[2020] UKFTT 0122 (TC)

TC07616

INCOME TAX - High Income Child Benefit Charge - Penalty for failure to notify liability for 2012/13 and later years - Appellant in employment and not in self-assessment regime during years of charge - Section 36(1A) Taxes Management Act - Percentage deductions adjusted - Appeal allowed only to that extent, and otherwise dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/06527

BETWEEN

MICHAEL ROBERTS **Appellant**

-and-

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

TRIBUNAL: JUDGE CHRISTOPHER MCNALL
MISS SUSAN STOTT FCA CTA

Sitting in public at Liverpool Civil Justice Centre on 3 December 2019

The Appellant appeared in person

Mrs Helen Roberts, a litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. By way of a Notice of Appeal dated 30 September 2019, Mr Roberts challenges penalties imposed on him by HMRC on 26 February 2019 pursuant to Schedule 41 of the Finance Act 2008. Those were a result of his failures, in three non-consecutive years, to notify HMRC of his liability to pay the High Income Child Benefit Charge ('HICBC').

2. The penalties in dispute in this appeal, amounting to £499.67, are as follows:

   (1) 2012/13 £2.99 (sic)

   (2) 2015/16 £293.48

   (3) 2016/17 £203.20 (recalculated from £292.10).

3. The penalties are calculated on the footing that Mr Roberts' behaviour was not deliberate, was prompted, and that he made HMRC aware of the deficiency more than 12 months after the end of the year of assessment.

4. Mr Roberts was also notified by HMRC of liability to repay the Child Benefit received; and that was repaid promptly and in full.

5. On 18 July 2019, Mr Roberts appealed directly to HMRC against the penalties. However, HMRC declined to consider that appeal on the basis that it was out of time. Accordingly, HMRC did not consider the merits of his position by way of departmental review. Mr Roberts therefore came directly to the Tribunal. However, by the time of the hearing before us, HMRC's position had evolved, and HMRC accepted that the Tribunal could consider the matter substantively.

6. Having considered the documents and heard from both parties, we have decided to dismiss the substance of Mr Roberts' appeal, for the reasons set out in more detail below, although we have made some adjustments to the deductions applied to the penalties by HMRC. As a matter of law, we consider that there is no option available to us other than to dismiss this appeal. But, for reasons which we explain, we do so with reluctance because we have a degree of sympathy for the circumstances faced by Mr Roberts. This is not a case in which he has acted with any lack of honesty or integrity.

THE LAW

7. The law is not in dispute.

8. The High Income Child Benefit Charge ('HICBC') was introduced by section 8 of the Finance Act 2012, with effect from 7 January 2013.

9. Thereafter, where an individual's 'Adjusted Net Income' exceeded £50,000, for each £100 in excess of £50,000, a 1% tax liability arises calculated on the amount of Child Benefit received.

THE FACTS

10. Most of the facts are not in dispute.

11. During the years in question, Mr Roberts was in employment, working at the Jaguar Land Rover plant in Halewood, where he still works.

12. As such, he was paying income tax through PAYE. He was not in self-employment and not in the self-assessment system. He did not receive notices to file tax returns under section 8 of the Taxes Management Act 1970 and he did not file self-assessment tax returns.

13. His adjusted net income in each of 2012/13, 2015/16, and 2016/17 exceeded £50,000. In each of those years, his income included a significant element of overtime (usually, weekend working). His base salary was below £50,000. It was the overtime/weekend working which carried him over the £50,000.

14. Child Benefit was received in each of those years. It amounted to £2,559.

15. Mr Roberts did not notify his liability to HICBC to HMRC, as required by section 7 of the Taxes Management Act 1970 ('the 1970 Act'). The ordinary time limit of four years after the end of the year of assessment, under section 34 of the 1970 Act, does not apply because these assessments are attributable to a failure by a person to comply with an obligation under section 7: see section 36(1A)(b) of the 1970 Act. HMRC therefore has, on the face of it, 20 years after the end of the year of assessment to which it relates.

