TC07834

Income tax – high income child benefit charge – penalties for failure to notify – taxpayer not aware that child benefit was being paid to partner – taxpayer received letter from HMRC prior to tax years in question with information about the charge - held: no reasonable excuse for failure to notify – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/05686

BETWEEN

FRANCIS BOND **Appellant**

-and-

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

TRIBUNAL: JUDGE ZACHARY CITRON

The Tribunal determined the appeal without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 23 August 2019 (with enclosures) and HMRC's Statement of Case (acknowledged by the Tribunal on 14 May 2020); the Tribunal also had before it two pdf bundles prepared by HMRC: a hearing bundle pdf of 79 pages and a legislation, pro formas and press releases and case law bundle pdf of 440 pages (the "generic bundle").

DECISION

INTRODUCTION

1. This was an appeal against penalties of £176.80 for failure over two tax years to notify liability to income tax by reason of the high income child benefit charge (the "Charge").

THE APPEAL

2. On 14 March 2019 HMRC raised assessments to the Charge on the appellant, Mr Bond, for the tax years 2015-16 and 2016-17 (the "tax years in question") in the amounts of £509 and £750. On the same date HMRC raised "failure to notify" penalty assessments in respect of those years in the amounts of £101.80 and £75 respectively. For 2016-17, the penalty was calculated as 10% of potential lost revenue ("PLR"); for 2015-16, the penalty was calculated as 20% of PLR.

3. Mr Bond appealed against the penalty assessments to HMRC by letter dated 3 April 2019.

4. On statutory review of the penalty assessments by HMRC, HMRC's review conclusion letter of 1 August 2019 upheld them.

5. Mr Bond notified his appeal against the penalty assessments to the Tribunal by notice dated 23 August 2019.

THE CHARGE

6. The Charge was introduced as a new charge to income tax by Finance Act 2012, with effect for the 2012-13 tax year and subsequent tax years. In broad terms it applies where someone's "adjusted net income" in a tax year exceeds £50,000 and that person, or his or her partner, is entitled to an amount in respect of child benefit for a week in the tax year.

7. Finance Act 2012 also provided that anyone liable to the Charge (and who had not received a notice to file a self-assessment tax return) had to notify liability to income tax to HMRC within six months of the end of the tax year (even if that person were otherwise exempt from such notification by reason of his or her total income being subject to PAYE).

8. Mr Bond did not appeal against the assessment to the Charge for the tax years in question – it was only in respect of the "failure to notify" penalties that he appealed.

FINDINGS OF FACT

9. Mr Bond had three children with Ms Lockhart, born in 2009, 2011 and 2013. Mr Bond and Ms Lockhart lived at the same address in Hove. Ms Lockhart received child benefit in respect of the children during the tax years in question.

10. Prior to HMRC sending him a letter raising questions about the Charge in January 2019, Mr Bond was not aware that Ms Lockhart was receiving child benefit in respect of their children; nor did he ask her if she was.

11. Mr Bond's adjusted net income for the purposes of the Charge exceeded £50,000 in each of the tax years in question. This finding is based on electronic records of Mr Bond's income kept by HMRC.

12. Mr Bond did not notify HMRC that he was chargeable to income tax for the tax years in question, within six months of the end of those tax years. Nor did he receive notice to file a tax return from HMRC.

13. HMRC sent Mr Bond a letter on 17 August 2013, and Mr Bond received the letter shortly afterwards, the content of which was as set out in the Appendix to this decision. I make this finding on the balance of probabilities, weighing up the evidence as follows: although no copy of the letter was kept by HMRC, HMRC's electronic records indicate that a "standard" letter

with this content was sent to Mr Bond on 17 August 2013. Mr Bond says that he has no record of receiving this letter. However, I put greater weight on the reliability of HMRC's electronic records, than on whether Mr Bond has a record of its receipt.

14. HMRC wrote to Mr Bond specifically about his liability to the Charge in January 2019. Shortly after this, Mr Bond paid the amount of the Charge owing for the tax years in question.

