[2016] UKFTT 0778 (TC)

TC05505

Appeal number: TC/2012/10105

INCOME TAX – PAYE Regulations – interaction between Regulation 72(5) direction relieving liability on employer for under-deduction of PAYE and Regulation 80 determination for unpaid tax considered

Appeal against Regulation 80 determinations – whether employee PAYE code sent to employer – no – absence of consent to use electronic communications in accordance with Regulation 213(4) - basis of obligation to deduct undermined – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Ridgecrest Cleaning Services Pendergate Ltd — **Appellant**

- and -

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

TRIBUNAL: JUDGE SWAMI RAGHAVAN

Sitting in public at Fox Court, London on 17 August 2016

Mr Richard Carter, director of the appellant for the Appellant

Mr John Corbett, HMRC presenting officer, for the Respondents

DECISION

Introduction

1. The appellant is a cleaning services company (Pendergate Ltd t/a Ridge Crest Cleaning Services) employing many hundreds of cleaners. Insufficient tax was said to be deducted by the appellant employer in 2010/11 for two employees in accordance with the relevant PAYE codes and HMRC issued two directions (Regulation 80 determinations) seeking recovery of the underpaid PAYE in the respective amounts of £844.20 and £128. The employees were not involved in the proceedings before the tribunal and, as it is not necessary to name them, this decision will refer to them as employees H and C respectively.

2. The appellant does not dispute the calculation of the amount but argues it took reasonable care to comply with the PAYE regulations and that any failure to deduct was due to an error made in good faith. Those matters are specifically stated to trigger the availability of relief from liability by way of a different sort of regulation (regulation 72(5)). The appeal was originally stayed to allow HMRC to consider making a Regulation 72(5) direction which the appellant could then appeal against. But HMRC argue a Regulation 72(5) direction cannot be made once a Regulation 80 determination has been made by HMRC and they ask that the tribunal now uphold the determinations that were made. The appellant disagrees and is concerned that HMRC has wrongly deprived it of the opportunity to raise matters relating to the reasonable care the appellant took to comply with its PAYE obligations and that any errors were ones made in good faith.

3. The appellant argues in any event that the Regulation 80 determinations cannot stand because although the employees' PAYE codes were accessible to the appellant electronically via the PAYE online website, the required statutory consent had not been given for the codes to be sent through that medium. HMRC say the medium the codes were sent is irrelevant and that in any case the required consent was given by the appellant signing up to PAYE online back in 2004.

Law

4. The Income Tax (Pay As You Earn) Regulations 2003 ("PAYE Regulations") impose obligations on employers to deduct amounts in respect of tax from certain payments made to their employees and require employers to account for the tax to HMRC.

5. The appeals before the tribunal are against HMRC's determinations made under Regulation 80 of the PAYE Regulations. This regulation enables HMRC to make a direction on an employer if it appears to HMRC that tax that was payable by the employer has not been paid to HMRC.

"80 Determination of unpaid tax and appeal against determination

(1) This regulation applies if it appears to HMRC that there may be tax payable for a tax year under regulation 68 by an employer which has neither been—

(a) paid to HMRC, nor

(b) certified by HMRC under regulation…

…

(2) HMRC may determine the amount of that tax to the best of their judgment, and serve notice of their determination on the employer.

(3) A determination under this regulation must not include tax in respect of which a direction under regulation 72(5) has been made; and directions under that regulation do not apply to tax determined under this regulation.

…

(4) A determination under this regulation may—

(a) cover the tax payable by the employer under regulation … 68 for any one or more tax periods in a tax year, and

(b) extend to the whole of that tax, or to such part of it as is payable in respect of—

(i) a class or classes of employees specified in the notice of determination (without naming the individual employees), or

(ii) one or more named employees specified in the notice.

