TC07737

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/2018/02126

BETWEEN

DAVID CALLEN **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

Mr David Callen, the Appellant

Mr Harry Robison, 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 2012/13, 2013/14, 2014/15 and 2015/16.

Relevant background and law

2. 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).

3. 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.

4. 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.

5. 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.

6. 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%.

7. 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.

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

9. 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

10. We find the following facts based on the bundle of documents before us.

11. Prior to 2012/13 Mr Callen was not required to notify his liability to tax to HMRC or to complete a self-assessment return ("**SATR**").

12. Following the introduction of HICBC, Mr Callen's spouse received child benefit in tax years 2012/13, 2013/14, 2014/15 and 2015/16.

13. In respect of the four tax years in question, Mr Callen:

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

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

(3) did not file a SATR.

14. Following initial correspondence, HMRC issued notices of assessment on 16 October 2017 for the HICBC based on Mr Callen's ANI and the child benefit received by his spouse as follows:

Tax Year Adjusted Net	Income	Child benefit received	HICBC due
2012/13	£55,279.08	£438.00	£277.00
2013/14	£55,593.66	£1,752.00	£963.00
2014/15	£57,185.83	£1,770.00	£1,257.00
2015/16	£59,029.40	£1,823.00	£1,640.00

15. Mr Callen accepted that he owed these amounts of HICBC and duly paid them.

16. Also on 16 October 2017, HMRC issued penalty assessments to Mr Callen for failing to notify his liability to income tax.

17. The penalties were calculated at a rate of 20% of the potential lost revenue for the first 3 tax years and at 10% for the final year, being judged by HMRC to be non-deliberate and reduced for "telling, helping and giving".

18. The penalties assessed were as follows:

Tax Year	Liability to Tax	FTN penalty structure	Penalty range	Penalty percentage	Penalty charged
2012/13	£277.00	Non-deliberate, prompted	20%-30%	20%	£45.40
2013/14	£963.00	Non-deliberate, prompted	20%-30%	20%	£192.60
2014/15	£1,257.00	Non-deliberate, prompted	20%-30%	20%	£251.40
2015/16	£1,640.00	Non-deliberate, Prompted	10%-30%	10%	£164.00

19. Mr Callen received the penalty assessment and replied to HMRC to make an appeal on 3 November 2017 against the penalties.

20. HMRC responded on 29 November 2017 to Mr Callen's appeal explaining that they did not believe he had a reasonable excuse. The letter therefore upheld the penalties.

21. Mr Callen requested a further review on 22 December 2017.

22. HMRC provided its review of the matter on 9 February 2018 upholding the penalties on the grounds that Mr Callen did not have a reasonable excuse and there were no special circumstances.

23. Mr Callen appealed to the Tribunal on 25 March 2018.

PRELIMINARY ISSUE

24. Mr Callen's appeal to the Tribunal was made approximately two weeks late. It was explained in the notice of appeal that Mr Callen had been away on annual leave when the review response arrived and had since been working away from home and unable to speak to the HMRC team on the telephone because he had been unavailable during the day.

25. HMRC did not object to the late appeal.

26. Given the relatively short delay, the explanation given and the fact that HMRC did not object, we considered that it was in the interests of justice to allow the late appeal.

PARTIES ARGUMENTS

Appellant's contentions

27. The appellant contended that the penalties should be waived because:

(1) When he was originally notified of the possibility of the HICBC applying to him he considered his income and concluded that it did not apply to him because the information provided by HMRC at that time was sufficient to make it clear that his company car and fuel benefits had to be taken into account in calculating his ANI, specifically:

(a) The letter sent to him contained a web link that did not explain that car benefits should be included in the calculation of income; and

(b) He provided the notification to HMRC at the time in response to that letter, stating that he was not liable to the HICBC but received nothing back from HMRC

(2) He was not reminded of the HICBC between the original letter in August 2013 and the opening of this investigation in September 2017, which is inconsistent with HMRC's approach of reminders since he has registered for self-assessment;

(3) The HICBC threshold has not adjusted with inflation;

(4) The HICBC is an unfair tax and should be based on the household income rather than the income of one earner; and

(5) HMRC should review how elements outside of PAYE are communicated to taxpayers.

HMRC's contentions

28. 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 Callen 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 Callen 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 penalties for tax years 2012/13 to 2014/15 have been charged at a rate of 20%, and 10% for the 2015/16 tax year. This represents full mitigation for the Appellants quality of disclosure, when prompted;

(8) The online calculator was available from 30 October 2012 and had several updates in 2012 and 2013 as can be seen from the extract from the government's web archives;

(9) The online calculator that was available at the time (again available on the web-archive) did make it clear that the benefits received in employment had to be taken into account in calculating a person's ANI;

(10) 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; and

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

DISCUSSION

29. We considered the contentions put forward by Mr Callen and HMRC and the bundle of documents put together by HMRC, which included the notice of assessment of the penalties issued to Mr Callen.

30. 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 Callen had accepted that the assessments raised were appropriate and represented the income tax for which he was liable.

31. 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 Callen'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.

32. 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, save for the penalty in respect of the 2012/13 year, where HMRC have incorrectly stated throughout that the penalty of 20% was £45.40, whereas the correct sum is £55.40; and

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

33. We reviewed the web archive for the HICBC calculator and found that the calculator was available from 30 October 2012 and was still available at the time Mr Callen received his letter from HMRC in August 2013. The web archive records a version of the calculator in June and September 2013. They are slightly different:

(1) The one dated 27 June 2013 has, on the opening page, a link to an additional page that explains how to calculate ANI. The first step on that page is to add up taxable income, which is stated to include income from employment "including any company benefits"

(2) The one dated 19 September 2013 does not contain that link on the opening page, but once you have opened the calculator, the first page includes instructions on how to calculate income details including specific reference to including taxable benefits "like a company car".

34. Mr Callen had not provided any evidence to support his contention that the information he had looked at on the HICBC had failed to mention company benefits. We therefore find that, on the balance of probabilities, the information available to Mr Callen at the time would have been enough to make it clear to him that his car benefits needed to be taken into account.

35. We find that Mr Callen did not have a reasonable excuse for his failure to notify, in particular noting that:

(1) ignorance of the law in this case is not a reasonable excuse; and

(2) although Mr Callen did make an attempt to assess his position with regards to the HICBC, he made a mistake on whether the car and fuel benefits should be included in the calculation and a mistake as to the law is also not a reasonable excuse.

36. There is nothing exceptional in Mr Callen'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.

37. 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, whether the threshold should increase in line with inflation and 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

38. For the reasons given above, we uphold the penalties assessed in respect of the 2012/13 (with the addition of £10 for the incorrect calculation made by HMRC), 2013/14, 2014/15 and 2015/16 tax years and refuse Mr Callen's appeal.

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.

ABIGAIL MCREGOR

TRIBUNAL JUDGE

RELEASE DATE: 12 JUNE 2020