LAW RELATING TO NOTIFYING LIABILITY TO TAX AND PENALTIES FOR FAILURE TO DO SO

15. Under section 7 Taxes Management Act ("TMA")1970, a person who is chargeable to income tax for a tax year, and who has not received a notice under section 8 of that Act requiring a return for that year of his or her income and chargeable gains, is required to give notice to HMRC of his or her chargeability. There are certain exceptions to this in sub-section 7(3), but these do not apply where the person is liable to the Charge.

16. Under paragraph 1 Schedule 41 Finance Act 2008, a penalty is payable by a person where he or she fails to comply with an obligation to give notice of liability to income tax under section 7 TMA 1970. (References in what follows to "paragraphs" are to paragraphs of Schedule 41 Finance Act 2008).

17. The standard amount of the penalty is 30% of PLR in a case (like this one) where the failure was not deliberate (paragraph 6).

18. Paragraph 13 provides for reductions in penalties where there has been disclosure. A 30% penalty can be reduced down to 10% for "prompted" disclosure where HMRC first become aware of the failure within 12 months after the time when the tax first becomes unpaid by reason of the failure; otherwise, it can only be reduced down to 20% for "prompted" disclosure. (If the disclosure is "unprompted", the reductions may be down to 0% if within this 12 month period, and otherwise down to 10%).

19. A person discloses the relevant act or failure by (a) telling HMRC about it, (b) giving HMRC reasonable help in quantifying the tax unpaid by reason of it, and (c) allowing HMRC access to records for the purpose of checking how much tax is so unpaid (sub-paragraph 12 (2)).

20. A disclosure is "unprompted" if made at a time when the person making it has no reason to believe that HMRC have discovered or are about to discover the relevant act or failure (sub-paragraph 12(3)).

21. Under paragraph 14, if HMRC think it right because of special circumstances, they may reduce a penalty under paragraph 1.

22. On an appeal to the Tribunal, the Tribunal may rely on paragraph 14 to a different extent than HMRC have done, but only if the Tribunal thinks that HMRC's decision in respect of the application of paragraph 14 was flawed (when considered in the light of the principle applicable in proceedings for judicial review) (sub-paragraphs 19(3) and (4)).

23. Liability to a penalty under paragraph 1 does not arise in relation to an act or failure which is not deliberate if a person satisfies HMRC (or on an appeal to the Tribunal, the Tribunal) that there is a reasonable excuse for the act or failure (paragraph 20).

24. In *The Clean Car Co Ltd v C&E Comrs* [1991] VATTR 234 Judge Medd QC set out his understanding of "reasonable excuse":

> "One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?...

> It seems to me that Parliament in passing this legislation must have intended that the question of whether a particular trader had a reasonable excuse should be judged by the standards of reasonableness which one would expect to be exhibited by a taxpayer who had a responsible attitude to his duties as a taxpayer, but who in other respects shared such attributes of the particular appellant as the tribunal considered relevant to the situation being considered. Thus though such a taxpayer would give a reasonable priority to complying with his duties in regard to tax and would conscientiously seek to ensure that his returns were accurate and made timeously, his age and experience, his health or the incidence of some particular difficulty or misfortune and, doubtless, many other facts, may all have a bearing on whether, in acting as he did, he acted reasonably and so had a reasonable excuse."

29. That this is the correct test was confirmed by the Upper Tribunal in *Perrin v HMRC* [2018] UKUT 156. At [81] of that judgment, the Upper Tribunal also set out a recommended process for this Tribunal when considering whether a person has a reasonable excuse:

> "(1) First, establish what facts the taxpayer asserts give rise to a reasonable excuse (this may include the belief, acts or omissions of the taxpayer or any other person, the taxpayer's own experience or relevant attributes, the situation of the taxpayer at any relevant time and any other relevant external facts).
>
> (2) Second, decide which of those facts are proven.
>
> (3) Third, decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default….In doing so, the Tribunal should take into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times. It might assist the Tribunal, in this context, to ask itself the question "was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?"
>
> (4) Fourth, having decided when any reasonable excuse ceased, decide whether the taxpayer remedied the failure without reasonable delay after that time (unless, exceptionally, the failure was remedied before the reasonable excuse ceased). In doing so, the FTT should again decide the matter objectively, but taking into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times."