(5) A determination under this regulation is subject to Parts 4, 5, 5A and 6 of TMA (assessment, appeals, collection and recovery) as if—

(a) the determination were an assessment, and

(b) the amount of tax determined were income tax charged on the employer,

and those Parts of that Act apply accordingly with any necessary modifications.

..."

6. Regulation 80(5) refers to various chapters of the Taxes Management Act 1970 ("TMA 1970"). As regards the tribunal's powers on an appeal these are set out in Part of 5 of TMA 1970 in section 50(6) which provides as follows:

"(6) If, on an appeal notified to the tribunal, the tribunal decides—

(a) that, the appellant is overcharged by a self-assessment;

(b) that, any amounts contained in a partnership statement are

excessive; or

(c) that the appellant is overcharged by an assessment other than a self-assessment, the assessment or amounts shall be reduced accordingly, but otherwise the assessment or statement shall stand good."

7. Regulation 80(3) refers to Regulation 72(5). That regulation (72) deals with the situation where the employer in fact deducts a lower amount than the amount which it ought to have deducted and provides a mechanism, providing certain conditions are met, for HMRC to direct that the employer is relieved of its liability to HMRC, and for a direction to be made that the tax is recovered from the employee. The Regulation provides where relevant:

"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.

(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;

"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.

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

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

(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.

(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;

(b) the employee if condition B is met.

[(5B) A notice need not be issued to the employee under paragraph (5A)(a) if neither the Inland Revenue nor the employer are aware of the employee's address or last known address.

(6) If a direction is made, the excess must not be added under regulation 185(5) or 188(3)(a) (adjustments to total net tax deducted

for self-assessments and other assessments) in relation to the employee..

…"

8. Regulation 72A enables an employer to ask HMRC for a direction under Regulation 72(5) and provides a right of appeal if HMRC refuse the request.

"72A Employer's request for a direction and appeal against refusal

(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—

(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

(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.

(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—

(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.

(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."

Evidence and Facts

9. I heard oral evidence from Mr Richard Carter ("Mr Carter"), the director of the appellant, which HMRC had the opportunity to cross-examine and also had before me a bundle of documents containing the determinations under appeal and various pieces of correspondence between HMRC and the appellant together with print-outs from HMRC's website which the appellant and HMRC brought along in aid of their respective positions. I found Mr Carter to be a helpful and credible witness of fact who readily conceded certain matters e.g. that the receipt of certain letters which were thought to be in dispute were no longer in dispute given his further examination of the appellant's files which he had brought along to the hearing. Mr Carter who had built up the business and his son Mr Scott Carter who had also written various letters which were referred to in the proceedings took a "hands on" role in running the business. I was satisfied Mr Carter was well able to speak to the day to day running of the company over its lifetime.

10. From the evidence I found the following facts. Employees H and C were employed by the appellant during 2010-11 and both of their earnings were subject to PAYE. The tax code notifications were sent electronically (more accurately they could be accessed through HMRC's PAYE Online website) on 28 February 2010. These notifications referred to a tax code change for H to 246L and 349L for employee C.

11. The appellant accepts the codes sent through electronic means were overlooked. Putting to one side the issue of whether the codes were able to trigger an obligation on the appellant to deduct (which is considered in more detail below), and assuming they were, there was an underpayment of £844.20 for employee H and an underpayment of £128 for employee C.

12. In accordance with its internal guidance HMRC issued a standard letter (OCA83) showing the amount of tax due and asking the employer (if the employer agreed a mistake had been made) to explain if they had taken reasonable care to operate PAYE and had made the error in good faith, or if the codes had not been received, to confirm how the codes had normally been received and which records had been checked.

13. As regards employee C the letter was issued on 13 January 2012 and in employee H's case HMRC say it was issued on 30 January 2012. The appellant says it did not receive the 30 January 2012 letter. No reply from the appellant was received by HMRC. HMRC then issued standard letter OCA104 which warned the employer that if payment or a satisfactory explanation was not received within 14 days further action would be taken to collect the tax from the employer. The letter also advised that if a Regulation 80 determination was issued it would stop HMRC considering any claim from the employer that the employee should pay the tax. In employee C's case the letter was issued on 9 March 2012 and in employee H's case it was said to have been issued on 19 March 2012.

