



TC04867

Appeal number: TC/2014/06327

*INCOME TAX – PAYE – whether coding change notices were generated
and sent by HMRC – appeal against regulation 80 determinations*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

LLOYDS PROPERTY GROUP LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE VICTORIA NICHOLL
JOHN AGBOOLA**

Sitting in public at Fox Court on 2 December 2015

**Mr Laurence Tish, Tish Leibovitch Accountants and Business Consultants, for
the Appellant**

**Ms Carwardine, Presenting Officer and HMRC Tribunal Case Worker, for the
Respondents**

DECISION

1. The Appellant (“Lloyds Property”) appeals against two determinations by the Respondents (“HMRC”) under regulation 80 of the Income Tax (PAYE) Regulations 2003 (SI 2003/2682) (“the PAYE regulations”). We gave our decision after the hearing. These are the reasons for our decision.

Background and facts found

2. Lloyds Property is an estate agency based in the Sandbanks area. It employed Mr Paul Fisher for a period, including the tax years ending 5 April 2011 and 5 April 2012. On 2 July 2014 HMRC issued two determinations under regulation 80 of the PAYE Regulations for unpaid income tax in respect of Mr Fisher’s employment in these two tax years. The unpaid income tax relates to amounts to be deducted under PAYE tax codes that HMRC submit were issued to both Lloyds Property and Mr Fisher, but which they both claim were not received.

3. Mr Fisher had moved to another employer by the date on which the determinations were issued and so he provided the information requested by Lloyds Property for this appeal by email correspondence. Lloyds Property’s PAYE was managed by a book-keeper at the time of the relevant events. It appointed Tish Leibovitch, of which Mr Tish is a partner, as its agent on 20 November 2013. The following facts were found from the letters, emails and documents in the Tribunal bundles.

4. On 8 November 2010 a manual code change was recorded in HMRC’s coding history for Mr Fisher for 2010-11. The code change was to K508. HMRC’s contact history record for Mr Fisher shows outbound internet contact with the employer on 8 November 2010 but there is no copy or record of a P6 notice generated and issued to employer.

5. Tricia Tait, an HMRC Personal Tax Operations Manager, states in an email dated 12 December 2014 that Lloyds Property enrolled and activated the PAYE Online service on 26 May 2010. She was able to provide the copy of the 2011-12 code referred to in paragraph 6 below, but stated that she was unable to view details of the tax code issued in 2010 “as this information has been archived”. HMRC have instead provided a screen print for Lloyds Property that shows the PAYE online enrolment notification on 26 May 2010 and that a P6 was issued on 9 November 2010, but there is nothing to link the P6 with Mr Fisher. There is no record of whether Lloyds Property had requested to continue to receive paper notifications or whether it had requested to receive email reminders of notifications at the relevant time, but there was no email address on HMRC’s alert subscription table on 12 December 2014.

6. On 29 January 2011 an annual coding was recorded in HMRC’s coding history for Mr Fisher for 2011-12. The code was K1156. HMRC’s contact history for Mr Fisher shows outbound internet contact with the employer on 3 March 2011. A copy

of the P9 tax code notice issued to the employer in respect of Mr Fisher has been printed from HMRC's system. This shows the issue date of the P9 as 10 March 2011. A copy was sent to Lloyds Property's tax agent on 27 September 2014 as part of this appeal process.

5 7. Mr Fisher has confirmed in emails to Lloyds Property that he did not receive the amending tax codes for 2010-11 or 2011-12. The book-keeper for Lloyds Property at the relevant dates also confirmed to Lloyds Property that he did not receive a copy of the notices.

10 8. Once HMRC identified the arrears, it contacted Mr Fisher and he claimed employer error. As HMRC's further enquiries confirmed that the amended codes had apparently been sent to Lloyds Property, it agreed that there had been an employer error and so it did not seek to recover the tax from Mr Fisher under regulation 72. HMRC issued the two regulation 80 determinations on 2 July 2014 to Lloyds Property and to Mr Tish as its agent. The first was for £770.40 for 2010-11 and the second was
15 for £7619.60 for 2011-12. HMRC credited Mr Fisher with the underpaid tax.