16. This is a penalty appeal, and so HMRC bears the burden of establishing that the penalties are due. Thereafter, the burden shifts to Mr Roberts to establish either the existence of a reasonable excuse for the failure to file self-assessment returns, or the existence of circumstances justifying a special reduction in the penalty.

17. In all instances, the party bearing the burden need only discharge that burden to the usual civil standard, namely the balance of probabilities.

DISCUSSION

Is the HICBC 'income'?

18. One issue which had occurred to us in our pre-reading was whether the HICBC was 'income', and therefore was capable of being assessed in the way it has been.

19. In *HMRC v James Robertson* the First-tier Tribunal (Judge Richard Thomas and Miss Stott) allowed Mr Robertson's appeal against penalties imposed in similar circumstances: [2018] UKFTT 158 (TC). But the Upper Tribunal (Judge Thomas Scott and Judge Kevin Poole) allowed HMRC's appeal and reinstated the penalties: [2019] UKUT 0202 (TCC). The central issue before the Upper Tribunal was the meaning of 'potential lost revenue' (PLR) in the applicable penalty legislation: see Para [4].

20. Perhaps unfortunately, Mr Robertson did not take any part in the hearing before the Upper Tribunal in that case, and so the Tribunal did not have the benefit of hearing adversarial argument. HMRC had been represented by an in-house litigator before the First-tier Tribunal, but by a specialist Revenue Bar Queens Counsel on the appeal. We do not know whether that change in advocate was simply in deference to the Upper Tribunal (being, unlike the First-tier Tribunal, a superior court of record) or whether it was some tacit recognition by HMRC of the importance of the income point, and its potentially far-reaching consequences.

21. The Upper Tribunal concluded that that the FtT had made an error of law in calculating the PLR, and that conclusion was sufficient to dispose of the appeal in HMRC's favour.

22. However, the Upper Tribunal went on to remark:

> "It is therefore not necessary for us to determine whether the FtT was right in its conclusion that the discovery assessments were not valid because HICBC is not

'income'. We recognised that there are respectable arguments on both sides, but the issue should be fully considered and determined when it is dispositive to the case."

23. Those remarks refer back to Paragraphs 83 to 91 of the First-tier Tribunal's decision ('Was there a valid section 29 assessment?'), and the fact that an assessment may only be made if HMRC discover (relevantly) "that any income which ought to have been assessed to income tax ... [has] not been assessed".

24. But here, in this appeal, we encounter difficulty. This is an adversarial jurisdiction, and we must therefore remind ourselves of the hazard which may be present when venturing (especially of our own initiative) outside the case put by the Appellant. We must be cautious. In particular, the Tribunal cannot act as an advocate for any party.

25. Mr Roberts does not explicitly raise the point as to whether what has happened in his case is appropriately a matter for the income tax system at all (and therefore a matter for Schedule 41 of the Finance Act 2008). That is not to be read as any criticism of him: he is not a lawyer (let alone that more rarefied of characters, a tax lawyer). Nor do we criticise him for not seeking legal advice, or bringing a lawyer with him to the hearing: the sums in dispute, although sufficiently important to Mr Roberts for him to take time off work to come to the hearing, are relatively modest in the overall scale of things (one is exceptionally modest indeed). We do not imagine that many economically rational taxpayers would consider it worthwhile spending much money on legal advice and fees (which would not be ordinarily be recoverable from HMRC in a case of this kind) in challenging a penalty of less than £500 where that penalty does not relate to the taxpayer's honesty or any issues of character.

26. Nonetheless, this does mean that questions which (as the Upper Tribunal identified) are "respectably arguable", and perhaps even dispositive, end up not getting argued before the First-tier Tribunal because the sums involved in individual cases are just not big enough to warrant the engagement of lawyers. This situation is even more striking when it is considered that there may be many more similar appeals to this one - where a potentially fundamental point lies just underneath the surface - but is not explored because it cannot be. We do not know whether that is really the position, but Mr Roberts told us that many of his colleagues at Halewood are in a similar position to him. They too worked overtime, carrying them over £50,000, without really realising the implications in terms of HICBC or income tax.

