TC 04956

Appeal number: TC/2015/02477

Income Tax - Appellant's failure to amend coding for one employee - whether the failure had been an error made in good faith and whether the Appellant had taken reasonable care to comply with the PAYE Regulations - Appeal allowed

FIRST-TIER TRIBUNAL

TAX

PENDERGATE LIMITED

t/a

RIDGE CREST CLEANING SERVICES

Appellant

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Tribunal: JUDGE HOWARD M. NOWLAN

CATHERINE FARQUHARSON

Sitting in public at Fox Court in Brooke Street, London on 2 March 2016

Richard Carter, director of Pendergate Limited, on behalf of the Appellant

Bisi Sanu of HMRC on behalf of the Respondents

DECISION

1. This was an Appeal resulting from the fact that the Appellant had failed to amend the PAYE coding for one employee, Miss Bosomba, in the tax years 2011/12 and 2012/13. The result of the failure was that the tax deducted and accounted for to HMRC was below the required amount, the relevant under-deduction being of £312.69 for the first period and £882.40 for the second.

2. It was common ground that under Regulation 72 of the Pay As You Earn Regulations 2003, the employer itself became liable to pay the under-deducted tax unless it could demonstrate both that it had taken reasonable care to comply with the Regulations and that the failure to deduct had been due to an error made in good faith. The Respondents conceded that the error had been made in good faith such that the only issue for us to determine was whether the Appellant had taken reasonable care to comply with the Regulations.

3. We consider that there are three relevant considerations that we should address in this Appeal.

4. The first is that there is no disputing that the Appellant had generally complied fully with the Regulations. It is a cleaning company that has been operating since 1984; it usually had about 700 employees; there is rapid turnover in staff such that in any year 1,200 people may be employed. Some of the employees, Miss Bosomba certainly being one, often had simultaneous employment. Accordingly PAYE compliance was clearly a common and very material issue for the Appellant and it is realistic to say that the Appellant has generally been a very reliable taxpayer. The Director, Mr. Carter, who appeared before us, said that until 2010 or 2011 he could not recall any failures or slips in PAYE compliance and for the years since the failure with which we are presently concerned, compliance had again been excellent. For some reason, and we will address that as the third material point in this Appeal, there were 4 employees in respect of whom mistakes and under-deductions were made. Nevertheless, with the deductions being made from roughly 700 employees and these 4 instances being the only occasions when an error had been made, it seems reasonable to conclude that generally the Appellant had been an impeccable taxpayer, complying with the PAYE Regulations with more than reasonable care.

5. The second relevant consideration is that in the case of the three other employees, i.e. other than Miss Bosomba, in whose case under-deductions had been made, HMRC had not held the Appellant to be liable for the under-deducted tax. The one case, about which we were told some detail, related to a Miss Hill. In her case, the facts were virtually identical to those in the present case. They also related to the same two tax years, and the only difference was that the under-deducted tax was roughly twice the under-deducted tax in the present case. That particular under-deduction was dealt with by a different tax office or district and it was expressly conceded in that case that the Appellant had satisfied the two conditions of good faith and of having taken reasonable care to comply with the Regulations. We were told less about the other two cases but believe that they also occurred at around the same time. Mr. Carter was very honest in relation to them. He did not expressly say that the relevant tax offices had conceded that the two conditions just referred to had been satisfied. They simply said that they were dropping the issue and not pursuing the Appellant for the under-deducted tax.

6. We are certainly not saying that we can abandon considering the right outcome in the present Appeal by simply referring to the other three cases, and particularly the case in relation to Miss Hill, but it does certainly seem that taxpayers should expect treatment to be reasonably consistent for similar situations. Particularly therefore when there appears to be only one case amongst the four, all occurring at roughly the same time, when HMRC has disputed the proposition that the Appellant took reasonable care to comply with the Regulations, it seems sensible to reach the same decision in this case. When we add those facts to the point in paragraph 4 in which we considered the invariable compliance with the Regulations for many years, and in relation to hundreds of ever changing employees, the case for accepting that the Appellant had shown reasonable care becomes fairly compelling.

