[2020] UKFTT 00148 (TC)

TC07641

INCOME TAX – high income child benefit charge – penalties for failure to notify – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/01266

BETWEEN

RICHARD COOK **Appellant**

-and-

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

TRIBUNAL: JUDGE DAVID BEDENHAM
LESLIE HOWARD

Sitting in public at Nottingham Justice Centre on 31 January 2020

The Appellant did not appear and was not represented

Connor Fallon, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. The Appellant appeals against penalties totalling £240.90 charged to him pursuant to Schedule 41 to the Finance Act 2008 ("FA 2008") as a result of his failure to notify liability to the High Income Child Benefit Charge ("HICBC"). The Appellant did not attend the hearing of this appeal but did write to the Tribunal in advance to notify us that he was not going to attend and that he understood that a decision would be reached in his absence.

BACKGROUND

2. On 5 May 2017, HMRC wrote to the Appellant as follows:

> "Our records indicate that the recent changes to Child Benefit for people on higher incomes may apply to you and you did not register to receive a Self Assessment tax return for the tax years ended 5 April 2014, 2015 and 2016.
>
> **Changes to Child Benefit**
>
> The new High Income Child Benefit Charge came into effect on 7 January 2013. You have to pay the tax charge if all of the following statements applied to you in any of the tax years ended 5 April 2015, 2015 and 2016:
>
> - you have an individual income of over £50,000 a year
> - either you or your partner received any Child Benefit payments between 6 April 2013 and 5 April 2014, 6 April 2014 and 5 April 2015 and 6 April 2015 and 5 April 2016
> - your income for the tax year is higher than your partner's
>
> The partner with the higher income has to pay the charge if both partners have income over £50,000,"

HMRC then proceeded to state that they believed the Appellant to be liable to the HICBC in each of the years ending 5 April 2014, 5 April 2015 and 5 April 2016, with a total amount due of £3,218. HMRC concluded the letter by asking the Appellant to contact them with any further information by 5 June 2017.

3. On 30 May 2017, the Appellant wrote to HMRC stating that the child benefit had been claimed "unilaterally by my partner…without my knowledge" and that for a proportion of the time that the Child Benefit was claimed, he and his partner were separated.

4. On 13 June 2017, seemingly not having had sight of the Appellant's letter of 13 June 2017, HMRC notified the Appellant that he would shortly receive an assessment in the sum of £3,218 pursuant to s 29 of the Taxes Management Act 1970 ("TMA 1970").

5. On 20 June 2017, HMRC notified the Appellant that having considered his letter of 30 May 2017, HMRC was now of the view that he was liable to the HICBC only in the years ended 5 April 2014 and 5 April 2016. On the same date, HMRC issued the Appellant with assessments totalling £1,577. HMRC also issued the Appellant with penalty notices totalling £240.90. These penalties were issued pursuant to Schedule 41 FA 2008.

6. On 11 July 2017, the Appellant wrote to HMRC as follows:

> "…
>
> I will of course pay any tax underpayment (begrudgingly because the Child Benefit was claimed without my knowledge) in order to bring my tax account up to date. However, with regard to the Tax Act Penalties I have done some research on the internet and understand that you were supposed to have written to all taxpayers who might fall foul of the High Income Child Benefit Charge, advising them to go through the laborious process of trying to find out if one's ex-partner might be claiming Child Benefit and then filling in that godforsaken waste of paper that is a Self-Assessment Form, when there should be absolutely no need for a PAYE employee to do so.
>
> Accordingly, can you please advise what attempts you made to advise me of this requirement and why I never received any such notification(s). As someone who has never had any issues with claiming undue benefits, had I known that this requirement existed, there would have been no underpayment in the first place."

7. On 13 July 2017, the Appellant paid to HMRC £1,645.33 (being the assessed £1,577 plus interest).

8. On 23 August 2017, HMRC wrote to the Appellant stating that his 11 July 2017 letter had been treated as an appeal against the Schedule 41 FA 2008 penalties. HMRC's letter continued:

> "Awareness letters were issued from November 2012 and although we administer the Child Benefit system, I do not have access to those records to see when the letter was issued.
>
> …
>
> Based on the information held we made a decision to charge the minimum Non-Deliberate Failure to Notify penalty for tax years ended 5 April 2014 and 2016. Non-deliberate is where you failed to tell us about a circumstance that affected your liability to tax within the relevant time limit, but the failure was not deliberate or deliberate and concealed.
>
> We may not charge you a penalty for a failure to notify if:
>
> - You have a reasonable excuse for the failure
> - You told us without unreasonable delay after your reasonable excuse ended.
>
> …
>
> From the information that you have given, I am sorry to tell you that I do not agree that you have a reasonable excuse…
>
> If there are any special circumstances that you believe the officer dealing with the check should take into consideration, you should let us know straightaway."

