to him on that date giving a breakdown of the code to be operated and which showed car benefit was not included in his tax code, although he was still receiving car benefit. He did not contact HMRC to bring this to their attention. Had he done so, they would have reviewed their records and issued a correct tax code. In addition, the Appellant would have received a large refund of tax in his wages following the implementation of the new tax code 407L, but HMRC have no record of the Appellant contacting them to query this.

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(7) HMRC therefore did not consider that the reasonable belief condition of ESC A19 was satisfied in respect of the Appellant's tax underpayment for 2008-09 and so would not agree to give up the additional tax due.

2009-10

(1) Again, tax was underpaid during the year due to the Appellant receiving car benefits from his employer which were not collected through the tax code in operation during the year. The tax underpaid was £4,562.20.

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(2) A notification of coding was issued to the Appellant for the 2009-10 year on 11 January 2010, advising him of code of 637L. This code did not include any deductions for car benefits received. The forecasted car benefit, initially for the 2009-10 tax year would have been taken from the 2007-08 P11D and the tax code should have been updated following receipt of the 2008-09 P11D, which was dealt with on 19 August 2009. However although HMRC's computer system showed P11D/P46 was processed at that time, no tax code amendments were made. It appears that there was a discrepancy between the amounts of car benefit calculated by the employer on the P11D form. This discrepancy then prevented any automated coding review.

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(3) The 2009-10 form P11D was received from the Appellant's employer on 6 July 2010, that is in tax year 2010-11, which meant HMRC had until 5 April 2012 to review and make use of information given.

5 (4) As the Appellant was in receipt of a company car for the whole of the 2009-10 tax year, HMRC did not think it reasonable for him to believe his tax affairs were up-to-date. HMRC had issued a tax code for 2009-10 on 11 January 2009, but although no car benefit coding was included, the Appellant did not
10 contact HMRC to bring this to their attention. The guidance notes issued with the Notice of Coding ask taxpayers to check the information on the coding notice and to contact HMRC if there is anything that could be incorrect. HMRC do not hold any record of the Appellant contacting HMRC, to query his 2009-10 tax code.

15 (5) The 2009-10 calculation was issued to the Appellant on 17 September 2011 advising of tax underpaid. Therefore in any event, HMRC did not fail to make proper use of information received as the calculation was issued to the Appellant within the permitted time limits. ESC A19 does not therefore apply and so HMRC could not agree to give up the tax underpayment for 2009-10.

2010-11

20 (1) The tax code in operation during the 2010-11 year, of 203L, included a restriction for car benefits. Tax was underpaid due to the Appellant receiving more car benefits than were coded.

25 (2) At the start of the 2010-11 tax year the tax code included a car benefit figure of £7,582, which appears to be the figure taken from the 2008-09 P11D. This would be correct, while awaiting the 2009-10 P11D on which to review the tax code and amend as necessary.

(3) HMRC's records show that the Appellant telephoned HMRC on 7 May 2010, and based on the information provided by him, his 2010-11 tax code was amended and the car benefit figure was reduced to £4,331.

30 (4) The 2010-11 form P11D was received from the employer on 6 July 2011, tax year 2011-12, which meant HMRC had until 5 April 2013 to make use of information given.

35 (5) The 2010-11 calculation was issued to the Appellant advising of tax underpaid on 17 September 2011. Again HMRC did not fail to make proper use of information received as the calculation was issued within the permitted time limits and ESC A19 did not apply.

2011-12

The code in operation during the 2011-12 year, of K646, included a restriction for car benefits greater than were received during the year, and tax overpaid during the 2011-12 year was set against tax underpaid at 5 April 2011.

40 6. HMRC's records show that self-assessment returns for the years 2008-09, 2009-10, 2010-11 and 2011-12 were issued to the Appellant for completion on 10 December 2012, and at the date HMRC issued their review decision on 13 March

2013, remained outstanding. HMRC asked for the returns to be completed by 17 March 2013.