14. At the hearing the Mr Carter accepted upon checking the appellant's files further that the appellant had had the opportunity to respond in relation to employee C but

had not done so, however he maintained that the letters in relation to employee H had not been received.

15. HMRC's position was that the standard letters were posted as a matter of routine and the letters to the appellant relating to employee H were issued by HMRC and received by the appellant. Mr Carter's evidence was that the letters for employee H were not received and that there had been sporadic problems with post to the appellant's address and letters not arriving including letters from the tribunal service. I came to the view upon hearing Mr Carter's evidence that the general approach adopted by the appellant's staff in dealing with incoming correspondence was one of reasonable diligence. There was a system for dealing with incoming post and forwarding it onto the member of payroll staff who then inputted the codes onto the company's payroll system.

16. Despite the issues with receiving post, it is clear that many letters and notifications from HMRC, for instance those containing codes and notifications were routinely and successfully sent and received. The appellant's evidence that it did not receive certain letters is not inconsistent with the letters being sent. It appears to me more likely that the letters for employee H were in fact sent but not received than the possibilities of the letters not being sent at all, or of them being sent and received but not logged / acted upon by the appellant. My conclusion is that the letters of 30 January 2012 and 19 March 2012 giving the appellant an opportunity to make representations relevant to matters within the scope of whether it was appropriate to make a direction under Regulation 72(5) were issued to the appellant but were not received by it.

17. No replies having been received to its letters HMRC proceeded to make determinations under Regulation 80 in respect of employee C for £128 on 15 June 2012 and for employee H for £844.20 on 25 June 2012.

18. Employee H's determination stated the following: (total pay) £8368, PAYE code 246L, tax payable at Month 12 £1179.60, tax paid or certified £335.40, tax now due £844.20.

19. For employee C the details were as follows: (total pay) £4694, PAYE code 349L, tax payable at Month 12 £238.80, tax paid or certified £110.80. Tax now due £128.

Discussion

Issues

20. As indicated above the appellant's primary concern is that HMRC, in proceeding to make a Regulation 80 determination, has deprived the appellant of the opportunity to seek a Regulation 72(5) direction and thereby being able to put forward its case that it took reasonable care in operating PAYE and that any error in under-deduction was made in good faith.

Interplay between directions under Regulation 80 and Regulation 72(5)

21. The key provision in contention here is Regulation 80(3) which provides:

> "(3) A determination under this regulation must not include tax in respect of which a direction under regulation 72(5) has been made and directions under that regulation do not apply to tax determined under this regulation."

22. HMRC take the view that when a Regulation 80 determination has been issued Regulation 80(3) prevents HMRC from issuing a direction under 72(5) and the Tribunal from deciding that the employer took reasonable care to comply with regulations and that the failure to deduct was due to an error made in good faith. The grounds for altering the determination are limited to disputes over the amount of the determination and whether the amount was taxable or not under the PAYE system. HMRC followed its standard process to determine if the tax should be paid by the employer or employee and as the employer failed to reply it was left with no alternative but to issue the Regulation 80 determinations.

23. As pointed out by Mr Carter the statutory words do not however in terms say that HMRC cannot not make a Regulation 72(5) direction once a Regulation 80 determination was made.

24. Noting the provisions of Regulation 80(5), which made the determination subject to the assessment, appeals, collection and recovery provisions with any necessary modifications as if the determination were an assessment and the amount were tax charged, the issue arises as to whether the reference to "determined" in the phrase "tax determined" means the tax determined by HMRC once it makes a Regulation 80 regulation or, if an appeal is made, the final determination following disposal of the appeal.