9. On 19 September 2017, the Appellant wrote to HMRC stating:

> "…
>
> I would also like to point out that until I am shown evidence that I was FORMALLY notified about this change, I will not be paying any sort of punitive interest charges. Indeed, I will exhaust the appeals process (such as it is) to ensure it costs you more to collect it than the amount you wrongly

> claim is outstanding. So, kindly find someone who can be bothered to prove that a letter was sent to, and received by me.
>
> As you seem to be largely incompetent at dealing with any form of appeal, I'll help you here: I DO NOT regularly read or listen to the media and (as you should be aware, given the information is readily available to you!), was a PAYE taxpayer in the years leading up to this change, and since this came into force – so, just remind me again how I was supposed to know?!"

10. On 13 October 2017, HMRC wrote to the Appellant stating:

> "Your original appeal was made, it seems on the basis that you had not been made aware of the higher income child benefit charge despite the extensive media campaign that was launched when the new rules were introduced. The appeal was correctly turned down as a lack of awareness of the charge is not accepted as a reasonable excuse for failing to notify HMRC of your obligation to submit self-assessment tax returns. However, our letter of 23 August 2017 should have pointed out to you that we wrote to you on 17 August 2013 to tell you about the charge. I am sorry that this was not stated.
>
> …"

11. On 4 November 2017, the Appellant wrote to HMRC asking for details of the "extensive media campaign" and for a copy of the 17 August 2013 letter together with "proof of posting and proof of receipt given that no such letter was ever received by me." The Appellant asked that HMRC conduct a statutory review.

12. On 7 December 2017, HMRC wrote to the Appellant informing him, *inter alia*, that HMRC did not have a copy of the letter sent to the Appellant on 17 August 2013 (but were able to provide a "template" letter) and was not in a position to provide any proof of posting. HMRC again stated that ignorance of the changes to the law cannot constitute a reasonable excuse.

13. On 8 December 2017, HMRC issued to the Appellant a "view of the matter" letter which in material part stated:

> "…
>
> Your letter dated 20 May 2017 confirmed that you lived with a partner claiming child benefit. Your income for the tax years in question exceeded the £50,000 threshold. It is clear that, as a matter of fact, you did not notify HMRC of your additional liabilities for the years ended 5 April 2014 and 5 April 2016.
>
> We treated your failure to notify as non-deliberate which attracts a penalty of between 20% and 30% of the additional tax due. If the failure is rectified within 12 months of the original payment due date, the penalty range is reduced to 10% and 20% of the additional tax due.
>
> The penalties were charged are as follows

Y/E	**Penalty type**	**Penalty rate**	**Penalty amount**
5 April 2014	Failure to notify	20%	£166.40
5 April 2016	Failure to notify	10%	£74.50

…

Whilst I accept that you were not aware of the change in legislation, HMRC is not obliged to notify every person of every change to legislation that may affect them. However, as noted in our letter dated 13 October 201[7], our PAYE records show that we sent you SA252 letter on 17 August 2013 which is a reminder to:

- Check your tax code and report any changes required.
- Declare any changes to your income which have not previously been declared.
- Register for Self-Assessment (SA) if you meet the criteria
- Check if you are liable to the HICBC

Individuals need to take steps to understand the law and how it applies to their circumstances. I do not consider ignorance of that law, nor the fact that, as you state, you were not notified of the changes, to be a reasonable excuse.

…"

14. On 11 December 2017, the Appellant wrote to HMRC repeating that HMRC had adduced no evidence of him having received the SA252 letter and expressing dissatisfaction with HMRC's statement that it was not obliged to notify every person of every change to legislation that may affect them. The Appellant's language was intemperate. The Appellant concluded the letter by stating:

> "Frankly, however, and as stated in previous correspondence, I couldn't care less if your intransigence continues, my primary objective in appealing was to cost you considerably more than you might eventually collect from me in penalties and given the amount of drivel you have responded with thus far, I remain very confident of achieving that…"

15. On 28 December 2017, the Appellant again wrote to HMRC to complain about HMRC's conduct and asking that HMRC provide to him copies of "all documents sent to you during the last 50 days please (including this one, in case I mislay it of course)". The Appellant also stated:

> "…my primary objective in continuing to exploit the appeals process is to ensure that it costs you considerably more than you could ever hope to recover from me and given the amount of due process and correspondence thus far, I remain extremely confident of achieving that – you must be close to four figures already!
>
> …"

16. On 11 January 2018, HMRC notified the Appellant of the conclusion of the statutory review. The review officer upheld HMRC's decision to issue the Appellant with the penalties.