7. On 28 March 2013 the Appellant asked HMRC to reconsider matters saying that HMRC 'were not acting in accordance with ESC A19'.

5 **The Appellant's contentions**

8. The Appellant says that he should not have to pay back the tax underpayment, and on 28 April 2014 submitted a Notice of Appeal to the Tribunal. The Appellant argues that the underpayment arose because of a mistake on the part of HMRC, or his employer and that he should not be prejudiced by that error. Effectively the Appellant presents an argument of legitimate expectation.

9. At the hearing the Appellant largely reiterated what he had said in his Notice of Appeal:

15 'My argument as an employee on the PAYE scheme is that it is the duty of my employers payroll dept. to provide relevant information to HMRC, as far as benefits are concerned, which they have done.

It is then the responsibility of HMRC to use this information accurately and in a timely manner and apply the correct tax code, so that I can be taxed properly.

My responsibility is to ensure that on every payslip there is an amount of tax being deducted from my earnings.

20 Over the years, my tax code has changed so many times, and I assumed that this is normal, due to the cars which kept changing, as well as changes to my personal situation, with having children.

25 I have always checked my payslips to ensure that tax/NI was deducted every month from my earnings, and if ever there was to be a NIL figure, then of course alarm bells would have started to ring. But this was never the case. On top of that, how can I be responsible for not paying enough tax, when this is something that is done by PAYROLL DEPT and HMRC, it's not as if I am Self-Employed and on Self-Assessment, and I deliberately chose not to pay tax.

30 I come to work for an employer, and assume that my tax affairs will be dealt with accurately by my employer's payroll and the HMRC. It is absurd that someone can simply go to work and then end up in almost £10,000 worth of debt!!!!

35 Throughout the last 18 months or so, I have been sent various types of letters from HMRC which I can only assume relate to this underpayment. These letters were self-assessment forms, fines, Self-Assessment statements, late tax return notices, surcharges, etc. all of which as a lay person, when it comes to tax matters I could make no sense of.

I have also paid various fines imposed on me for not completing Self-Assessment, as I thought it did not relate to me as I was on PAYE.

5 I have written to HMRC on various occasions, trying to show them that I am a law abiding citizen, who has not avoided paying any tax, and that there must be a flaw either in their systems or possibly an element of issues with the "Averaging Scheme" and how/when HMRC go about applying the information they receive from Payroll. I have even been advised to suggest to HMRC that they look at my case under the ESC A19, but they have suggested that this cannot be applied to my case.

In the various letters I have received from HMRC they have admitted to "not using the information provided to them by me or a third party properly or on time", but yet I am still faced with a huge debt over my head

10 I would like the apparent underpayment amount to be written off, as I feel that the HMRC have not used the accurate information properly or in a timely fashion, which was provided by my employers, in order to ensure that I have paid/continue to pay the correct amount of tax.'

HMRC's case

15 10. During HMRC's review of the Appellant's case it was noted that the nature of his employer's benefits scheme meant that it would not be possible for him to pay the right amount of tax and that he would always be either over or under paid in his PAYE tax. This is because his employer operated an 'Averaging Scheme' which
20 meant that the employee could have any number of different cars throughout the year, each with massively different list prices and rather than provide details of each individual car, they have added them all together and provide an average car benefit figure for the whole year.

25 11. HMRC explained to the Appellant that under PAYE, where they are unable to collect the arrears of tax through the tax code because of insufficient PAYE income, or the amount to be coded exceeds the limit - £3,000 - they write to the customer to request a voluntary payment.

12. In the event of no reply HMRC then issue self-assessment tax returns to the individual to protect the collection of the tax due.

30 13. The returns have to be completed and submitted within the time period allowed. For late issued tax returns - as was the case with the Appellant's 2009-10 and 2010-11 tax returns - the time period was three months and seven days. If the tax returns are not submitted within that time period, then penalties are automatically charged.