25. In the following paragraph ([82]), the Upper Tribunal went on to say:

> "One situation that can sometimes cause difficulties is when the taxpayer's asserted reasonable excuse is purely that he/she did not know of the particular requirement that has been shown to have been breached. It is a much-cited aphorism that "ignorance of the law is no excuse", and on occasion this has been given as a reason why the defence of reasonable excuse cannot be available in such circumstances. We see no basis for this argument. Some requirements of the law are well-known, simple and straightforward but others are much less so. It will be a matter of judgement for the FTT in each case whether it was objectively reasonable for the particular taxpayer, in the circumstances of the case, to have been ignorant of the requirement in question, and for how long."

BURDEN AND STANDARD OF PROOF

26. The burden of establishing that the appellant is prima facie liable for a penalty which has been properly notified and assessed lies with HMRC. The burden of establishing that the appellant should not be liable for the penalty because, for example, there is a reasonable excuse for his failure, or that the decision by HMRC that special circumstances do not apply in this

case is flawed, lies with the appellant. In each case the standard of proof is the balance of probabilities.

THE PARTIES' ARGUMENTS

27. The hearing bundle included the following documents setting out Mr Bond's arguments:

(1) Letter from Mr Bond dated 4 February 2019

(2) Letter from Mr Bond dated 3 April 2019

(3) Letter from Mr Bond dated 3 June 2019

(4) Mr Bond's notice of appeal to the Tribunal

28. A number of points were made in these documents (some of which I have already addressed in the findings of fact at [11] and [13] above) but I pick out the following as being most relevant to whether there is a reasonable excuse for Mr Bond's failure to notify, or special circumstances:

(1) Mr Bond was not aware that Ms Lockhart was claiming child benefit

(2) Child benefit was not being paid to Mr Bond but rather to Ms Lockhart

(3) Mr Bond says he was not aware of HMRC's publicity campaign concerning the Charge as he was busy caring for young children at the time.

29. HMRC's position was that the penalty assessments were validly raised as Mr Bond had not notified his chargeability to income tax within six months of the end of the tax years in question; that any disclosures made by Mr Bond regarding the failure to notify were "prompted" rather than "unprompted"; and they had given Mr Bond the maximum reduction in the penalties (20% for the first year and 10% for the second year) under the rules in Schedule 41 Finance Act 2008.

30. HMRC argued that there was no reasonable excuse for Mr Bond's failure to notify; and that their decision that there were no special circumstances, was not flawed.

DISCUSSION

31. The Tribunal's powers are limited to interpreting and applying the law to the matter in question. Here, the matter in question is the penalties raised by HMRC for failure to notify liability – there was no appeal against Mr Bond's underlying liability to the Charge for the tax years in question. I have found that Mr Bond did not notify his income tax chargeability to HMRC within six months of the end of the tax years in question; and Mr Bond's disclosures to HMRC in 2017 were prompted. All this means the penalties were validly raised, subject only to the "defences" of reasonable excuse (as the failure to notify was not deliberate) and special circumstances.

32. The excuse given by Mr Bond for failing to notify HMRC of his liability to income tax by reason of the Charge was that he did not know that Ms Lockhart was receiving child benefit in respect of their children; nor was he aware of the Government's publicity regarding the Charge when it was introduced.

33. I accept the facts comprised in Mr Bond's excuse above as proven i.e. from a subjective point of view, Mr Bond did not have the awareness as described above. The question is whether this excuse is reasonable judged by the standard of a reasonably conscientious taxpayer in Mr Bond's position.