17. On 17 January 2018, HMRC replied to the Appellant's letter of 28 December 2017 (which letter HMRC had treated as a complaint). HMRC rejected the Appellant's complaints.

18. On 21 January 2018, the Appellant responded to HMRC's 17 January 2018 letter. The Appellant made various observations and comments about HMRC's conduct (none of which are relevant to the determination of the present appeal, although we note that the Appellant's language was, again, intemperate) and then went on to state:

> "…I did not request that you intervene in the appealable decision as I am fully aware of the procedural protocol. On the contrary, that will be dealt with by

> the next stage – a tribunal; and boy that's going to add some really significant cost to your folly. "

19. On 22 January 2018, the Appellant responded to HMRC's 11 January 2018 review conclusion letter. In his letter, the Appellant (again, using somewhat intemperate language) made clear that he disagreed with HMRC's decision. The Appellant concluded this letter as follows:

> "Finally, you have my assurance that referring to past tribunal outcomes is not going to deter me from a 'fun day in court'; if nothing else to exemplify the folly of your organisational priorities, and thank you for bringing another nebulous, but no doubt expensive process to my attention – ADR, just off to fill out the form."

20. On 2 February 2018, the Appellant filed his Notice of Appeal.

THE APPELLANT'S CASE

21. The Appellant's Grounds of Appeal stated in material part:

> "Despite claiming that they did, HMRC failed to notify me (a PAYE taxpayer) that my liabilities with regard to Child Benefit were fundamentally changing; relying on the fact that a 'media campaign' and 'explanations on their website' were/are considered sufficient. It is, apparently, MY responsibility to understand my (changing) tax liabilities – even though they were dealt with entirely between HMRC and my employer.
>
> Once the mistake was brought to my attention, I immediately settled the overdue tax amount but was then charged an exorbitant penalty, the origins of which bear no resemblance whatsoever with Bank of England interest rates or anything else that I am aware of - just some arbitrary addition.
>
> I have had numerous appeals turned down on the basis of the same regurgitated drivel because they seemingly cannot grasp that I am fully aware that they CAN do within the bounds of the law; whilst my appeal is based on the fact that it remains fundamentally unprofessional and unfair.
>
> …"

22. The remainder of the Grounds of Appeal went on to raise issue with HMRC's conduct and diligence (over which we have no jurisdiction) and the perceived unfairness of issuing a penalty to a person who was unaware of the changes in the law.

23. In a letter dated 29 January 2020, the Appellant (as well as notifying the Tribunal of his non-attendance) repeated that he had not seen the "media campaign" said by HMRC to have accompanied the change in the law relating to child benefit, had not received any communication from HMRC in relation to the change in the law (and again stated that HMRC had failed to prove that they had sent him any correspondence in this regard), and considered the imposition of the penalties to be unfair.

HMRC'S CASE

24. HMRC's case was simple: there was an extensive media campaign about the change in the law around child benefit and the Appellant had been specifically written to in August 2013 but, in any event, ignorance of the change in the law does not constitute a reasonable excuse.

RELEVANT LAW

25. The Finance Act 2012 ("FA 2012") inserted the provisions relating to the HICBC into the Income Tax (Earnings and Pensions) Act 2003. The charge took effect from the tax year 2012/13 in relation to child benefit amounts received after 6 January 2013. The relevant provisions are:

> *"681B High income child benefit charge*
>
> (1) A person ("P") is liable to a charge to income tax for a tax year if—
>
> (a) P's adjusted net income for the year exceeds £50,000, and
>
> (b) one or both of conditions A and B are met.
>
> (2) The charge is to be known as a *"high income child benefit charge"* .
>
> (3) Condition A is that—
>
> (a) P is entitled to an amount in respect of child benefit for a week in the tax year, and
>
> (b) there is no other person who is a partner of P throughout the week and has an adjusted net income for the year which exceeds that of P.
>
> (4) Condition B is that—
>
> (a) a person ("Q") other than P is entitled to an amount in respect of child benefit for a week in the tax year,
>
> (b) Q is a partner of P throughout the week, and
>
> (c) P has an adjusted net income for the year which exceeds that of Q."
>
> …
>
> *681H Other interpretation provisions*
>
> (1) This section applies for the purposes of this Chapter.
>
> (2) *"Adjusted net income"* of a person for a tax year means the person's adjusted net income for that tax year as determined under section 58 of ITA 2007.
>
> (3) *"Week"* means a period of 7 days beginning with a Monday; and a week is in a tax year if (and only if) the Monday with which it begins is in the tax year."

