



TC05381

Appeal number: TC/2016/01970

Application for re-instatement of appeal - PAYE – underpaid tax -change to coding notice –appealable decision – Held – appeal no real prospect of success – appeal not reinstated.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Mr Andre D’Ambra

Appellant

- and -

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

**TRIBUNAL: JUDGE Rachel Short
Mrs Shameem Akhtar (Member)**

**Sitting in public at Eastgate House, Newport Street, Cardiff on 2 September
2016**

Mr D’Ambra the Appellant in person

**Mr Bradley, instructed by the General Counsel and Solicitor to HM Revenue
and Customs, for the Respondents**

DECISION

1. This is an application by Mr D'Ambra to have his case re-instated in response to the Tribunal's decision of 15 June 2016 that it should be withdrawn as a result of HMRC agreeing to withdraw Mr D'Ambra's PAYE coding notice for the 2016-7 tax year, having accepted that Mr D'Ambra does not agree to them collecting underpaid tax through his PAYE coding.

2. Mr D'Ambra argues that while HMRC have agreed to change his coding notice for 2016-17 they have not waived the £445.30 of tax which they allege remains due from Mr D'Ambra and that he wishes to appeal against the payment of that tax.

3. HMRC argue that the only issue in dispute is the correct tax coding for 2016-17 and this has now been agreed with Mr D'Ambra. HMRC say that they may pursue the remaining tax due by another means, but no appealable decision has yet been made in that regard.

4. The remaining tax in dispute is tax which was charged on Mr D'Ambra arising from his self-assessment return for 2013-14 and Mr D'Ambra has no right of appeal against his own self- assessment.

Background

5. Mr D'Ambra explained the history of his tax payments and PAYE codes for the 2012-3 and 2013-4 years, the numerous letters and many conversations which he had had with HMRC and the multiple different figures which HMRC had advanced as the correct amount of tax due. Mr D'Ambra estimates that the figure of tax which HMRC says is due has altered more than twenty times.

6. Mr D'Ambra is a solicitor who is employed and pays all of his tax through PAYE. He has no other income other than his employment income. In 2011-12 he claimed tax deductible expenses for professional expenditure in his self-assessment tax return of £2,696 and £630.

7. Those expenses were one-off payments and did not re-occur in later years. However HMRC's policy, applied in this case, is to roll-over employment based expenses to future years and include it in an employee's tax coding on the assumption that employee expenses are likely to re-occur in future years. They rolled over these expenses into the next two of Mr D'Ambra's PAYE codes, in effect giving him larger tax deductions than he was eligible for and so under taxing him for both of the 2012-3 and 2013-4 tax years.

8. The error was identified by Mr D'Ambra in conversations with HMRC in December 2013 but the amended tax code was not applied until after the end of the 2013-14 tax year.

9. As part of Mr D'Ambra's dispute with HMRC he has already made a complaint to the Adjudicator which was not upheld, received £275 of compensation from HMRC and HMRC have agreed to write off £164.80 of underpaid tax which would otherwise have been due for the 2012-3 tax year. HMRC have also written off
5 wrongly charged PAYE (due to employer error) for the 2013-4 tax year amounting to £166.30 and paid Mr D'Ambra compensation of £30 to reflect their failure to pursue the right amount of tax due.

10. The remaining amount of tax due is £445.30 relating to Mr D'Ambra's self-assessment for 2013-4 which included the additional amount of expenses which were
10 not due to him which had been included in his PAYE code. This amount due was set out in the tax calculation provided to Mr D'Ambra for the 2013-4 tax year. Mr D'Ambra's tax calculation for 2013-14 did not include any deductions for underpaid tax for earlier years.

11. The question for this Tribunal is whether Mr D'Ambra can make any appeal
15 which is within the remit of this Tribunal in respect of the remaining amount of tax due for 2013-14.

12. HMRC have not yet assessed Mr D'Ambra for the tax which they say is owing for 2013-14 but have now, as requested by Mr D'Ambra, removed the amounts owing from his tax code for 2016-7.

20 13. Mr D'Ambra appealed to this Tribunal on 4 April 2016.

Law

14. PAYE Regulations 2003 paragraph 18 (1) to (4) set out the way in which a taxpayer can object to HMRC's determination of his tax coding:

25 *"18(1) An employee who objects to the determination of a code must state the grounds of objection.*

18(2) On receiving the notice of objection the Inland Revenue may amend the determination of the code by agreement with the employee.