25. The relevance of the point is that if "determined" in this context meant determined on appeal by the tribunal then pending that determination it would still be possible for HMRC to consider whether to make a Regulation 72(5) determination. If that were then refused it would then generate an appeal right and if the tribunal was satisfied the conditions for a Regulation 72(5) determination were met a direction on the employee in respect of the under-deducted tax (which the employee could then appeal). The tribunal could then, as a practical solution, join the two appeals together. Indeed, before HMRC had indicated its resistance to considering a Regulation 72(5) the Tribunal had previously stayed the Regulation 80 appeal to allow for the process under Regulation 72A (under which an employer can seek a Regulation 72(5) direction and then appeal a refusal) to be worked through.

26. Although I did not receive submissions on the point it is helpful to note that there are analogous provisions in the scheme of regulation that applies to contractors under the Construction Industry Scheme (CIS) scheme (under the Income Tax (Construction Industry Scheme) Regulations 2005). Under those regulations there is a liability on the contractor to deduct but then under a CIS Regulation 9(5) direction, the ability to relieve the contractor from liability for under-deduction (upon satisfying either of two statutory conditions A or B, where Condition A refers to the contractor taking

reasonable care and the deduction error being made in good faith). CIS Regulation 13 allows for liability to be imposed on the contractor for under-paid deductions (akin to PAYE Regulation 80). In this context CIS Regulation 13(3) contains a very similar provision to PAYE Regulation 72(5):

> "A determination under this regulation must not include amounts in respect of which a direction under regulation 9(5) has been made and directions under that regulation do not apply to amounts determined under this regulation."

27. These provisions were considered by the First-tier Tribunal in the case *of Nigel Barrett v HMRC* [2015] UKFTT 0329 (TC) (Judge Berner) in which one of the matters under appeal was a determination under CIS Regulation 13. In that case no direction had been made under CIS Regulation 9(5) but tax had been paid by the sub-contractor. It was conceded Regulation CIS 13(3) was an obstacle to the tax being taken account of but it was argued by the appellant's counsel (at [101] onwards) that the legislation should be construed so as to enable a direction under CIS regulation 9(5) to made after the regulation 13 determination. At [107] Judge Berner set out the appellant's argument that the correct amount under CIS Regulation 13 could not be regarded as final until the appeal process had concluded but rejected the argument as without merit. He accepted HMRC's submission that the tribunal had no jurisdiction to adjust the amount determined by HMRC under regulation 13 otherwise than in accordance with the statutory provision themselves. While the tribunal had to exclude amounts in respect of which a CIS 9(5) direction had been made it was precluded from taking into account:

> "any subsequent direction that might have been made under regulation 9(5) and a fortiori any amount that could have been the subject of a direction but in respect of which no direction had been made." [109]

28. In passing I note that it is implicit in that view that the tribunal thought it was possible at least, contrary to HMRC's position in this case, for a further direction (analogous to PAYE Regulation 72(5)) to be made even if it could have no impact on the determination of the contractor's liability under the CIS Regulation 13 (analogous to PAYE Regulation 80) which had been made.

29. *Barrett* concerned statutory condition B (in relation to which it was accepted there was no statutory right of appeal). This is potentially significant because in reaching the conclusion he did Judge Berner noted the approach the Upper Tribunal ("UT") took in *Revenue and Customs Commissioners v Dhanak* [2014] UKUT 0068 (TC). There, a similar argument was made in relation to assessments under s386 ITEPA remaining open such that the First-tier Tribunal had jurisdiction to consider a refusal of s392 relief made up to the time of the hearing. Judge Berner described how the Upper Tribunal had rejected this argument on the basis that the absence of a provision for an appeal against a refusal of relief under s392 weighed strongly against an intention that a refusal of an application for relief should be open to challenge on an appeal. There is an argument, which could be adopted in furtherance of the appellant's case, that the above line of reasoning arguably carries with it the implication that if, as is the case here, there *is* a statutory appeal right against refusal to make the direction then the tribunal could account of reasonable care / good faith

issues when considering an appeal against a Regulation 80 determination. But having considered the matter further I am not persuaded the reasoning does go that far.