19 9. HMRC were asked to confirm that they had considered whether Extra Statutory Concession A19 ("ESC A19") could be applied to the arrears. HMRC's response was that as ESC A19 is a concession for taxpayers, it can only apply if the taxpayer makes a claim and Mr Fisher had not made a claim under ESC A19 as he had not been asked
20 to pay the arrears.

24 10. On 16 July 2014 Mr Tish appealed against both determinations on behalf of Lloyds Property and asked for details of how the underpayments had arisen. After further correspondence, HMRC reviewed the decision to issue the determinations under regulation 80 of the PAYE Regulations and set out the conclusion of the review
25 in a letter dated 5 November 2014 to Lloyds Property. A notice of appeal was filed with HM Courts & Tribunals Service on 24 November 2014.

The law

11. Regulation 20 of the PAYE Regulations ("regulation 20") provides

30 "(1) If the code for use by an employer in respect of an employee is amended after notice of it has been issued to the employer, [HMRC] must issue the amended code to the employer.

35 (2) An amended code is issued to an employer if it is contained in a document that is sent to the employer or a person acting on behalf of the employer by [HMRC], and any code so issued is received by the employer for the purposes of these Regulations.

(3) On making any subsequent relevant payment to the employee, the employer must deduct or repay tax by reference to the amended code.

40 (4) Paragraphs (5) and (6) apply if there is a change or proposed change in the rates of any of the personal reliefs allowable under

sections 257 and 257A of ICTA (personal allowance and married couple's allowance).

5 (5) If the change or proposed change relates to the current tax year, [HMRC] may give notice requiring the employer, with effect from the date specified in the notice, to amend specified codes as directed.

(6) If the change relates to the following tax year, [HMRC] may give notice requiring the employer to carry forward to the following tax year specified codes of the current tax year and adjust them as directed in the notice.

10 (7) A code which has—

(a) been amended by virtue of paragraph (5) in respect of the current tax year, or

(b) been carried forward to the following tax year and adjusted by virtue of paragraph (6),

15 is treated as having been determined and issued by [HMRC] as the employee's code for that tax year.

(8) A notice under paragraphs (5) and (6) may be issued to the employer or to a person acting on behalf of the employer.”

12. Regulation 68 of the PAYE Regulations (“regulation 68”) provides

20 “ (1) This regulation applies to determine how much an employer must pay or can recover for a tax period.

(2) If A exceeds B, the employer must pay the excess to the Inland Revenue.

25 (3) But if B exceeds A, the employer may recover the excess either—

(a) by deducting it from the amount which the employer is liable to pay under paragraph (2) for a later tax period in the tax year, or

(b) from the Board of Inland Revenue.

(4) In this Regulation—

30 A is—

(a) the total amount of tax which the employer was liable to deduct from relevant payments made by the employer in the tax period, plus

35 (b) the total amount of tax for which the employer was liable to account in respect of notional payments made [or treated by virtue of a retrospective tax provision as made,] by the employer in that period under regulation 62(5) (notional payments);

B is the total amount which the employer was liable to repay in the tax period.

40 (5) Paragraphs (2) and (3) are subject to regulation 71 (modification in case of trade disputes).

(6) Paragraph (2) is also subject to regulation 78(11) (entitlement to set off excess payments).

[(7) In the application of paragraph (4) to notional payments arising by reason of the coming into force of the Finance Act 2006, the reference to section 710(7A)(a) of ITEPA 2003 shall be modified as mentioned in section 94(5)(c) of the Finance Act 2006.]”

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13. Regulation 80 of the PAYE Regulations (“regulation 80”) provides:

“(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—

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(a) paid to [HMRC], nor

(b) certified by [HMRC] under regulation 76, 77, 78 or 79.

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

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(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.

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[(3A) A determination under this regulation must not include tax in respect of which a direction under regulation 72F has been made.]

(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

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(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.

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(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,

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

14. Regulation 72 of the PAYE Regulations (“regulation 72”) provides that if certain conditions are satisfied HMRC may direct that the employer is not liable to pay the excess of the amount of tax owed over the amount of tax deducted from payments made to an employee. In these circumstances the excess income tax is payable by the employee.

