



TC04295

Appeal number: TC/2014/04365

PAYE – incorrect deduction - Regulation 72 - refusal notice - reasonable care – no - appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

CAMPBELL MEYER & CO LTD

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE ANNE SCOTT, LLB, NP
MR IAN G SHEARER**

**Sitting in public at George House, 126 George Street, Edinburgh on Tuesday
3 February 2015**

Mr McSherry for the Appellant

Ms Linda McGuigan, Officer of HMRC, for the Respondents

DECISION

The appeal

1. The appeal is against the refusal notice issued by HMRC on 10 July 2014. The
5 appeal is brought in terms of Regulation 72A(4) of the Income Tax (Pay as You Earn)
(Amendment) Regulations 2004 (the PAYE Regulations). The refusal notice was
issued in terms of Regulation 72A(3) of the PAYE Regulations.

The facts

2. The appellant employed a new employee, Miss Skelton with effect from
10 17 January 2013. She left their employ on 27 September 2013. Miss Skelton was an
accountant with previous experience in payroll although she was not responsible for
payroll with the appellant. She worked in a team with, amongst others, Mrs Purdie
who is also an accountant and who took over as Finance Director of the appellant on
21 January 2013. She is now responsible for payroll. She had no training in payroll
15 matters other than her training when she became an accountant.

3. Miss Skelton had provided the appellant with her P45 on 18 January 2013. The
then Finance Director, who was an accountant, and who left the appellant's employ
on 18 January 2013, apparently processed the P45. It is not in dispute that the
previous pay and tax details were not entered in the payroll function. Accordingly no
20 tax was deducted in the period to 5 April 2013.

4. On 20 December 2013 Miss Skelton disputed a PAYE tax calculation which
HMRC had sent to her. This calculation advised her that her PAYE income tax for
the 2012-13 year had been under-deducted by £793.60.

5. She wrote to HMRC stating that she had always been a PAYE employee and "I
25 am unsure how my tax calculation would be incorrect." She went on to say that when
she received her January payslip she had queried with Mrs Purdie why there had been
no deduction of tax. She said that she had been told by Mrs Purdie that the figures
were correct as the P45 figures had been processed with the payroll for the month of
January.

6. She confirmed that prior to joining the appellant she had been made redundant by
30 her previous employer and had not done any other work in January 2013. She stated
that Mrs Purdie had advised her that the fact that there was no deduction for tax
probably related to her having paid too much tax in her previous employment

7. We heard evidence from Mrs Purdie and Mr McSherry. Mrs Purdie freely
35 confirmed that when she processed the January payroll since she had a tax code for
Miss Skelton, she had simply assumed everything was in order. She stated that if
Miss Skelton had come to her to say that no tax was being deducted and that there
was a problem, then she would certainly have double checked everything.

8. She was aware that Miss Skelton had more experience than she herself did in
40 payroll matters.

9. Since she had a tax code for Miss Skelton, she had assumed that all details of previous pay and tax had been included in the introduction of Miss Skelton as a new employee. That was not the case. She did not check the tax code.

5 10. She refuted Miss Skelton’s account of events and, by contrast, indicated that in conversation, since they worked together, Miss Skelton had informally indicated that she was pleased that she would not be paying tax since she had overpaid tax because of a redundancy payment in her previous employment.

10 11. There was correspondence between the appellant and HMRC and regrettably it was not brought to HMRC’s attention that Miss Skelton was an accountant with experience of payroll, nor that the previous Finance Director had been a qualified accountant. The only information provided was to the effect that there had been an innocent omission by the person then responsible for payroll who had “now” been replaced by an accountant. Accordingly, HMRC were unable to make further enquiries.

15 12. On 10 July 2014 HMRC issued a Notice of Refusal letter intimating that they had decided not to make a direction under Regulation 72(5) Condition A of the PAYE Regulations in respect of the tax under deducted from the relevant payments to the employee. That tax amounts to £793.60.

20 13. The reason for the decision is that HMRC were not satisfied that the appellant had taken reasonable care in the operation of PAYE in that they had not included the previous pay and tax details shown on Form P45(3) and they did not have adequate checking processes in place at the time of the errors.

25 14. The appellant appealed on the basis that “it is our contention that HMRC have the authority and powers to track her subsequent employment and collect unpaid taxes from her”.