30. In *Dhanak* (see in particular [47] – [51]) the issue before the UT was whether a provision making the scope of liability subject to another provision (akin in broad conceptual terms to Regulation 13(3) in CIS or Regulation 72(5) in PAYE) could enable the court to have a wider jurisdiction than was otherwise apparent from the face of the statute. The conclusion was it did not. The absence of a statutory appeal route weighed strongly against the conclusion there was provision for an appeal against a refusal of the relief in question. But in my view, neither *Dhanak* nor *Barrett* necessarily go as far as suggesting that if there are two determination or direction routes each with their own appeal rights under which the tribunal's jurisdiction is expressed in different ways, that grounds of appeal allowed under one appeal route may thereby be subsumed under the other appeal right. The jurisdiction will inevitably depend on construing the particular statutory provision. In other words the fact there is, in contrast to the situation *Barrett* was dealing with, a statutory right of appeal with specified grounds in relation to refusals of Regulation 72(5) directions does not mean those grounds can necessarily be imported into the appeal jurisdiction under Regulation 80.

31. Returning to the question of the inter-play between Regulation 80 and Regulation 72(5) in my judgment the following propositions follow from the wording of those regulations. The tribunal's jurisdiction under Regulation 80 does not include those matters concerning reasonable care and good faith error; these issues are specifically to be addressed under the scope of an appeal against a refusal notice in respect of Regulation 72(5). Once a Regulation 80 determination is made by HMRC, although in principle it is possible for a Regulation 72(5) direction to be made, Regulation 80(3) clearly prevents any 72(5) direction from having effect in relation to an amount of tax payable which has already been covered by the Regulation 80 determination.

32. Although this conclusion does not assist the appellant's case it should be noted that HMRC's submission that HMRC and the tribunal are prevented by 80(3) from even making a Regulation 72(5) is, as highlighted by Mr Carter's submissions over-broad and does not tally with the wording of the provisions. In fact it is possible to posit situations where the two regulations might co-exist in relation to the tax payable in respect an employee given the two regulations have potentially different scope even if there is an overlap between them. In broad terms it can been seen that Regulation 72 is concerned with amounts which ought to have been deducted but which were not and relieving the employer from liability in certain specified circumstances. Regulation 80 is concerned with the amount of tax payable by an employer but which was not paid (this could cover both those cases where amounts which were liable to be deducted were not deducted and amounts which were deducted from the payment to the employee but which were not paid over by HMRC). Regulation 80(3) prevents a conflict arising where on the one hand one regulation says the employer is *not* liable and on the other that the employer *is* liable over the *same* amount; but it does not state that Regulation 72 determinations are precluded once a Regulation 80 determination has been made. (In fact, given, according to the first part of Regulation 80 it is clear that prior 72(5) directions relieving liability cannot be overridden by Regulation 80, if

it were the case that a Regulation 72(5) direction could never be made after a Regulation 80 determination had been made there would be no need to provide that Regulation 72(5) directions take effect subject to Regulation 80). Although not applicable on the facts of this case the two regulations could co-exist for example in a situation where there was tax that the employer did not deduct but should have deducted and which fell to be relieved because the conditions for 72(5) were met, but also amounts of tax which were deducted but which were for some reason not paid over.

33. Further, although a refusal in relation to a later 72(5) direction, even if it purported to cover the same amount of tax as covered by Regulation 80 could generate appeal rights the difficulty is that this will not ultimately assist the appellant because even if the tribunal were to agree that a Regulation 72(5) direction was appropriate because the conditions were met, it would be prevented by Regulation 80(3) from covering tax which is the subject of the Regulation 80 direction by making a direction under Regulation 72(5).