7. The third relevant consideration is, however, that the facts were all slightly confused and it was impossible to be certain how the errors had arisen. According to Mr. Carter's original claim, the problem had perhaps resulted from the change in roughly 2004 when employers with more than 250 employees had been required to file PAYE returns online. Mr. Carter said that he was aware that that was how returns had to be filed and indeed they had been so filed. He said, however, that he had not appreciated that HMRC's notifications that PAYE codings should be changed were also to be found online, and in any event for several years the Appellant had continued to receive such notices in paper form. The Respondents initially suggested that from 2004 onwards, the default case was automatically that notifications of coding changes were published online and it was for the employer to log onto HMRC's website to search out coding changes, unless the employer opted out of this system. We were told that the Appellant had not opted out of the system.

8. Matters remained, however, very unclear. The only document that we were shown about filing returns online certainly did not say that unless the employer opted out of the online system for HMRC's notification of coding changes, it was the employer's responsibility to make online checks regularly. The 2009 document that we were shown indicated that there were other services that could be obtained online but it did not specify precisely what they were, nor, more relevantly, that the one about coding change notifications was obligatory unless the employer opted out of that system. In any event Mr. Carter claimed that for many years after 2004 the Appellant had continued to receive paper notifications of changes.

9. There were then several further areas of doubt. It took a long time first to ascertain whether coding changes were notified by email or whether the employer had to search the information on HMRC's website. When it eventually seemed to be clear that the notifications had to be located on the website and that that was the only way in which the employer who had not opted out of the system would obtain the notifications, the Respondents then suggested that indeed paper notifications had been sent, and that these included the two coding changes relevant to Miss Bosomba. Mr. Carter was fairly confident that no paper copies had been received and we were not shown the revised coding notice for the second of the two years, the more material year, in any event.

10. It also appears that in March 2012, the employee who had previously dealt with PAYE matters for the Appellant left employment and there was a gap of an unknown period before another employee was trained to undertake the role. The relevant replacement is apparently extremely diligent, and he examines the website every two weeks and since the 2012/13 period there have been no further slips. Rather confusingly it was suggested that the relevant replacement might have been searching the website from the date when he took over

the relevant responsibilities (at some time after March 2012) but there was no clear information about this.

11. In summary, there was considerable confusion, albeit that fortunately the failure that may have resulted from the confusion was not that serious. We were not clear whether the Appellant was or was not still receiving paper copies of notifications. We did eventually understand that the other method of notification was not by the despatch of emails but the need on the part of the employer to examine the website. We were slightly unclear about the nature and timing of the second coding notification in respect of Miss Bosomba. We were also unclear whether the Appellant had itself failed to make the requisite checks in some way, possibly because of the departure of the original person responsible for PAYE matters and the delay before the appointment of her replacement.

12. Our decision is therefore that in the light of the general high compliance record of the Appellant, the fact that no action was taken by HMRC in relation to the other three employees in respect of whom similar slips were made, and in the light finally of the fact that it was very difficult to determine precisely what had gone wrong in relation to the coding changes for Miss Bosomba, nothing undermines the clear proposition that the Appellant attended to all PAYE Regulation matters with very great care. We understand that no further error has occurred in the following three years and that Mr. Carter is entirely confident that the system is now operating smoothly.

13. We accordingly allow the Appellant's Appeal. It did satisfy both of the relevant requirements and is therefore not directly liable for the under-deducted tax.

Right of Appeal

14. This document contains full findings of fact and the reasons for our decision in relation to each appeal. Any party dissatisfied with the decision relevant to it 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.

HOWARD M. NOWLAN

TRIBUNAL JUDGE

RELEASE DATE: 08 MARCH 2016