



LITRG employer or pension payer error guide 2015/16

If HMRC calculate that you have underpaid tax but you think that the underpayment arises because your employer or pension payer failed to operate Pay As You Earn (PAYE) correctly, you have the right to challenge whether HM Revenue & Customs (HMRC) should ask your employer or pension payer to pay it instead.

Here, we aim to provide a guide to the law and advise you what to do next.

The guide is divided into the following sections:

1. Background and an overview of the law
2. What might your employer or pension payer have done wrong?
3. What should you do?
4. What happens next and information about your rights
5. Key messages if you are confused or worried

Appendix: Suggested wording for a letter you might use to contact HMRC

1. Background and an overview of the law

PAYE is a three-party process, involving:

- HMRC;
- those making payments within its remit, usually employers and pension payers; and
- the employee or pensioner recipient.

Its operation is set out in law, together with each of the parties' responsibilities. Information can pass between all three and sometimes the system breaks down. The issue considered in



this guide is whether the employer or pension payer has failed to do something they are required to do by law – for example, not acting on instructions received from HMRC or not following the correct procedure when taking on a new employee or pensioner.

When PAYE works properly and a correct code is operated throughout the year, the tax paid should broadly equal the tax due. There can be small ‘rounding’ discrepancies of just a few pounds or pence but generally these are ignored.

Basically, those making payments under PAYE are required to follow the rules and deduct the right tax, based on those rules, before paying the ‘net’, after-tax amount to the payee.

Mistakes can of course happen. Forms can get lost in the post, although these days, most exchanges between employers/pension providers and HMRC are electronic, and there can be breakdowns in communication. It can be a very difficult task for you, the employee or pensioner, in receipt of an underpayment ‘P800’ calculation from HMRC to work out why it has arisen. Usually, all you know is that you thought everything was fine until, out of the blue, you have been told otherwise.

Each of the three parties in the process could be at fault:

- You might not have told HMRC about something affecting your tax affairs;
- HMRC might not have acted upon information in their possession to get your tax right, or made some error in doing so;
- Your employer or pension payer might not have followed the rules correctly.

In some cases, there might be a far more serious situation, where the employer or pension payer has not simply made an error, but they have been generally irresponsible in the way that they have operated PAYE or have deliberately not operated PAYE correctly.

2. What might your employer or pension payer have done wrong?

HMRC records can often show whether or not an employer or pension payer has taken a range of steps to operate PAYE in accordance with HMRC’s instructions. HMRC should not issue a tax calculation without checking why an employer or pension payer has acted inappropriately.

You might think to ask your employer or pension payer what has gone wrong. But be very careful – this is not the role of the taxpayer and is unlikely to get a favourable, or a friendly, response. We recommend that you ask HMRC to investigate, as they are in a much stronger and better position to do so.

But when you are checking the P800 calculation, you should bear in mind the types of errors that employers or pension payers do make:

- They may not have operated the PAYE code issued by HMRC. Have a look at any coding notices you received from HMRC and compare them to the ‘final tax code’

box on the P60s you should have received after the end of the tax year – if things have been done right, they should usually match.

- Did you hand in a P45 when you started a new job? Did the code used by your new employer match the one on the P45?
- If you did not have a P45 to hand in when you started a new job, were you given a new starter checklist¹ to complete? Do you think your employer used the right tax code based on the answers you gave?
- Your P800 calculation might have included a note to say that you have been given more than one personal allowance on different sources of income. There are a number of ways this can happen, but it could be an indication of employer or pension payer error.

3. What should you do?

If you suspect any of the above situations apply to you or that there has been some other error by your employer or pension payer, either deliberately or perhaps by way of poor administration, you should contact HMRC. You can telephone them, or alternatively write a letter (see appendix below).

HMRC's guidance says that you should give details of what you think has gone wrong. You might of course not understand the detail, but still feel something has gone wrong that is not your fault. In that case, we recommend you ask HMRC if they have considered whether your employer or pension payer is in any way at fault. If they do not feel that there has been any error on the employer or pension payer's part, you should get HMRC to explain why the underpayment has arisen.

It is unlikely that you will have received an adequate explanation on the P800 issued by the computer – it might just say something bland like 'The reason for the underpayment is given on the enclosed sheet', but the only other sheet is the calculation itself.

4. What happens next and information about your rights

It is up to HMRC to review the situation and then tell you of their decision, which will be one of the following:

- That there is no employer or pension payer error, in which case they should tell you why they have reached that conclusion. You should insist that they give you a full explanation of how they think the underpayment has arisen and you should then consider your next move – for example, whether you wish to claim for the tax to be written off under other provisions covered in our guides.
- That the employer or pension payer is at fault and they are pursuing them for the tax instead of you – in which case you should not have to pay HMRC the under-deducted tax, but your employer might seek to recover the amount from you

¹ See <https://www.gov.uk/government/publications/payee-starter-checklist>

wages. Whether your employer can do this is a matter of employment law and not one upon which we can advise.

