Neutral Citation: [2023] UKFTT 00657 (TC)

Case Number: TC08878

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2022/11554

Higher income child benefit charge – failure to notify penalty – whether reasonable excuse - no

Heard on: 22 May 2023
Judgment date: 28 July 2023

Before

TRIBUNAL JUDGE MCGREGOR
JAMES ROBERTSON

Between

MR CHRISTOPHER DIBALL

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Diball

For the Respondents: Mr Campbell, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. With the consent of the parties, the form of the hearing was V (video) via Tribunal video hearing system. A face-to-face hearing was not held because a remote hearing was expedient. The documents to which we were referred are a bundle of 75 pages, a generic bundle of 808 pages and HMRC's Statement of Case of 28 pages.

2. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

INTRODUCTION

3. 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 year 2018/19.

Relevant background and law

4. 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").

5. 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 the way in which this applies is not in dispute in this case. ANI is defined in ITEPA 2003, s 681H.

6. 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.

7. 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.

8. 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%.

9. 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.

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

11. 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

12. We find the following facts based on the evidence given and bundle of documents before us.

13. Prior to 2018/19 Mr Diball was not required to notify his liability to tax to HMRC or to complete a self-assessment return ("SATR").

14. Mr Diball's spouse received child benefit in tax year 2018/19, having commenced receiving child benefit in 2011.

15. In respect of 2018/19, Mr Diball:

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

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

(3) did not file a SATR.

16. On 11 June 2021, HMRC sent a letter to Mr Diball explaining that they considered that he was liable to HICBC in 2018/19. This letter included a calculation of the amount of the HICBC and the risk of penalties, including a failure to notify penalty. It gave a deadline of 11 July 2021 to respond to the letter.

17. On 17 June 2021, Mr Diball called HMRC and agreed the figures set out in the letter on 11 June 2021.

18. HMRC issued an assessment on 18 June 2021 for £1,788. The same letter also explained that a penalty would be issued for failure to notify. The amount was set at £357.60, being 20% of the £1,788. The letter explained that the 20% figure had been reached on the basis that Mr Diball's behaviour was non-deliberate and prompted, because Mr Diball had told HMRC about his liability for HICBC after HMRC had contacted him about it.

19. An appeal against the penalty was submitted to HMRC on 28 June 2021.

20. The penalty appeal was suspended for a period behind another case.

21. Mr Diball called HMRC twice to enquire about the progress of his appeal, once in August 2021 and then in April 2022.

22. HMRC issued a view of the matter letter on 24 May 2022, which upheld the penalty. The letter offered a review or an appeal to the Tribunal if Mr Diball disagreed.

23. Mr Diball appealed to the Tribunal, which was received at the Tribunal on 17 June 2022, within the 30 day window for the appeal.

PARTIES ARGUMENTS

Appellant's contentions

24. The appellant contended that the penalty should be waived because:

(1) He did not know anything about the HICBC until the letter arrived from HMRC in June 2021, by which stage, the penalty had already arisen and there was nothing he could do about it;

(2) He did not receive the awareness letter that HMRC stated was sent to him in December 2019;

(3) He was informed on the telephone (when he called in June 2021) that a second letter would have been sent to him when he did not respond to the December 2019 letter. However, HMRC now say that they did not send a second letter and therefore did not follow their own protocols;

(4) If he had received the letter in November 2019, he would have responded to it by contacting HMRC, establishing that he needed to submit a return and done so promptly;

(5) The last time that he and his spouse had made a claim for child benefit was in 2014, while the rules had changed by then, his income was such that the rules were not relevant to him for several years afterwards;

(6) He has only ever been over the £50,000 threshold in that one year due to the receipt of a long service gratuity from the RAF.

HMRC's contentions

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

(4) the potential lost revenue on which the penalties must be assessed is the amount of the HICBC to which Mr Diball 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;

(5) the amount of HICBC to which Mr Diball was liable is not in dispute in this case;

(6) 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 has been charged at a rate of 20%. This represents full mitigation for the Appellant's quality of disclosure, when prompted;

(7) the disclosure was prompted by the letter of 11 June 2021;

(8) the assessment of penalties does not depend on the existence or validity of an assessment, but rather on the liability for tax, as confirmed by the Upper Tribunal in *Robertson*.

(9) 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) the Appellant has not adduced any evidence that shows that the lack of knowledge of the HICBC charge was objectively reasonable by reference to specific factors that acted on him specifically;

(b) as per *Lau*, *Johnstone [2018] UKFTT 689,* 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; and

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

(10) the Appellant has not provided any special circumstances that could be considered by HMRC to reduce the penalty under paragraph 19(3) of Schedule 41 to FA 2008.

