NCN: [2020] UKFTT 0284 (TC)

TC07768

Income tax – Higher income child benefit charge – penalties for failure to notify – whether reasonable excuse – no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/02689

BETWEEN

MR JAMES TREVORROW **Appellant**

-and-

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

TRIBUNAL: JUDGE ABIGAIL MCGREGOR
DAVID BATTEN

Sitting in public at Taylor House, London on 23 January 2020

The Appellant did not attend and was not represented.

Mr Paul Davison, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents.

DECISION

INTRODUCTION

1. This appeal concerned penalties for failure to notify liability to income tax in the form of the higher income child benefit charge (HICBC) under Schedule 41 to Finance Act 2008 in respect of tax years 2014/15 and 2015/16.

PRELIMINARY ISSUE

2. Mr Trevorrow did not attend the hearing and had made no request to adjourn the hearing. The Tribunal telephoned Mr Trevorrow on the morning of the hearing to establish whether he was intending to attend or had sent a representative, but he did not answer the telephone calls.

3. We decided to proceed with the hearing in accordance with rule 33 of the Tribunal Procedure Rules (SI 2009/273) because we were satisfied, on the balance of probabilities, that Mr Trevorrow had received notification of the hearing and that was in the interests of justice to proceed with the hearing.

4. Mr Trevorrow may apply for this decision to be set aside in accordance with rule 38 of the Tribunal Procedure Rules.

Relevant background and law

5. The HICBC came into effect on 7 January 2013 and arises under section 681B of the Income Tax (Earnings and Pensions) Act 2003 (ITEPA 2003).

6. The HICBC imposes a charge to tax equal to the child benefit received for those individuals who have adjusted net income of over £60,000 in the tax year. The tax charge is reduced proportionally where adjusted net income ("**ANI"**) is between £50,000 and £60,000, but this is not relevant in this case because the ANI for both years is in excess of £60,000. ANI is defined in ITEPA 2003, s 681H.

7. A person who has an income tax (or capital gains tax) liability (and has not received a notice to file a tax return from HMRC) is obliged, under section 7 of the Taxes Management Act 1970 ("**TMA 1970**"), to notify his liability to tax by the 31 October after the end of the tax year in question. This is subject to some exceptions, but the exceptions do not apply if the person is subject to the HICBC.

8. A person who fails to comply with the obligation to notify liability to tax in accordance with TMA 1970, s 7 is liable to a penalty under paragraph 1 of Schedule 41 to Finance Act 2008.

9. The penalty is determined as a percentage of the potential lost revenue under paragraph 6 of Schedule 41 to Finance Act 2008. Where the failure or act is not deliberate, the percentage rate is 30%.

10. Under paragraphs 12 and 13 of Schedule 41 to Finance Act 2008, the penalty percentage can be reduced as a result of the taxpayer's cooperation with and disclosure to HMRC. Where the disclosure is prompted, this can reduce the penalty to:

    (1) 10% if HMRC become aware of the failure less than 12 months after the time when tax first becomes unpaid; and

    (2) 20% in any other case.

11. Under paragraph 14 of Schedule 41 to Finance Act 2008, HMRC may reduce the penalty if there are special circumstances.

12. Under paragraph 20 of Schedule 41 to Finance Act 2008, liability to the penalty does not arise where the taxpayer has a reasonable excuse for the failure.

FACTS

13. We find the following facts based on the bundle of documents before us. Further findings of fact are set out in the discussion below in relation to matters where this some dispute.

14. Prior to 2014/15 Mr Trevorrow was not required to notify his liability to tax to HMRC or to complete a self-assessment return ("**SATR**").

15. Mr Trevorrow's spouse received child benefit in 2014/15 and 2015/16.

16. In respect of the two tax years in question, Mr Trevorrow:

(1) was not issued with any notice to file a tax return;

(2) did not notify his liability to income tax to HMRC; and

(3) did not file a SATR.

17. Following initial correspondence, HMRC issued notices of assessment on 3 November 2017 for the HICBC based on Mr Trevorrow's ANI and the child benefit received by his spouse as follows:

Tax Year Adjusted Net	Income	Child benefit received	HICBC due
2014/15	£61,005.00	£1,066.00	£1,066.00
2015/16	£60,141.00	£1,686.00	£1,686.00

18. The actual ANI was higher in both years (when car and fuel benefits were taken into account) but this has no impact on the amount of HICBC or penalties since even the lower ANI calculations were in excess of £60,000 in both years.