- That the employer or pension payer is at fault but HMRC have concluded from their investigations that they acted 'in good faith' and 'took reasonable care' to operate PAYE correctly. When considering whether an employer or pension payer has taken reasonable care HMRC should look to see how that employer or pension payer has been handling the PAYE obligations of other employees or pensioners. Also, whether returns have been accurate and on time and whether the error in your case has been replicated with others. It would be reasonable for you to ask to be told the extent of HMRC investigations.
- That the employer or pension payer deliberately failed to deduct the right amount of tax from you and you knew about it.

In the latter two situations, HMRC will need to issue a formal notice – a 'Direction' – to both you and your employer or pension payer that they think you should pay the tax. You then have a right to appeal in writing to HMRC within 30 days against their Direction, either by way of HMRC's internal review system or an independent tribunal. More information on appeals generally can be found on our website.²

You should specify your grounds of appeal. Where the issue is whether the employer or pension payer took reasonable care and acted in good faith, you can appeal on the grounds that:

- the employer or pension payer did not act in good faith;
- the employer or pension payer did not take reasonable care; or
- the calculation of the underpayment is incorrect.

Where HMRC allege that you received payment knowing that tax had not been deducted, your grounds of appeal can be that:

- you did not receive payment knowing that your employer or pension payer had wilfully failed to deduct tax; or
- the calculation of the underpayment is incorrect.

The Tribunal may set aside the Direction if they are persuaded that it should not have been made, or increase or reduce the amount of the underpayment shown in the Direction.

It is also possible that your tax underpayment has arisen for more than one reason – in which case, HMRC might consider that part of it is due to an employer or pension payer error, and part for other reasons. They could then treat each part of the tax bill differently – for example, agreeing to pursue your employer or pension payer for part of it and still asking you for the balance.

5. Key messages if you are confused or worried

² See <http://www.litrg.org.uk/tax-guides/tax-basics/when-things-go-wrong/tax-appeals>

The key point is that you make contact with HMRC either by telephone or in writing – see appendix below for help in writing your letter – to raise your concerns over the calculation you have been issued, and not to be easily deterred if you cannot get through or are initially declined what seems fair treatment.

When contacting HMRC, keep a note of your conversation and copies of any correspondence and papers sent to them, together with proof of postage.

As noted above, you do have rights and should not be afraid to exercise them. Indeed, LITRG campaigned successfully back in 2003 for HMRC to change the law so that appeal rights were included for taxpayers where their employer or pension payer has made an error.

APPENDIX

Suggested wording for a letter you might use to contact HMRC

It is always dangerous to try and draft letters without knowing the context. Nevertheless, it may be that the following short letter (on page 6) might help to give you an idea of what to write if you think that either your employer or pension payer has made an error. If you do use it, you do so at your own risk as we cannot give any guarantees.

Where you need to insert some text we have shown in square brackets the information you need to insert. *For example:* [your own name].

But do bear in mind that you may also need to tailor the letter further to your individual situation and ideally you should take advice from someone knowledgeable in tax matters. If you already have a tax agent, it is advisable to consult them. If not, but the amounts underpaid are significant, you may wish to appoint a tax adviser, who may charge you a fee.

We stress again that using letters which are not appropriate to your own circumstances can do you more harm than good.

Letter asking HMRC to consider employer/pension payer error

HM Revenue & Customs

[Address from P800]

Dear Sir

[Your own name]

[Your National Insurance Number]

[Any other HMRC reference shown on the P800]

P800 Tax Calculation – employer error query

I have received your tax calculation for the tax year[s] [quote that which applies to you – eg, 2015/16].

The calculation suggests that I have underpaid tax.

I believe that the underpayment in question arose through a failure by my employer[s] [substitute/add 'pension payer[s]' for 'employer[s]' if relevant] to operate PAYE correctly.

[If you have any details of why you think the employer/pension provider is at fault, give them here. For example: *'I received a PAYE coding notice from HMRC dated (insert date) which showed a tax code of (insert code number from coding notice) but my P60 shows my employer used a tax code of (insert code number from P60).'*]

Accordingly, I believe that the law requires you to seek any tax you believe to be underpaid from my employer[s] [or substitute/add 'pension payer[s]'].

Would you please confirm that you have done so and that I need to take no further action.

Yours faithfully

[sign and date your letter]