34. As to the tribunal's jurisdiction on Regulation 80, the starting point is section 50(6) TMA which in essence refers to cases where the charge to tax made on the assessment exceeds that which the tax legislation provides for. As explained in *Barrett* at [79] by reference to various decisions (*Rotberg v HMRC* [2014] UKFTT 657 (TCC) which in turn refers to higher authorities) the jurisdiction does not extend to the process for determination of assessments. Applying this interpretation across to Regulation 80 determinations, the statutory provisions do not intend that the tribunal's jurisdiction should cover the process by which the Regulation 80 determination is made. It could cover matters such as what the amount of "tax payable" is under the tax legislation, or in principle if there was dispute of what had been "paid" to HMRC, that too.

The consequence of the above conclusion is that it appears HMRC can effectively forestall a Regulation 72 determination by moving ahead with a Regulation 80 determination and this is not something which can be policed by an appeal to the tribunal. A decision to move to a Regulation 80 determination must nevertheless be exercised in accordance with good administrative practice and principles of public law reasonableness and fairness and if it is not then a taxpayer's remedy will lie in seeking a judicial review and/or pursuing a complaint or other forms of administrative redress. (On the face of it there appears to be nothing to suggest HMRC's standard procedures in giving the employer an opportunity to put forward any explanations pertinent to issues of the care they took and whether errors were made in good faith first before moving on to make a Regulation 80 determination are unreasonable).

35. Similarly questions of whether HMRC would be able to withdraw the Regulation 80 direction under their statutory powers, and if so whether any refusal to do so might be challenged are not matters with the tribunal's jurisdiction on an appeal against Regulation 80 and again are in principle matters falling within the remit of judicial review.

36. Mr Carter also referred the tribunal to extracts from an internal HMRC manual (PAYE 54055) which suggested that HMRC will normally use its discretion to make determinations for all the necessary years together. He queried HMRC's approach in not making the various directions for multiple years all together at the same time. Again, even if it is assumed the approach in the manual was not followed questions of whether HMRC were correct to use their discretion to impose a Regulation 80 determination in such a way are not matters that can be dealt with in the context of an appeal against such determinations to the tribunal.

Regulation 80 determinations – significance of codes being sent by electronic means and whether appropriate consent given under Regulation 214 PAYE Regulations

37. The next issue of contention relates to the means by which the PAYE code was notified to the appellant. The appellant's case is that it had been receiving the PAYE codes in paper form as well as in the post but did not receive paper code change notifications for the employees in this appeal. It was not aware it should have been checking the PAYE account online website to receive amendment notices and crucially it had not given permission for the notices to be sent electronically as was required. Mr Carter referred in particular to Regulation 213(4) of the PAYE Regulations which is considered further below.

38. For HMRC Mr Corbett highlighted that the PAYE regulations require the employer to deduct or repay by reference to the employee's code, if the employer has one for the employee. The appellant, who accepted the codes were received electronically on 28 February 2010 in subsequent correspondence with HMRC, was required to deduct tax by reference to those codes. The method of delivery was not relevant.

39. In order to understand the relevance of the medium of delivery and consent to the appellant's case it is necessary to say a little more about the background to the employer's obligation to pay tax to HMRC under the PAYE regulations.

40. Regulation 80 refers to "tax payable" under Regulation 68 which in turn sets out how much an employer must pay. For present purposes it is sufficient to note that under Regulation 68(2) the employer must pay the excess of the amount was liable to deduct from relevant payments made by the employer over the amount the employer was liable to repay. Regulation 21 provides that:

> "(1) On making a relevant payment to an employee during a tax year, an employer must deduct or repay tax in accordance with [the PAYE regulations] by reference to the employee's code, if the employer has one for the employee."

41. The meaning of "code" is set out at Regulation 7 and Regulation 8 explains what is meant by the "employee's code". Regulations 8 and 20 envisage that codes and notices to amend codes will be sent by HMRC to the employer. Regulation 8(2) provides that:

> "(2) A code is issued to an employer if it is contained in a document that is sent-
>
> (a) to the employer…
>
> by [HMRC], and any does so issued is received by the employer for the purposes of these Regulations."

