PENALTY — FA 2007 Sch 24 — inaccuracy in document — preliminary issue — whether any inaccuracy within statutory meaning in employer's end of year return — no — appeal allowed

Appeal number: TC/2015/04593

FIRST-TIER TRIBUNAL
TAX CHAMBER

BETWEEN

FAB CLEANING MANAGEMENT LIMITED **Appellant**

- and –

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

Tribunal: Judge Colin Bishopp

Appeal determined on written submissions alone

DECISION

1. This decision notice relates to what has been identified as a preliminary issue in an appeal by Fab Cleaning Management Limited ("Fab") against penalties imposed on it for errors, or supposed errors, in its employer's end of year returns, commonly known as P35s, for the years to 5 April 2011, 2012 and 2013. The preliminary issue is whether there were any errors which might give rise to a penalty; if that issue is decided against Fab it will be necessary to determine whether Fab's conduct was deliberate (though not concealed), as the respondents, HMRC, maintain, or merely careless. The parties accept that oral evidence will be required if it should prove necessary to determine the second issue, but they have agreed that the first should be decided on the basis of written submissions alone.

2. It is common ground that Fab has traded as a contract cleaning company since about September 2010. It is a relatively small concern, run by a husband and wife and company secretary on a part-time basis. Its payroll function has been contracted out to a third party from the start of its trading activities. It seems that most of its staff, employed as cleaners and typically numbering about 140, do not speak English as a first language, and many of them are unfamiliar with British employment procedures. In consequence, at the material time, they did not always produce all of the documents which they should have handed over on starting their employment with Fab, and Fab or its payroll agent was not as scrupulous as it should have been in ensuring that the correct procedures were followed.

3. In 2013 HMRC began a check into Fab's employer's end of year returns for the relevant years. They came to the conclusion that Fab had deducted too little income tax and national insurance contributions ("NICs") from their employees' earnings and had correspondingly accounted for too little to HMRC, and formal determinations designed to recover the underpayments were issued. In addition, HMRC imposed the disputed penalties on Fab for, they said, inaccuracies in its P35s; the penalties amounted to £1,594 (2011), £2,031 (2012) and £480 (2013). Fab accepts that errors were made, and that too little tax and NICs were deducted and paid over; there is therefore no challenge to the principle of the determinations or, I understand, to their amounts. As I have indicated, Fab does dispute the penalties.

4. The obligation on an employer to submit a return each year is imposed by reg 73 of the Income Tax (Pay As You Earn) Regulations 2003 ("the PAYE Regs"), made pursuant to s 684 of the Income Tax (Earnings and Pensions) Act 2003. That regulation, so far as relevant for present purposes, is as follows:

> "(1) Before 20th May following the end of a tax year, an employer must deliver to the Inland Revenue [for which now read HMRC] a return containing the following information.
>
> (2) The information is—
>
> (a) the tax year to which the return relates,
>
> (b) the total amount of the relevant payments made by the employer during the tax year to all employees in respect of

whom the employer was required at any time during that year to prepare or maintain deductions working sheets, and

(c) the total net tax deducted in relation to those payments.

(3) The return must be supported by the following information in respect of each of the employees mentioned in paragraph (2)(b).

(4) The supporting information is—

(a) the employee's name,

(b) the employee's address, if known,

(c) either—

(i) the employee's national insurance number, or

(ii) if that number is not known, the employee's date of birth, if known, and sex,

(d) the employee's code,

(e) the tax year to which the return relates,

(f) the total amount of the relevant payments made by the employer to the employee during that tax year, and

(g) the total net tax deducted in relation to those payments."

5. The appropriate practice (see reg 211), which Fab followed, is to submit a P35 setting out the aggregate amounts of the payments and deductions—the sub-para (2) information—and a separate form, known as P14, providing the requisite details for each employee—the sub-para (4) information and some further details irrelevant to the issue before me. Both the P35 and the P14 are forms devised by HMRC for the purpose.

6. The penalties were imposed in accordance, or purported accordance, with para 1 of Sch 24 to the Finance Act 2007, which is in these terms:

"(1) A penalty is payable by a person (P) where—

(a) P gives HMRC a document of a kind listed in the Table below, and

(b) Conditions 1 and 2 are satisfied.

(2) Condition 1 is that the document contains an inaccuracy which amounts to, or leads to—

(a) an understatement of a liability to tax,

(b) a false or inflated statement of a loss, or

(c) a false or inflated claim to repayment of tax.

(3) Condition 2 is that the inaccuracy was careless (within the meaning of paragraph 3) or deliberate on P's part.

(4) Where a document contains more than one inaccuracy, a penalty is payable for each inaccuracy."

7. The Table to which para (1)(a) refers includes "Returns for the purposes of PAYE Regulations" and it appears to be common ground that both a P35 and a P14 fall within that description.