27. Mr Roberts had not considered (for example) approaching a legal advice charity such as LawWorks, Tax Aid, the Bar's Pro Bono Unit ('Advocate'), or indeed the Revenue Bar Association, which does occasionally act by way of appointment by the Tribunal on important issues of law where the taxpayer cannot afford representation.

28. Therefore, as such, and in the absence of express challenge on the point, we consider that we must treat the Child Benefit as income, and therefore the Schedule 41 penalties are appropriately imposed.

NOTIFICATION OF THE HICBC

29. Mr Roberts made it very clear that he had no objection to paying back 'every penny' of Child Benefit, and indeed that is what he did. But the main ground upon which he objected to the penalties was that he had not, at any time, received correspondence from HMRC informing him of any changes to the law relating to Child Benefit or to the overpayments he had received.

30. We are satisfied that HMRC issued 'nudge' letters to Mr Roberts in August 2018 and October 2018. But those are of limited evidential utility since they post-date, by several years,

the introduction of the charge. They are of no evidential weight in establishing what would or should reasonably have been known by Mr Roberts before August 2018.

31. However, we are satisfied that Her Majesty's Government, through HMRC, took steps to make taxpayers generally, as a class, aware of the HICBC. The introduction of the HICBC was not entirely uncontroversial, and it was very widely publicised before the 2012 Budget and thereafter. There were press releases in October and December 2012. After its introduction, there were press releases later on reminding higher income parents to register for self-assessment. It has not been argued that HMRC was under any statutory duty to notify the Appellant individually, and we know of no such obligation. It was made clear that HICBC applied to people already in receipt of Child Benefit (as Mr Roberts was, his children having been born in 2008 and 2010) and not simply those coming to Child Benefit after 2012.

32. Having regard to the materials that HMRC relies upon in this appeal, the present appeal cannot be one of the 6,000 cases, discussed in the Government's press release on 6 June 2019 ('Review for High Income Child Benefit Charge penalty case concludes'), where HMRC had reviewed and cancelled the 'Failure to Notify' penalties on the basis that there was a reasonable excuse.

33. That apparently left 29,000 cases, of which the present appeal must be one. On the basis of HMRC's own published policy, the penalties can only have survived on the basis that Mr Roberts was already liable to HICBC in 2012-13 (see HMRC's document 'High Income Child Benefit Charge penalty refund').

34. In short, if it were not for the £13.00 for 2012/13, referred to below, HMRC would have refunded the penalties for (at least) 2015/16, and it is possible that this appeal might not have reached the Tribunal at all.

2012/13 - The £2.99 Penalty

35. Mr Roberts' liability in relation to HICBC for 2012/13 was £13.00. From this figure, it is self-evident that, in this year (during the course of which the HICBC was implemented) his earnings were just over the £50,000 threshold. HMRC then applied discounts to the £13.00 giving a penalty percentage of 23% (in a possible range of 20-30%).

36. Some features of this penalty do call for comment.

37. HMRC did not do anything in relation to this liability (which had existed since, at the very latest, 6 April 2013) until 7 January 2019 (i.e., just under six years later) when it wrote to Mr Roberts about it. There was no evidence (and so we do not know, and cannot make any findings) as to why it took HMRC so long to get around to dealing with this situation. Mr Roberts was not unknown to HMRC: he was in the PAYE system, paying tax. HMRC would have known, at the time, from its PAYE records, exactly how much he had earned, and that this exceeded £50,000. But we do not know what information HMRC knew about the Child Benefit being claimed. In other cases, the Tribunal has touched on the potential difference between the taxpayer being penalised, and the person actually in receipt of the Child Benefit.