42. While Regulation 16(2) provides that if for any tax year the employer does not receive a code for an employee who was in that employer's employment on the previous 5th April, the code which applied on that date is treated as having been issued by HMRC for the tax year in question, I was not directed to any evidence which confirmed that either H or C were such employees and if so what their applicable codes were.

43. Instead of sending a document to the employer, Regulation 213 enables HMRC to deliver the information that would have been contained in the document by an approved method of electronic communication. However Regulation 213(4), which the appellant refers to, provides that HMRC may only deliver the information by an approved method of communications if:

> "the employer or employer's agent (as the case may be) has consented to delivery of information in that way, and [HMRC] have not been notified the consent has been withdrawn."

44. In its later correspondence with HMRC the appellant confirmed there were electronic notifications of the tax code change for employee H (246L) and employee C (349L) on the website on 28 February 2010.

45. Contrary to HMRC's submission the means of communication of the code may well be relevant. If consent has not been given for the purposes of Regulation 213(4) then a code which has been sent via such means is not an "employee's code" for the purposes of the regulations. Treating the code as an operative code which triggered the obligation to deduct even if consent had not been given would render the requirement for consent to be meaningless. The Regulation 80 determination in this case is predicated on there having been a liability to deduct in accordance with a particular code. If no such code was sent for the purposes of the regulations (noting that Regulation 8(2) deems a code which is sent to have been received) then there can have been no liability to deduct. The issue, in contrast to the prior one, is not of the process by which tax payable is determined but a pre-condition to the liability arising in the first place. It is therefore necessary to consider whether 1) consent was given for the purposes of Regulation 213(4) prior to the issue of the codes on 28 February 2010 and 2) if not whether the PAYE codes were otherwise sent in a paper form document to the appellant.

Consent for PAYE codes to be notified through website?

46. Mr Corbett referred in his skeleton argument to the appellant having registered on-line in 2004. Within the bundle of documents there was a letter dated 20 December 2013 from an HMRC Debt manager stating:

> "Having liaised with our Online Services Team they have confirmed you registered for PAYE online on 24 November 2004. When an employer registers for PAYE online, they automatically sign up for online notices by default. If they want to opt out of this method then they have to notify HMRC separately in order to update the account."

47. The above letter was sent in response to a letter dated 18 July 2013 further to correspondence with HMRC around an under-deduction in respect of an employee for 2011-12. Mr Carter explained that at the time that error occurred the appellant was still receiving paper tax code notices from HMRC but that the tax code notice change was received electronically.

48. At the hearing Mr Corbett brought along a print out of a screen shot which he said reflected the screen an employer would have seen if logging onto the PAYE online website as at 17 November 2003 entitled "Enrol for PAYE Online for Employers". It contained boxes to be filled in with the Employer's PAYE reference and the accounts office reference and stated the following:

> "Important note
>
> By registering for the PAYE Online Service your organisation will automatically receive statutory notices (such as Tax Code changes, Collection of Student Loans and reminders over the Internet.
>
> If your organisation (or agent) would prefer to continue receiving PAYE notices via EDI, magnetic media or by paper please contact the Online Services helpdesk"

49. HMRC highlight that the appellant accepts that it received the electronic code amendments on 28 February 2010 for employees H and C. Mr Corbett also asserted in his skeleton argument that employee H's 2011-12 code was issued online on 27 January 2012 and was amended by the appellant. He submits this shows that the previous payroll officer was accessing and using online codes and was aware that they had enrolled for on-line notifications in 2004.