30 *18(3) If the Inland Revenue and employee do not reach agreement, the employee may appeal against the determination of the code by giving notice to the Inland Revenue.*

18(4) On an appeal that is notified to the tribunal, the tribunal must determine the code in accordance with these Regulations."

Evidence

35 15. We saw the two versions of Mr D'Ambra's self-assessment tax calculations for 2012-13, one sent by HMRC on 20 November 2013 and one on 5 March 2014 showing different amounts of tax due.

16. We saw Mr D'Ambra's self-assessment tax calculation for 2013-4 which did not include any amounts carried forward for unpaid tax, but did include an amount of tax owing stated as £611.60.

5 17. We saw a letter from HMRC to Mr D'Ambra of 14 August 2016 explaining the net amount which they considered outstanding from Mr D'Ambra for the 2012-13 and 2013-14 tax years, apologising for providing incorrect information previously, agreeing to forgive £164.80 of tax for the 2012-13 tax year, reducing the arrears due to take account of Mr D'Ambra's employer's error for 2013-4 by £166.30 and offering a compensation payment of £30.

10 18. We saw Mr D'Ambra's tax coding notice for 2016-17 dated 17 March 2016 including job expenses.

15 19. We saw a letter to Mr D'Ambra from the Adjudicator's Office dated 16 May 2016 setting out the detailed history of Mr D'Ambra's dealings with HMRC from July 2012 to June 2015, confirming that compensation of £275.00 had been paid by HMRC and refusing to uphold Mr D'Ambra's complaint.

20. Mr D'Ambra provided a chronology of his contacts, by letter and telephone, with HMRC from 31 July 2012 until HMRC's letter of 14 August 2016 agreeing the amount of tax due as £445.30.

Taxpayer arguments

20 21. Mr D'Ambra says that since HMRC have not been able to establish what his correct tax liability actually is for the period in question, having referred to numerous different amounts over a four year period, he is not liable to any additional tax since HMRC have not properly demonstrated what amount is due and why.

25 22. Mr D'Ambra's view is that he does not owe HMRC any tax since they cannot explain how the tax figures given to him have been calculated. The confusion demonstrated by HMRC discredits their calculations. If there is any tax owing, that has already been collected; HMRC notified Mr D'Ambra on four separate occasions in 2015 that underpaid tax would be collected in his 2015-16 tax coding.

30 23. Even though HMRC have now agreed to withdraw the tax coding which would recover the underpayments from Mr D'Ambra for the 2016-17 tax year, they have not agreed that the £445.30 is not due and have said that they reserve their position about how and if this is collected from him.

HMRC arguments

35 24. At the Tribunal Mr Bradley accepted Mr D'Ambra's description of his correspondence and conversations with HMRC as confusing, but pointed out that Mr D'Ambra had already received compensation from HMRC directly and made an application to the Adjudicator which had been rejected. Any issues with HMRC's procedures or how it has dealt with a particular taxpayer are outside the remit of this Tribunal.

25. In respect of Mr D'Ambra's appeal against his coding notice for 2016-7, HMRC have now agreed to remove the amount of tax from Mr D'Ambra's tax code for that year as requested. Mr D'Ambra has no right of appeal against a coding notice which has been agreed, as set out in PAYE Regulations 2003 18(2) and (3).

5 26. The amount appealed by Mr D'Ambra for 2013-4 is an amount which was included on Mr D'Ambra's self-assessment return, as such Mr D'Ambra has no right of appeal against that amount. Mr Bradley said that there was no right of appeal against an unamended self-assessment but did accept that Mr D'Ambra's self-
10 assessment for 2012-13 had been amended by HMRC through the carry forward of the underpaid tax from 2011-12 into Mr D'Ambra's self-assessment for that year. However in respect of the 2013-14 self- assessment, there had been no amendment by HMRC; Mr D'Ambra had included incorrect figures in his self-assessment return which included expenses which were not due. There had been no amendment to Mr D'Ambra's tax return by HMRC.