38. As to the passage of time - which is striking - HMRC pointed to section 36(1A) of the 1970 Act, and submitted that pursuing penalties imposed in relation to HICBC in this way (i.e., for trifling amounts, years after the event) was 'the will of Parliament'. This is not an argument which Mr Roberts, appearing on his own behalf, was able to address. Therefore, we did not hear or have the chance to consider adversarial argument on the point. We limit ourselves to observing that we were not taken to any Parliamentary materials (for example, White or Green

Papers; debates; or ministerial notes) which demonstrate that, when Parliament was enacting this legislation in 2012, it was indeed the will of Parliament (or, put another way, that Parliament expressly had in mind) that people in the position of Mr Roberts - employed and in the PAYE system, rather than self-employed and in the Self-Assessment system - should, up to 20 years after the end of the tax year (i.e., up to 2033, which is still over a decade away) face penalties of this kind.

39. Leaving aside the passage of time, a further perhaps unusual feature of this case is that HMRC (i) has assessed a sum so modest as £13.00; (ii) has imposed a penalty geared to the £13.00, coming to £2.99; and (iii) has resisted the appeal (insofar as it can be treated as a freestanding appeal) against the £2.99. We say 'unusual' because pursuit of a £2.99 penalty is markedly different to the stance which HMRC (doubtless for very good reasons) routinely adopts in relation to (for example) VAT default surcharges where HMRC does not seek to recover penalty sums which are de minimis. In case we were under some misapprehension, we did ask about this at the beginning of the hearing, and it was made clear to us that HMRC did still pursue the £2.99 and would require judicial determination of it.

40. We have already discussed above what seems to have been the likely outworking of HMRC's review of the penalties in Mr Roberts' case. Because he owed £13 for 2012/13, he would not (on the terms of HMRC's policy, and notwithstanding the size of the sum) have been entitled to have the penalty refunded or cancelled. If nothing else, this appeal is a striking example of the consequences which follow from the absence of a de minimis limit on the policy.

41. Mr Roberts makes the point that had he realised earlier that he was liable to HICBC then he would have adjusted his employment behaviour accordingly. That is to say, had he known earlier, he says (and we accept) that he would have accepted less overtime, so as to make sure that his earnings fell below £50,000. Indeed, that is what he now does. He tells us - and we accept - that is what he would have done for 2015/16 and 2016/17. But he had not realised that he was liable to HICBC, and so he did not.

42. Mr Roberts tells us that many of his colleagues at Halewood are in a similar situation and that they too have taken the decision to limit the amount of overtime they take so as to avoid incurring HICBC. That the productivity of one of the United Kingdom's leading car plants should end up even potentially affected by the decision of its skilled workforce prompted by HICBC is perhaps an illustration of the far-reaching effects of tax legislation.

43. What Mr Roberts says really comes down to an allegation of unfairness. We see the point which Mr Roberts makes. So far as it goes, it is a fair one. But, if the penalty is lawfully imposed then (it is well-established in other cases which are binding on us) we do not have the ability to discharge or adjust it because of a perception that it is unfair: see (for example) *HMRC v Hok Ltd* [2012] UKUT 363 (TCC).

44. The minimum penalty percentage here is 20% but we adjust it from 23% to 20%. There is no evidence to support 23% as opposed to (say) 22% or 24%. It appears entirely arbitrary. In our view, founded on our knowledge and experience of deductions applied to Schedule 41 penalties in a wide range of scenarios, there is no good reason why the penalty percentage should be any higher than the minimum. HMRC shall perform the appropriate calculation.

THE 2015/16 PENALTY

45. The same discussion above applies. The minimum penalty percentage here is 20% and we adjust it from 23% to 20%. HMRC shall perform the appropriate calculation.

THE 2016/17 PENALTY

46. The same discussion above applies. HMRC originally charged this at 23% of PLR (in the erroneous belief that the minimum was 20%) but subsequently adjusted this to 16%. The minimum here is 10%. We adjust the penalty to 10%. HMRC shall perform the appropriate calculation.

DECISION

47. Subject to the adjustments in the penalties charged, the appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

48. 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.

DR CHRISTOPHER McNALL
TRIBUNAL JUDGE

RELEASE DATE: 02 MARCH 2020