19. Mr Trevorrow accepted that he owed these amounts and duly made arrangements to pay them.

20. Also on 3 November 2017, HMRC issued penalty assessments to Mr Trevorrow.

21. The penalties were calculated at a rate of 20% of the potential lost revenue for the first tax year and at 10% for the final year, being judged by HMRC to be non-deliberate and reduced for "telling, helping and giving".

22. The penalties assessed were as follows:

TaxYear	Liability to Tax	FTN penalty structure	Penalty range	Penalty percentage	Penalty charged
2014/15	£1,066.00	Non-deliberate, prompted	20%-30%	20%	£213.30
2015/16	£1,686.00	Non-deliberate, Prompted	10%-30%	10%	£168.60

23. Mr Trevorrow received the penalty assessment and replied to HMRC to make an appeal on 27 January 2018 against both the penalties.

24. HMRC responded on 23 February 2018 to Mr Trevorrow's appeal explaining that he had made his appeal to HMRC late and that he had not provided a reasonable excuse for doing so.

25. Mr Trevorrow appealed to the Tribunal on 7 April 2018.

PRELIMINARY MATTERS

26. Mr Trevorrow's appeal to HMRC was made some six weeks late.

27. In the Statement of Case submitted by HMRC in June 2018 and at the hearing, HMRC stated that it did not object to the application for a late appeal.

28. Given the effluxion of time caused by the stay of this cases behind another case proceeding to the Upper Tribunal and the fact that HMRC had prepared full arguments on this appeal, we conclude that it is in the interests of justice to proceed to decide the case, despite the lateness of the appeal.

PARTIES ARGUMENTS

Appellant's contentions

29. The appellant contended in his notice of appeal and his appeal to HMRC that the penalties should be waived because:

(1) The penalties are unfair and the system is flawed if it does not notify taxpayers for such a long period;

(2) If he had been aware of the HICBC, he would have complied with his obligations, which is supported by his unblemished tax record for 20 years;

(3) He did not receive the letter HMRC purport to have sent in August 2013 notifying him of potential liability and did not see any of the other media advertising;

(4) HMRC's process of notifying the public of the change in law is not sufficiently robust and is whimsical, particularly when compared with the process for pursuing penalties;

(5) It has taken four years for HMRC to advise of his liability which has allowed the penalties to accrue; and

(6) Unawareness is not the same as disregarding his obligations and so the penalties should not accrue.

30. The appellant also stated in his letter of appeal to HMRC: "I understand that the responsibility sits with us as individuals".

HMRC's contentions

31. HMRC submits that:

(1) the Appellant was liable to the HICBC and was required to give notice of his liability to HICBC within 6 months from the end of the year of the tax year in question;

(2) the Appellant did not make such a notification;

(3) in accordance with the decision in *Johnstone v HMRC* [2018] UKFTT 689 (para 30):

> "In the absence of a challenge against the s 29 assessments, there is a prima facie case that the requirement under para 1 for the imposition of a Sch 41 penalty has also been met."

(4) the penalties were validly assessed in accordance with paragraph 16(1) of Schedule 41 to Finance Act 2008;

(5) The potential lost revenue on which the penalties must be assessed is the amount of income tax to which Mr Trevorrow was liable in respect of the tax years in question by reason of his failure to notify, in accordance with the decisions in *Robertson v HMRC* [2019] UKUT 0202 and *Lau v HMRC* [2018] UKFTT 230;

(6) The amount of income tax to which Mr Trevorrow was liable is not in dispute in this case;

(7) The behaviour of the Appellant is determined as 'non-deliberate' and 'prompted', allowing for a penalty up to 30% of the PLR. The failure to notify penalty for tax year 2014/15 has been charged at a rate of 20%, and for the 2015/16 tax year at 10%. This represents full mitigation for the Appellant's quality of disclosure, when prompted.