26. FA 2012 also amended the provisions requiring notification of chargeability by the addition of a new section 7(3)(c) to the TMA 1970 which, at the relevant time, provided:

> "7.— Notice of liability to income tax and capital gains tax.
>
> (1) Every person who—
>
> (a) is chargeable to income tax or capital gains tax for any year of assessment, and
>
> (b) falls within subsection (1A) or (1B),
>
> shall, subject to subsection (3) below, within the notification period, give notice to an officer of the Board that he is so chargeable.
>
> …

(3) A person shall not be required to give notice under subsection (1) above in respect of a year of assessment if for that year

(a) the person's total income consists of income from sources falling within subsections (4) to (7) below,

(b) the person has no chargeable gains, and

(c) the person is not liable to a high income child benefit charge

…"

27. Paragraph 1 of Schedule 41 FA 2008 provides a penalty is payable by a person who fails to comply with an obligation under, *inter alia*, s 7 TMA 1970. Paragraphs 6(2) and 6A(1) set out how the amount of that penalty is to be calculated.

28. Paragraph 14 of Schedule 41 FA 2008 provides that if HMRC think it right because of special circumstances they may reduce a penalty.

29. Paragraph 17(1) of Schedule 41 FA 2008 provides that a person issued with a penalty may appeal against the decision that a penalty is payable. Paragraph 17(2) of Schedule 41 FA 2008 provides that a person issued with a penalty may appeal the amount of the penalty.

30. Paragraph 19 of Schedule 41 FA 2008 provides:

"(1) On an appeal under paragraph 17(1) the tribunal may affirm or cancel HMRC's decision.

(2) On an appeal under paragraph 17(2) the tribunal may–

(a) affirm HMRC's decision, or

(b) substitute for HMRC's decision another decision that HMRC had power to make.

(3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 14–

(a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or

(b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 14 was flawed.

(4) In sub-paragraph (3)(b) *"flawed"* means flawed when considered in the light of the principles applicable in proceedings for judicial review."

31. Paragraph 20 of Schedule 41 FA 2008 provides:

"(1) Liability to a penalty under any of paragraphs 1, 2, 3(1) and 4 does not arise in relation to an act or failure which is not deliberate if P satisfies HMRC or (on an appeal notified to the tribunal) the tribunal that there is a reasonable excuse for the act or failure.

(2) For the purposes of sub-paragraph (1)–

(a) an insufficiency of funds is not a reasonable excuse unless attributable to events outside P's control,

(b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the relevant act or failure, and

(c) where P had a reasonable excuse for the relevant act or failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the relevant act or failure is remedied without unreasonable delay after the excuse ceased."

DISCUSSION AND DECISION

32. The Appellant does not dispute that he was liable to the HICBC or that he failed to notify that liability to HMRC. However, the Appellant submits that in circumstances where he was unaware of the change in the law in relation to the HICBC, he ought not to be liable to a penalty. That amounts to arguing that his ignorance of the law (for he says he did not see any of the media campaign and did not receive the letter HMRC claims to have sent to him in August 2013) gives rise to a reasonable excuse. We are of the view that ignorance of the law cannot here constitute a reasonable excuse. We agree with and endorse the observations and approach of Judge Scott at paragraphs 29-38 of *Lau v HMRC* [2018] UKFTT 230 (TC).

33. The Appellant also submitted that the imposition of a penalty was "unprofessional and unfair". However, if a penalty is lawfully imposed (which we find the penalty in this instance was), we do not have the power to discharge or adjust it on the basis of a perceived unfairness (see *HMRC v HOK Ltd* [2012] UKUT 363 (TCC)).

34. We did give some consideration to whether the Appellant might have a had a reasonable excuse if, as he claimed in correspondence with HMRC, he was at all material times unaware of the fact that his partner was claiming Child Benefit. However, the Appellant (who did not attend to give evidence before us) did not satisfy us as a matter fact that he was (and at all material times remained) unaware that his partner was claiming Child Benefit.

35. No challenge was made by the Appellant in relation to the amount of the penalties (beyond saying that they bore no resemblance to the Bank of England interest rates, which is not a relevant consideration) but, for the sake of completeness, we record that we are satisfied that the penalties were issued in the correct amounts. Further, we conclude that HMRC's view that there were no special circumstances justifying a reduction in the penalty amount cannot be said to be flawed in any way.

36. This appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

37. 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.

DAVID BEDENHAM
TRIBUNAL JUDGE

RELEASE DATE: 18 MARCH 2020