DISCUSSION

26. With regards to the validity of the penalty assessment, 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, the percentages were correctly applied to the PLR in respect of a non-deliberate disclosure.

27. There were two points of contentious fact. HMRC assert that they sent an "awareness letter" in December 2019 that was designed to alert Mr Diball to the possibility of a charge to HICBC.

28. HMRC has extracted a copy of the letter from its internal systems which is dated 2 December 2019 and which is addressed to Mr Diball at the address held on HMRC's records (and which has remained consistent throughout).

29. Mr Diball's evidence was that he did not receive this letter. He also submits that if he had received it, he would have responded to it promptly, as he has to all other correspondence.

30. On the balance of probabilities, we find that the letter was sent, but that it was not received by Mr Diball. We will return to whether that helps Mr Diball as we discuss reasonable excuse.

31. The second issue relates to whether or not Mr Diball's disclosure and co-operation with HMRC should be considered "prompted".

32. Mr Diball says that since he did not receive the December 2019 letter, he cannot have been prompted by that letter. Given our finding above that he did not receive it, we agree that Mr Diball was not prompted by that letter.

33. Mr Diball further says that the penalty had already arisen by the time he got the first letter in June 2021 and therefore there was no opportunity for him to do anything that could have achieved the lower unprompted penalties.

34. With all respect to Mr Diball, this argument derives from a misunderstanding of the concept of prompted and unprompted disclosures and of the penalty assessments.

35. An unprompted penalty is imposed when a taxpayer has realised their own mistake or error and approached HMRC to explain and seek to resolve the error before HMRC has commenced any kind of contact with the taxpayer about that issue.

36. Since Mr Diball did not realise his error until HMRC sent the letter on 11 June 2021, his disclosure and co-operation with HMRC is correctly treated as prompted.

37. Dealing with Mr Diball's argument that there was no opportunity for him to do anything once he received the letter on 11 June 2021, again this derives from a misunderstanding. The letter of 11 June 2021 did not assess a penalty on Mr Diball. It identified an amount of HICBC that HMRC considered to be likely and invited Mr Diball to contact them to confirm or challenge that amount. It also warned that a failure to notify penalty could arise, but did not quantify that penalty.

38. If Mr Diball had not responded to that letter, then the penalty issued could have been higher because HMRC could have concluded that he was not being co-operative and therefore not granted the highest possible reduction to the penalty.

39. Therefore, there was an opportunity for Mr Diball to do something, which was to co-operate and reduce the penalty, as he did.

40. Given the validity of the penalty assessment, Mr Diball's case therefore turns on whether he can show that he had a reasonable excuse for failing to notify his liability to HICBC.

41. As set out in Upper Tribunal, in *Christine Perrin v HMRC [2018] UKUT 0156*, we must take a four-step approach to considering whether Mr Diball had a reasonable excuse:

(1) First, establish what facts the taxpayer asserts give rise to a reasonable excuse;

(2) Second, decide which of those facts are proven;

(3) Third, decide whether, viewed objectively, those proven facts do amount to an objectively reasonable excuse for the default, e.g. by asking the question "was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?"; and

(4) Fourth, if such a reasonable excuse existed, consider whether, when the excuse ceased, the failure was remedied without delay.

42. As noted above, we have found that Mr Diball did not receive the December 2019 letter.

43. We also accept Mr Diball's position that he did not know about the £50,000 threshold which would have the effect that he needed to pay back in tax some of the child benefit charge received by his spouse.

44. In assessing whether these facts can amount to an objective reasonable excuse, we also considered the cases to which HMRC referred on the relevance of ignorance of the law. 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; and

(2) HMRC's failure to inform the taxpayers sufficiently of the law cannot make ignorance a reasonable excuse, since HMRC is not under a statutory duty to inform all taxpayers of changes to tax rules and 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.

45. Therefore we conclude that the fact that Mr Diball did not receive the letter dated December 2019, which would have alerted him to the need to consider HICBC and that he otherwise had not developed knowledge of HICBC does not amount to a reasonable excuse.

46. We acknowledge that the child benefit claims were made and HMRC's media campaign was conducted at a time when HICBC was not relevant to him due to the level of his income. However, on balance, we do not find that these factors make his ignorance of the HICBC law objectively reasonable.

47. There is nothing exceptional in Mr Diball's circumstances that would give rise to the application of reduction for special circumstances in accordance with paragraph 19 of Schedule 41 to Finance Act 2008.

48. For completeness, we note:

(1) 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

(2) issues on, for example, HMRC's approach to sending reminder letters, are not matters which are within the jurisdiction of this Tribunal, but rather for HMRC administration, Parliament or, possibly, for judicial review.

DECISION

49. For the reasons given above, we uphold the penalty and dismiss Mr Diball's appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

50. 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: 28th JULY 2023