34. I have found that Mr Bond received the letter sent by HMRC on 17 August 2013. The letter gave considerable information about the Charge. In my view, a reasonably conscientious taxpayer in Mr Bond's position would have paid attention to the contents of that letter and

noted the consequences of himself, or his partner, claiming child benefit, if his income were to exceed £50,000. When, two years after receiving this letter, Mr Bond's income did exceed the threshold, he would, if acting as a reasonably conscientious taxpayer, have found out from Ms Lockhart whether she was claiming child benefit in respect of their children; he would then have had the information necessary to comply with the obligation to notify HMRC of his liability to income tax in the tax years in question by reason of the Charge. In making these statements I have assumed that the reasonably conscientious taxpayer, like Mr Bond, was caring for young children – this would not, in my view, have prevented the taking of such actions by such a taxpayer.

35. By not paying adequate attention to the contents of the letter and not finding out from Ms Lockhart whether she was receiving child benefit, Mr Bond, in my view, failed to take the steps that a reasonably conscientious taxpayer in his position would have taken. This means that his excuse for failing to notify his liability to income tax in the tax years in questions is not a reasonable excuse in the eyes of the law.

36. I should add for completeness that there is no suggestion here that Mr Bond intentionally failed to carry out his tax obligations here – and I note that following HMRC's January 2019 letter, Mr Bond paid the liability to the Charge promptly.

37. As for HMRC's decision not to reduce the penalties on the grounds of there being special circumstances, this was not in my view a flawed decision: I have no evidence of HMRC, in making that decision, either taking something into account they should not have, or failing to take something into account which they should have; and the decision was not, in my view, an unreasonable one.

CONCLUSION

38. HMRC's decision to raise these "failure to notify" penalties is AFFIRMED.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

39. 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.

ZACHARY CITRON
TRIBUNAL JUDGE

RELEASE DATE: 08 SEPTEMBER 2020

APPENDIX

TEXT OF LETTER SENT TO MR BOND BY HMRC ON 17 AUGUST 2013

We are sending this letter to help you to pay the right amount of tax. If you have had any changes to your income in the last year, or if you are affected by the recent changes to Child Benefit for people on higher incomes, you might need to complete a Self Assessment tax return.

Changes to Child Benefit

The new High Income Child Benefit Charge came into effect on 7 January 2013. You are liable to pay the tax charge if all of the following statements apply to you, or applied to you in the 2012-13 tax year:
• you have an individual income of over £50,000 a year, and
• either you or your partner received any Child Benefit payments after 7 January 2013, and
• your income for the tax year is higher than your partner's. The partner with the higher income is liable to pay the charge if both partners have income over f50,000.

If you or your partner stopped your Child Benefit payments before 7 January 2013, you do not need to take any further action. To check whether the tax charge applies to you, go to hmrc.gov.uk/childbenefitcharge

If it does apply, then you must register for Self Assessment for the 2012-13 tax year by **5 October 2013**, so that you can declare the Child Benefit you received, pay the tax charge on time and avoid a late payment penalty.

You might be able to avoid Self Assessment in future years if you (or your partner if they are the Child Benefit recipient) choose to opt out of receiving Child Benefit and avoid incurring the tax charge. Go to hmrc.gov.uk/childbenefitcharge if you want to opt out.

Other changes to your income

If there have been any changes or additions to your income in the last year, or you have made any payments that qualify for tax relief, you must let us know. For example:

We might owe you some money if you:
• incurred expenses as part of doing your job, such as using your own car for business travel
• paid into a private pension plan, and have not claimed the right amount of relief, or
• made payments or charitable donations that might reduce the amount of tax you owe.

You might owe us money if you:
• received income from savings (including dividends)
• received rental income from letting land or property
• received tax relief for work related payments that you no longer pay (for example, laundry costs for uniforms or protective clothing)
• started working for yourself, or
• received any other income that has not been taxed.

These are just a few examples. To find more information about Self Assessment and whether you need to register, go to hmrc.gov.uk/yourtaxreturn To tell us about any changes phone us on 0300 200 3310.

Remember, if you need to register for Self Assessment to pay the High Income Child Benefit Charge, or to repay any tax that you owe, the deadline is 5 October 2013. To register online, go to hmrc.gov.uk/register

Don't delay. Please act now.