(8) The reasons set out by the Appellant do not constitute a reasonable excuse for this failure to notify in accordance with the four step test set out in *Perrin*; and in particular:

(a) as per *Lau*, *Hesketh*, and *Nonyane* [2017] UKFTT 11, the Appellant's failure to notify cannot be attributed to a failure by HMRC to inform the Appellant that the liability was due;

(b) the Appellant's ignorance of the change in the law does not excuse the failure; and

(c) although HMRC was not under an obligation to inform the taxpayer of the change in the law, HMRC did make such efforts in a way that would have assisted Mr Trevorrow, namely:

(i) issuing a letter in August 2013 alerting him to the potential for the HICBC to apply and the possibility that he would need to notify liability for tax; and

(ii) ensuring that the application form for child benefit (which was claimed by Mr Trevorrow's spouse for the first time in September 2013) alerted claimants to the fact that there may be tax charges if either the claimant or the claimant's partner exceeded £50,000.

32. HMRC has considered special circumstances but found nothing in Mr Trevorrow's grounds of appeal that would have supported an argument for special reduction.

DISCUSSION

33. We considered the contentions put forward by Mr Trevorrow in his notice of appeal and the bundle of documents put together by HMRC, which included the notice of assessment of the penalties issued to Mr Trevorrow.

34. We considered the decisions in *Robertson* and *Lau* and agree with HMRC that the principle established (which is binding upon us) is that the PLR on which the penalties must be based is the amount of income tax to which the taxpayer was liable in respect of the tax years in question by reason of his failure to notify, not the amount on which he was assessed. However, this distinction is not significant in this case as Mr Trevorrow had accepted that the assessments raised were appropriate and represented the income tax for which he was liable.

35. We also considered the cases to which HMRC referred on the relevance of ignorance of the law in considering reasonable excuse since this was the main thrust of Mr Trevorrow's appeal. We find that these cases support the conclusion that ignorance of the law should not, of itself, represent a reasonable excuse, because:

(1) To allow it would be to favour taxpayers who choose to remain ignorant of the law over those who try to find out the law in order to follow it;

(2) HMRC's failure to inform the taxpayers sufficiently of the law cannot make ignorance a reasonable excuse, since HMRC's decision not to inform did not cause the ignorance of the law, but rather failed to alter the taxpayer's state of ignorance.

36. We considered Mr Trevorrow's assertion that he did not receive the letter HMRC says that it sent in August 2013. The bundle of documents includes print outs from HMRC's system including:

(1) A record of the sending of letter SA252, which was a standard form letter sent to a large number of taxpayers in 2013 detailing the requirement to submit a tax return where HICBC applies;

(2) A sample of letter SA252, but not the actual letter HMRC state was sent to Mr Trevorrow; and

(3) A record of the addresses held by HMRC for Mr Trevorrow between 1992 and 2018, which shows that the address held by HMRC in August 2013 was an address in Hampton that had been held between 2009 and late 2017.

37. While it is frustrating that HMRC's records do not keep copies of the actual letters sent out, we find that, on the balance of probabilities that HMRC did issue a letter to the address held on file.

38. Having reviewed the documents and the arguments of both parties, we find as follows:

(1) The penalty assessments were validly raised and notified in accordance with the requirements of paragraph 16(1) of Schedule 41 to Finance Act 2008;

(2) The amount of PLR is not in dispute in this case;

(3) In determining the amount of the penalties:

(a) the percentages were correctly applied to the PLR in respect of a non-deliberate disclosure; and

(b) the maximum reduction in the penalties was appropriately made by HMRC to reflect Mr Trevorrow's cooperation with HMRC once the issue was raised;

(4) Mr Trevorrow did not have a reasonable excuse for his failure to notify, in particular noting that ignorance of the law in this case is not a reasonable excuse;

(5) There is nothing exceptional in Mr Trevorrow's circumstances that would give rise to the application of reduction for special circumstances in accordance with paragraph 14 of Schedule 41 to Finance Act 2008.

39. For completeness, we also note that we do not have jurisdiction to consider the fairness of the penalties, in accordance with the decision in *Hok v HMRC* [2012] UKUT 363; and issues on, for example, HMRC's approach to reminder letters, are matters either for Parliament or for HMRC administration and are not matters which are within the jurisdiction of this Tribunal.

DECISION

40. For the reasons given above, we uphold the penalties assessed in respect of the 2014/15 and 2015/16 tax years and dismiss Mr Trevorrow's appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

41. 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.

ABIGAIL MCGREGOR

TRIBUNAL JUDGE

RELEASE DATE: 3 JULY 2020