8. HMRC were asked by Fab to review the decision to impose the penalties, and the conclusions of the review were set out in a latter of 30 June 2015. The letter identified a number of errors made by Fab or its payroll agents in the operation of the PAYE scheme, and set out in some detail what the requirements of the scheme are. There may be some disagreement about the detail, but as I have said it is accepted by Fab that it did make some errors, and that those errors led to the under-deductions and consequent under-declarations of tax and NICs. The letter then turned to the penalties. It outlined the statutory provisions and then set out this, to my mind critical, paragraph:

> "Paragraph 1(1) of Schedule 24 directs the reader to the list of those documents for which the penalty regime applies and this includes a Return for the purposes of the Pay As You Earn Regulations—so where it is found that the calculation of the Pay As You Earn income tax was incorrect then the P35 details are inaccurate and so the P35 is incorrect as this return is to contain details of the amounts that employers are required to account for…."

9. In their written submissions prepared for the purpose of the determination of the preliminary issue HMRC set out again what an employer is required to do in order to comply with the PAYE Regulations and, like the review letter, identify various errors which, they say, Fab made. In particular, it is said to have failed to follow the correct procedure when taking on new employees, with the consequence that an incorrect tax code was applied; that error led in turn to the under-deductions of tax. The argument is then repeated that the understatement in the return of Fab's true liability is an inaccuracy which engages para 1 of Sch 24.

10. Fab's argument, shortly stated, is that reg 73 requires the employer to submit a return setting out (among other things) what amounts have been deducted from the employee's earnings. That is what the P35s and P14s it submitted did; but, as HMRC's review letter and submissions show, the penalties have been imposed not because Fab made an error in recording those amounts correctly, but because the returns do not reflect what ought to have been deducted.

11. I was provided with copies of various forms P35 and P14 which Fab had submitted. The P35 forms set out Fab's name, identify the year to which the return relates, and record the date of submission. Those details are followed by a series of questions, in the form of a checklist, and it is not suggested that any of those questions has been answered incorrectly. The checklist answers are followed by several fields which Fab has completed, the crucial one being identified as "Total Tax from P14s". A further box, identified as "Total NICs from P14s", has also been completed, although there is nothing in reg 73 which obliges an employer to provide details of NICs deductions. I have been unable to find, in the material produced by HMRC, anything which might indicate that the amounts recorded do not accurately represent the totals derived from adding the relevant amounts disclosed by the accompanying forms P14, and I do not think HMRC argue that any such error has been made.

12. The specimen forms P14 record the employee's surname and, in most cases, forename (occasionally only an initial appears), date of birth and sex. Very few bear a national insurance number or employee's address. Although HMRC do not rely on the point, I observe that a remarkably high number of the employees are said to have been born on 1 January 1960, which I deduce is a computer-generated default date which appears when no actual date has been entered. Several boxes follow in which Fab has entered figures recording the amounts paid to each employee by way of earnings and statutory payments, and the deductions of tax and NICs made from those payments. There is, again, nothing in HMRC's material to suggest that the figures entered do not accurately record the amounts actually paid and deducted.

13. Although para 1 of Sch 24 identifies only two conditions which must be satisfied if a penalty of the kind for which it provides is to be imposed, it is apparent from closer examination that Condition 1 has two elements: that there is an inaccuracy in the document; and that the inaccuracy "amounts to, or leads to … an understatement of a liability to tax". I am not concerned with Condition 2 and I shall not deal with it further.

14. HMRC's argument amounts to this: because the figures entered in the returns disclose deductions lower than those which should have been made, there is an inaccuracy which "amounts to, or leads to … an understatement of a liability to tax" and (subject to their being able to demonstrate, at least, carelessness on the employer's part) a penalty is exigible.

15. The difficulty with that argument, and the reason why in my judgment it must fail, is that (as, in effect, Fab argues) it does not take proper account of the wording of reg 73 or of the return forms. The obligation imposed on an employer by reg 73 is to provide details of the payments made by the employer to his employees during the year, and of "the total net tax deducted in relation to those payments". I do not see how those words can be interpreted as if they read "the total net tax *which should have been* deducted in relation to those payments". The legislative requirement is, plainly, to state the amount actually deducted. Similarly, both the P35 and P14 forms ask for, respectively, "Total Tax from P14s" and "Tax deducted". Again, I do not see how an employer who has recorded the amounts actually deducted can be said to have submitted an inaccurate return; he has provided precisely what the form asks for. There is, accordingly, no inaccuracy in the return which engages para 1 of Sch 24.

16. It follows that the penalties imposed on Fab must be discharged.

17. I should add two further observations for completeness. First, I am not persuaded by the second limb of Fab's argument which is that, even if the returns were inaccurate, the inaccuracy was not one which "amounts to, or leads to … an understatement of a liability to tax". What led to the deficiency of tax, Fab says, was not an inaccuracy in the return but a failure to apply the PAYE rules correctly. I agree that the failure was the cause of the deficiency, but para 1 is not aimed only at causes. It is sufficient that the inaccuracy (assuming it to be an inaccuracy) "amounts to … an understatement of a liability to tax". There is no doubt, even on Fab's own case, that the figures it entered for the amounts

deducted understated its true liability. Were this a determinative argument I would be obliged to resolve it in HMRC's favour.

18. Second, it may be that the P35s or P14s contained inaccuracies which did not relate to the amount of tax deducted—such as the use of a default date of birth rather than the true date, as I have mentioned. However, those errors, if established, would not in my view trigger a Sch 24 para 1 penalty because they neither mis-state nor lead to an understatement of tax.

19. 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.

Colin Bishopp

Tribunal Judge
RELEASE DATE: 21 JANUARY 2016