15 *Discussion*

Findings of fact

27. On the basis of the evidence provided to the Tribunal we make the following findings of fact:

- 20 (1) HMRC included professional expenses in Mr D'Ambra's tax coding for 2013-14 to which he was not entitled and did not wish to claim.
- (2) Mr D'Ambra underpaid tax for 2013-14.
- (3) HMRC have agreed with Mr D'Ambra that his tax coding for 2016-7 will not include repayment of the amount of underpaid tax for the 2013-14 tax year.
- 25 (4) Mr D'Ambra's tax calculation for the 2013-4 tax year stated that there was an amount of tax owing to HMRC.

HMRC's dealings with Mr D'Ambra

28. HMRC have already accepted responsibility for providing Mr D'Ambra with
30 confusing and contradictory information and have paid compensation and written off tax (£305 of compensation and costs and £164.80 of tax for 2012-3 and £166.30 of tax for 2013-14) in recognition of this.

29. This Tribunal has no jurisdiction to consider any questions of the way in which HMRC has operated their administrative procedures. In this case those issues have
35 already been raised with the Adjudicator and HMRC have already paid compensation to Mr D'Ambra.

30. While Mr D'Ambra's position is that he should not have to pay any sums to HMRC which they cannot properly explain, he did not dispute that the expenses included in his 2013-14 tax return were not due.

Tax amounts owing

31. Mr D'Ambra argued that all amounts outstanding had already been collected and referred to HMRC's four letters sent during 2015 stating that underpaid tax would be collected during 2015-6. On the basis of the chronology set out by Mr D'Ambra himself and the version of events as set out in the Adjudicator's letter of 16 May 2016 our conclusion is that HMRC intended to collect the £445.30 outstanding through Mr D'Ambra's tax code for 2016-7, but that as a result of HMRC agreeing to Mr D'Ambra's request that this should not be collected through his 2016-7 tax code, that amount of tax is still outstanding.

10 *Appealable decision*

32. The first question is whether Mr D'Ambra can make any valid appeal against that amount since (i) it was included as part of his self-assessment for 2013-14 (ii) HMRC have not issued any other "assessment" in respect of that amount owing.

33. We agree with HMRC that in circumstances where a taxpayer has submitted a self-assessment and that has not been amended, there is no basis on which an appeal can be made against that, since it is not a decision of HMRC. It is a slightly less straightforward question whether any other statements issued by HMRC pursuant to a self-assessment might be treated as an "assessment" against which a taxpayer may appeal. That question has been considered by the First Tier Tribunal in *Prince (Michael Prince v HMRC [2012] UKFTT 157(TC))* where it was held that a P800 tax calculation, was not an "assessment" against which an appeal can be made because it did not fulfil the formal requirements of the assessment procedure set out at s 30A Taxes Management Act 1970 and in *Robert E Clark v HMRC ([2011] UKFTT 302(TC))* where it was concluded that it was arguable that a P800 tax calculation could be treated as an assessment.

Grounds for re instatement

34. In considering whether Mr D'Ambra's appeal should be re-instated we taken into account whether Mr D'Ambra's appeal has a real prospect of being successful. Even if it could be established that Mr D'Ambra's tax calculation for 2013-4 is an assessment against which an appeal could be made, the likelihood of that appeal being successful appears to us to be relatively slim. Despite Mr D'Ambra's confusion about the specific amount which is owing, our view is that there is little real doubt that the calculations provided by HMRC in their letter of 14 August 2016 are correct and that Mr D'Ambra has underpaid tax of £445.30 outstanding for 2013-14.

35. We have also considered what the effect of refusing to reinstate this appeal would be for Mr D'Ambra. Mr D'Ambra has already received compensation of £305.00 and a write off of tax of £166.30, amounting in total to more than the remaining tax in dispute. Therefore, this is not a case in which the Appellant will suffer real financial hardship as a result of the appeal not being reinstated.

40. 36. Nor is it clear that refusing to reinstate this appeal will necessarily close off all avenues of appeal for Mr D'Ambra; having removed the sum owing from Mr

D'Ambra's tax code, HMRC have left open the possibility of assessing Mr D'Ambra for the outstanding amount. Were this to occur, Mr D'Ambra would have a right of appeal against that assessment.

5 37. For all of these reasons we have concluded that Mr D'Ambra's appeal should not be reinstated and his application is dismissed.

10 38. 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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**RACHEL SHORT
TRIBUNAL JUDGE**

RELEASE DATE: 20 SEPTEMBER 2016

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