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15. Extra-statutory concession A 19 provides that a taxpayer may apply for arrears of income tax and capital gains tax to be given up by HMRC if they result from the failure of HMRC to make proper and timely use of information supplied and certain other conditions are satisfied.

5 Submissions

16. Mr Tish submits on behalf of Lloyds Property that Lloyds Property and Mr Fisher have no record of receiving the amended tax codes or of receiving emails notifying the employer that amended codes were available to view online.

10 17. HMRC submit that Lloyds Property did not comply with its responsibilities to operate PAYE correctly and make the required payments in accordance with regulation 68 of the PAYE Regulations. The code notices were issued for both 2010-11 and 2011-12 and the tax codes notices were not returned undelivered from Lloyds Property or Mr Fisher.

15 18. HMRC submit that in light of the fact that Lloyds Property failed to operate the PAYE system correctly, responsibility for the underpayment of tax remains with Lloyds Property and not the employee Mr Fisher. HMRC does not intend to pursue Mr Fisher for the PAYE underpayment.

Discussion

20 19. This appeal concerns two questions of fact. Did HMRC generate and issue notices requiring Lloyds Property to amend the tax codes to be used in determining the tax to be deducted from payments to Mr Fisher in respect of (i) 2010-11 and (ii) 2011-12 in accordance with the PAYE Regulations?

25 20. Regulation 20(2) provides that an amended code is issued to an employer “if is contained in a document that is sent to the employer”. Therefore a document has to be generated, the notice, and that document then has to be sent. Both parties were uncertain whether Lloyds Property was registered to receive paper notifications or email notifications of code changes at the relevant dates, but they agreed that the notices should have been sent in paper form to Mr Fisher.

30 21. Insofar as the notice should have been sent by post we find that the section 7 of Interpretation Act is of assistance. This states that where the relevant legislation “authorises or requires any document to be served by post (whether the expression ‘serve’ or the expression ‘give’ or ‘send’ or any other expression is used) then, unless the contrary intention appears, the service is deemed effected by properly addressing, pre-paying and posting a letter containing the document...”. If the notification of the
35 code change only had to be delivered electronically, it is presumed delivered if the despatch of the information has been recorded on an official computer system (regulation 196 of the PAYE Regulations). We therefore had to decide whether a notice document was generated for each code change and, if so, was it sent to Lloyds Property.

22. We considered first whether the 2010-11 amending notice had been generated and sent to Lloyds Property. HMRC put forward their record of the coding history and contact history for Mr Fisher as evidence that the tax code change had been issued to Lloyds Property via the internet. The screenshots that we have been shown describe the code type as a “manual code change” but they do not include a notice of the coding change. HMRC admits that it is not clear in what format the notice was sent to Lloyds Property, but they submit that the printouts show that it was sent. HMRC claims that the notice is unavailable to view or print because it has been archived, but it has not explained why it cannot be retrieved some four years later. On the other hand, Lloyds Property and Mr Fisher have said that they did not receive notices of the coding change and they have not been provided with evidence of their issue by HMRC. We find that, on the balance of probabilities, the 2010-11 notice was not generated and therefore Lloyds Property has satisfied the burden of proof that the notice was not sent, despatched or made available for the employer to view for the purposes of regulations 20 and 68.

23. This can be contrasted with the position in relation to the 2011-12 coding change. The screen prints of HMRC’s records show the 2011-12 tax code change entry on 29 January 2011 on the code history page in the same way as the 2010-11 code change, but there is also a screen print of the P9 notice that was generated and issued on 10 March 2011. The notice states that it is the “Notice to employer of employee’s tax code”. We find that there is sufficient weight of evidence to satisfy us that this 2011-12 notice of coding change for Mr Fisher was generated and issued to Lloyds Property.

Decision

24. As we find that the 2010-11 notice of coding change was not generated and issued to Lloyds Property the appeal against the regulation 80 determination for that year is allowed and the determination in respect of 2010-11 is cancelled. The appeal in respect of the regulation 80 determination for 2011-12 is refused and the determination is upheld.

25. 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.

**VICTORIA NICHOLL
TRIBUNAL JUDGE**

RELEASE DATE: 10 FEBRUARY 2016