The law

15. Regulation 42 Procedure if employer receives Form P45

- 30 (1) This regulation applies—
- (a) If an employee gives Parts 2 and 3 of Form P45 to the employer on commencing employment, ...
- (2) The new employer must prepare a deductions working sheet and record on it the following information shown in Parts 2 and 3 of Form P45—
- 35 (a) the employee’s name,
- (b) the employee’s national insurance number.
- (3) If Parts 2 and 3 of Form P45 show that the earlier employment ended in the current tax year, the new employer must comply with regulation 43.

16. Regulation 43 Form P45 for current tax year

- (1) The new employer must record in the deductions working sheet the code shown in Parts 2 and 3 of Form P45 as the employee's code.
- 5 (2) Paragraphs (3) to (10) apply if Parts 2 and 3 of Form P45 show that the cumulative basis was used.
- (3) The employer must record in the deductions working sheet the total payments to date (if any) shown in Parts 2 and 3 of Form P45.
- (4) The employer must record in the deductions working sheet the following additional information, or keep such records as enable its production.
- 10 (5) If the code shown in Parts 2 and 3 of Form P45 is a K code, the additional information is—
- (a) the total additional pay to date,
 - (b) the total taxable payments to date, and
 - 15 (c) the lower of the total tax to date as at the week or month shown in Parts 2 and 3 of Form P45 and the total net tax deducted shown in it.
- (6) In any other case, the additional information is—
- (a) the total free pay to date,
 - (b) the total taxable payments to date, and
 - 20 (c) the corresponding total tax to date as at the week or month shown in Parts 2 and 3 of Form P45.
- (7) The amounts required by paragraphs (5)(a) and (b) and (6)(a) and (b) must be arrived at by the employer by reference to the information shown in Parts 2 and 3 of Form P45.
- 25 (8) On making any relevant payment to the employee, the employer must deduct or repay tax by reference to the employee's code on the cumulative basis.
- (9) For the purposes of—
- (a) paragraph (8), and
 - (b) item 8 of Table 2 in regulation 36(4) (Form P45), and
 - (c) regulation 55(4)(f) [(Form P46(Pen))]
- 30 the total payments to date recorded in the deductions working sheet in accordance with paragraph (3), and the figure recorded in accordance with paragraph (5)(c) or (6)(c) must be treated as if they were relevant payments made to the employee by, and tax deducted by, the new employer.
- 35 (10) For the purposes of regulation 23(8) (cumulative basis: meaning of previous total tax to date) the figure recorded in accordance with paragraph (5)(c) or (6)(c) must be treated as the previous total tax to date when the employer next makes a relevant payment to the employee.

(11) If Parts 2 and 3 of Form P45 show that the non-cumulative basis has been used, on making any relevant payment to the employee the employer must, subject to regulation 32 (higher rate code: deductions), deduct or repay tax by reference to the employee's code on the non-cumulative basis.

5 (12) The receipt by the employer of Parts 2 and 3 of Form P45 is treated as the issue by the Inland Revenue of the code shown in Parts 2 and 3 of Form P45 as the code for use in respect of the employee.

17. Regulation 72 permits HMRC to recover the under-deduction from the employee in certain circumstances. Regulation 72 reads:-

10 **72. Recovery from employee of tax not deducted by employer**

(1) This regulation applies if—

(a) it appears to the Inland Revenue that the deductible amount exceeds the amount actually deducted, and

(b) condition A or B is met.

15 (2) In this regulation [and regulations 72A and 72B]—

“the deductible amount” is the amount which an employer was liable to deduct from relevant payments made to an employee in a tax period;

20 “the amount actually deducted” is the amount actually deducted by the employer from relevant payments made to that employee during that tax period;

“the excess” means the amount by which the deductible amount exceeds the amount actually deducted.

25 (3) Condition A is that the employer satisfies the Inland Revenue—

(a) that the employer took reasonable care to comply with these Regulations, and

30 (b) that the failure to deduct the excess was due to an error made in good faith.

(4) Condition B is that the Inland Revenue are of the opinion that the employee has received relevant payments knowing that the employer wilfully failed to deduct the amount of tax which should have been deducted from those payments.

35 (5) The Inland Revenue may direct that the employer is not liable to pay the excess to the Inland Revenue.

[(5A) Any direction under paragraph (5) must be made by notice (“the direction notice”), stating the date the notice was issued, to—

(a) the employer and the employee if condition A is met;

40 (b) the employee if condition B is met.]