50. Although it was Mr Corbett's submission that there had been no request to continue receiving paper codes in this case he admitted that despite his best efforts to ascertain the position within HMRC he had not been able to bring evidence which established the extent to which paper codes continued to be sent to the appellant or which threw light on what if any records were kept in relation to the issue of paper codes. I find, taking account of Mr Carter's oral evidence, that paper codes and notifications did continue to be received by the appellant from HMRC for at least some period of time after 2004.

51. Without further detail on the provenance of the screen shot and on the record keeping systems and procedures kept in relation to PAYE online registration there is insufficient evidence before me to make a finding of fact that the appellant was in fact registered for PAYE online on 24 November 2004 or that the document was in fact representative of what would have appeared on a registration screen on 17 November 2003. But in any event it is not clear to me that registration pursuant to the note above at [48] would signify "consent" for the purposes of Regulation 213. The note tells the

reader they will receive statutory notices over the internet but it does not tell them in sufficiently clear terms that they will be taken to have agreed to receive notices which are operative for PAYE deduction purposes by internet only. Read in combination with the second paragraph it is also left unclear whether, if someone were to contact the Online Services helpdesk and asked to continue receiving PAYE notices this would mean the electronic notices would stop, or whether the employer would receive both paper and electronic notices. In circumstances where paper codes and notifications continue to be received from an employer's point of view it is left ambiguous which are the operative codes which would first serve to trigger the employer's deduction obligation.

52. Similarly there was insufficient evidence brought forward to make a finding that employee H's code was amended by the appellant on 27 January 2012 as a result of the online issue of codes as opposed to the issue of paper codes. In relation to the appellant's letters of 31 August 2012 from Mr Scott Carter while these indicate that the appellant did have access to notifications on-line they are not inconsistent with the appellant's case which is that it had previously continued to receive and act upon the paper notifications it had received. Even if were the case that the appellant made use of the on-line notifications, while on the face of it this would tend to suggest consent was given, it is not conclusive, in particular in a situation where it seems that paper notifications were normally sent and where it was possible therefore that the on-line facility was seen as something that could be used at the appellant's option, and in view of Mr Carter's oral evidence that the appellant did not give its consent.

53. Taking account of the above I am not persuaded that the appellant had given consent for the code amendments to be sent by approved electronic means for the purposes of Regulation 213(4).

54. In the absence of there being consent for the electronic notices under Regulation 213(4), the coding notice amendments to the employee codes which form the basis for the Regulation 80 determination were not treated as "sent". The electronic notifications which were received on 28 February 2010 in respect of employees H and C did not constitute an "employee's code" for the purposes of the PAYE Regulation.

Were paper codes/ notifications sent?

55. As to whether the code amendments which formed the basis of the Regulation 80 determinations for employees H and C were sent in paper form, Mr Carter's case, as explained in his oral evidence, was that although codes and notifications had previously been sent through in the post and the appellant had been under the impression this practice would continue the notifications for H and C had not been received in paper form. Mr Corbett's submission was that HMRC did not have any record of paper codes being issued. Given what is said above about the absence of evidence on HMRC's systems and record-keeping procedures on the issue of paper codes there is perhaps little store that can be attached to this observation but it is in any event consistent with the appellant's account.

56. In the absence of any evidence that the codes were sent in paper form by post, and in view of the appellant's evidence that they were not received by the appellant I find that the particular code notifications which formed the basis of the Regulation 80 determinations under appeal were not sent in paper form to the appellant.

57. It follows from the above conclusions that the PAYE codes for employees H and C for 2010-11 which were purportedly issued were not operative. The Regulation 80 determinations of "tax payable" were founded on an obligation to deduct which did not arise. No alternative basis having been put forward to support the Regulation 80 determination my decision is that the Regulation 80 determinations overcharge the appellant and that they should be reduced to zero.

Conclusion

58. The regulation 80 determinations under appeal are reduced to zero and the appellant's appeal is allowed.

59. 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.

SWAMI RAGHAVAN
TRIBUNAL JUDGE

RELEASE DATE: 23 NOVEMBER 2016