35 14. The returns for the stated tax years were sent to the Appellant on 10 December 2012 and the appropriate filing date was 17 March 2013, but HMRC did not receive the forms until 10 April 2013. This attracted Late Filing Penalty charges of £100 for each tax year.

40 15. HMRC's case is that in any event, the Tribunal has no jurisdiction to adjudicate on HMRC's application of, or refusal to apply, ESC A19. Any dispute relating to an ESC, they say, is to be determined by way of judicial review, either in the High Court or, in some circumstances, by the Upper Tribunal. They maintain that position both in relation to matters of law or principle, such as whether an ESC is capable of applying

in particular circumstances, and in relation to matters of fact, that is whether an individual taxpayer falls within the scope of a concession.

16. As the Appellant does not challenge HMRC's assertion that there has been an underpayment of tax, but relies instead only on his contention that he should not have to pay back the under-deducted tax, HMRC argue that the Tribunal has no other course open to it than to strike out the appeal in accordance with rule 8(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, which provides that :

10 “The Tribunal must strike out the whole or part of the proceedings if the Tribunal—
 (a) does not have jurisdiction in relation to the proceedings or that part of them ...”

17. HMRC therefore apply for the appeal to be struck out and in support of their application refer to the case of *Prince & Others* [TC 2011/03594] where the question of whether or not the Tribunal has jurisdiction to consider the application of ESC A19 was considered. Judge Colin Bishopp was forceful in his conclusion that the First-tier Tribunal had no such jurisdiction when he said at paragraph 18 line 40:

20 “‘It is perfectly plain, from perusal of the Act itself, that Parliament did not intend to confer a judicial review jurisdiction on the First-tier Tribunal, and there is nothing in the more detailed legislation relating to tax appeals, the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009, which points to a contrary conclusion.’”

18. Judge Bishopp went on to say at paragraph 19 etc.

25 “‘The question nevertheless remains, whether there is any other means by which this tribunal may assume jurisdiction, not by arrogating to itself a judicial review function, but by applying some other principle of law. The possibility that it might was raised by *Sales J in Oxfam v Revenue and Customs Commissioners* [2010] STC 686.’”

His conclusion to that question was:

30 “‘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
35 judicial review. Nothing in the legislation could be construed as conferring any jurisdiction to determine such an issue on this tribunal, nor do I see any basis on which an argument of legitimate expectation that a statutory duty (as HMRC's obligation to collect tax which is due is) will, or should, be waived could properly be regarded as the
40 province of a tribunal whose task is to determine the amount of tax which is due: in that, there is a clear distinction to be drawn between this case and *Oxfam*.’”

18. Judge Bishopp concluded at paragraph 34 that:

“The Tribunal cannot entertain a challenge to the refusal to apply ESC A19.”

Conclusion

5 19. In this case, the Appellant does not dispute that tax has been underpaid in the years 2008-09, 2009-10 and 2010-11. There is also no dispute as to the tax calculations. There is only a disagreement about whether HMRC should waive a legislatively due liability under ESC A19.

10 20. The legislation at s 31(1)(d) of Taxes Management Act 1970 says an appeal may be brought against any assessment to tax which is not self-assessment. Therefore there is no right of appeal against self-assessment.

15 21. We do not consider that the reasonable belief condition of ESC A19 was satisfied in respect of the Appellant’s tax underpayment for the tax year 2008-09, but in any event for that year, or any of the other years where the Appellant says HMRC should waive the tax due, we cannot assume any jurisdiction with regard to the exercise by HMRC of its discretion under ESC A19.

20 22. There is nothing in the relevant legislation that could be construed as conferring any jurisdiction to determine the issue in this appeal. The Tribunal does not have jurisdiction to consider an argument of legitimate expectation. We have no jurisdiction to consider whether or not HMRC have exercised their ESC discretion correctly, or reasonably.

23. The Appeal is accordingly struck out.

25 24. 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.

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**MICHAEL S CONNELL
TRIBUNAL JUDGE**

RELEASE DATE: 6 February 2015

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