18. Regulation 72A Employer’s request for a direction and appeal against refusal

- 5 (1) In relation to condition A in regulation 72(3), the employer may by notice to the Inland Revenue (“the notice of request”) request that the Inland Revenue make a direction under regulation 72(5).
- (2) The notice of request must—
- (a) state—
- 10 i. how the employer took reasonable care to comply with these Regulations; and
- ii. how the error resulting in the failure to deduct the excess occurred;
- (b) specify the relevant payments to which the request relates;
- (c) specify the employee or employees to whom those relevant payments were made; and
- 15 (d) state the excess in relation to each employee.
- (3) The Inland Revenue may refuse the employer’s request under paragraph (1) by notice to the employer (“the refusal notice”) stating—
- (a) the grounds for the refusal, and
- (b) the date on which the refusal notice was issued.
- 20 (4) The employer may appeal against the refusal notice—
- (a) by notice to the Inland Revenue,
- (b) within 30 days of the issue of the refusal notice,
- (c) specifying the grounds of the appeal.
- (5) For the purpose of paragraph (4) the grounds of appeal are that—
- 25 (a) the employer did take reasonable care to comply with these Regulations, and
- (b) the failure to deduct the excess was due to an error made in good faith.
- 30 (6) If on appeal under paragraph (4) [that is notified to the tribunal] it appears to the [tribunal] that the refusal notice should not have been issued [the tribunal] may direct that the Inland Revenue make a direction under regulation 72(5) in an amount the [tribunal determines] is the excess for one or more tax periods falling within the relevant tax year.

Reasons for decision

19. HMRC accept that the failure to deduct the tax was due to an error in good faith. The core of their argument is that the appellant did not take reasonable care to comply with these Regulations.

20. There is no doubt that the appellant was obliged to comply with the provisions of Regulation 43 and did not do so due to a lapse on the part of the previous accountant. There was no safeguarding or checking process in place. Mrs Purdie had received no training when taking over the payroll function and in relation to Miss Skelton relied on the bona fides, and greater experience in that field, of Miss Skelton. We were unable to test Miss Skelton's evidence.

21. One of the primary problems we have is that on checking a diary we find that Miss Skelton furnished her P45 on 18 January 2013 and that was a Friday. Mrs Purdie took over her duties on 21 January 2013 and that was the following Monday. It would appear that there was no specific handover process, as such, in regard to the payroll. Mrs Purdie simply assumed that everything had been done that should have been done. Since the P45 had been received on her predecessor's last day in post, it would have been prudent to have checked that everything was up-to-date and complete. This is a company with only some 35 employees but with more than one accountant employed at that time.

22. The fact that Mrs Purdie was inexperienced in payroll matters should have made her more wary if, as she asserts, at some point she was led to believe by Miss Skelton that no tax was being deducted.

23. We agree with Sir Stephen Oliver in *Portslade Dental Care Limited v HMRC*¹ where in commenting on an error which arose when payroll agents were changed he stated: "*It is in any event reasonable to expect that, on a changeover of payroll agents, an employer would have taken more than usual care to ensure that all relevant material regarding each employee's PAYE coding was drawn to the attention of the new agent.*"

24. We understand how this error arose, but we find that a prudent and diligent taxpayer, mindful of the obligation to comply with its duties in terms of tax legislation should have ensured that particular care was taken on handover of responsibility for the payroll. That is even more pertinent where a new staff member is entered on the payroll on the previous post holder's last day.

25. There was no evidence of checks and balances being in place at that time, although Mrs Purdie has instigated that now. There was no evidence of any formal and detailed "handover" when she took over the payroll. Whilst we understand why she made the assumptions that she did, that does not amount to reasonable care.

26. In these circumstances where there has been an almost total reliance on assumptions that both the previous Finance Director and the new employee had "done

¹ [2013] UKFTT 341 (TC)

the right thing”, we do not find that the appellant has proved that reasonable care was taken to ensure that the payroll details were correct and therefore the appellant cannot avoid the liability to pay the under deduction of PAYE.

5 27. Lastly, as we emphasised at the Hearing, whilst HMRC could have recovered the underpayment from Miss Skelton, and indeed initially attempted to do so, in the face of a finding that reasonable care was not exercised by the appellant, the liability remains with the appellant.

10 28. 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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**ANNE SCOTT
TRIBUNAL JUDGE**

RELEASE DATE: 23 February 2015

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