[2019] UKUT 0202 (TCC)

Appeal number: UT/2018/0068

INCOME TAX – high income child benefit charge – penalties for failure to notify – correct approach to quantifying potential lost revenue – appeal allowed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS — **Appellants**

- and -

JAMES ROBERTSON — **Respondent**

TRIBUNAL: JUDGE THOMAS SCOTT
JUDGE KEVIN POOLE

Sitting in public at The Royal Courts of Justice, Strand, London WC2 on 22 May 2019

David Yates QC, instructed by HMRC Solicitor's Office and Legal Services, for the Appellants

The Respondent did not appear and was not represented

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DECISION

Introduction

1. This is the decision on the appeal by HMRC against the decision of the First-tier Tribunal ("FTT") in *James Robertson v Revenue & Customs Commissioners.* The FTT's decision ("the Decision") is published at [2018] UKFTT 158 (TC).

2. The Decision concerned penalties issued by HMRC to Mr Robertson in respect of his failure to notify his liability to tax as a result of his being liable to the High Income Child Benefit Charge ("HICBC").

3. The penalties totalled £528 and were charged for the three years 2012-13, 2013-14 and 2014-15.

The issue

4. Although the FTT chose to comment on a number of issues in the Decision, the central issue in this appeal is the meaning of "potential lost revenue" in the applicable penalty legislation.

Relevant background

5. The legislation introducing HICBC came into effect on 7 January 2013. Prior to that date Mr Robertson was not required to notify his liability to tax to HMRC or to complete a self-assessment return ("SATR"). His income was taxed wholly under PAYE. Following the introduction of HICBC, because Mr Robertson's spouse continued to claim child benefit, Mr Robertson became liable to HICBC. The legislation imposed a requirement on him in that situation to notify his liability to tax.

6. Mr Robertson was not issued with any notice to file a tax return, and filed no SATR, for any of the three years in question.

7. Following considerable correspondence, HMRC issued notices of penalty assessments to Mr Robertson on 12 April 2017. The penalties were calculated at a rate of 20% of the potential lost revenue, being judged by HMRC to be non-deliberate and reduced for "telling, helping and giving". HMRC informed us at the hearing that they now accept that the penalties should be calculated at a rate of 10%, and we decide this appeal on that basis.

8. On 12 April 2017 HMRC also sent Mr Robertson three discovery assessments under section 29 Taxes Management Act 1970 ("TMA") for the unpaid HICBC for the three relevant years.

9. Mr Robertson appealed against the penalty assessments. He did not appeal against the discovery assessments.

Relevant legislation

10. We set out below the relevant provisions dealing with HICBC, the obligation to notify, and penalties.

11. The Finance Act 2012 ("FA 2012") inserted the rules regarding HICBC into the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA"). The charge took effect from the tax year 2012-13 in relation to child benefit amounts received in a week beginning after 6 January 2013. The relevant provisions are as follows:

> *"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.
>
> …
>
> *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."

12. FA 2012 also amended the provisions requiring notification of chargeability by the addition of a new section 7(3)(c) to the TMA as follows:

> *"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."

13. We note that in the Decision, the version of section 7(1) TMA which is set out at [55] is incorrect and was not that applicable to the periods in question.

14. In Schedule 41 to Finance Act 2008 ("FA 2008") the provisions regarding penalties which are relevant to this appeal are as follows:

"*Failure to notify etc*

A penalty is payable by a person (P) where P fails to comply with an obligation specified in the Table below (a "relevant obligation").

Tax to which obligation relates	*Obligation*
Income tax and capital gains tax	Obligation under section 7 of TMA 1970 (obligation to give notice of liability to income tax or capital gains tax).

…

6D

Paragraphs 7 to 11 define "potential lost revenue".

Potential lost revenue

7

(1) "The potential lost revenue" in respect of a failure to comply with a relevant obligation is as follows.

(2) In the case of a relevant obligation relating to income tax or capital gains tax and a tax year (not falling within sub-paragraph (1A)), the potential lost revenue is so much of any income tax or capital gains tax to which P is liable in respect of the tax year as by reason of the failure is unpaid on 31 January following the tax year.

…

11

(1) In calculating potential lost revenue in respect of a relevant act or failure on the part of P no account is to be taken of the fact that a potential loss of revenue from P is or may be balanced by a potential over-payment by another person (except to the extent that an

enactment requires or permits a person's tax liability to be adjusted by reference to P's).

(2) In this Schedule "a relevant act or failure" means—

(a) a failure to comply with a relevant obligation…

5 …

16

(1) Where P becomes liable for a penalty under any of paragraphs 1 to 4 HMRC shall—

(a) assess the penalty,

10 (b) notify P, and

(c) state in the notice the period in respect of which the penalty is assessed.

(2) A penalty under any of paragraphs 1 to 4 must be paid before the end of the period of 30 days beginning with the day on which
15 notification of the penalty is issued.

(3) An assessment—

(a) shall be treated for procedural purposes in the same way as an assessment to tax (except in respect of a matter expressly provided for by this Act),

20 (b) may be enforced as if it were an assessment to tax, and

(c) may be combined with an assessment to tax.

(4) An assessment of a penalty under any of paragraphs 1 to 4 must be made before the end of the period of 12 months beginning with—

(a) the end of the appeal period for the assessment of tax unpaid by
25 reason of the relevant act or failure in respect of which the penalty is imposed, or

(b) if there is no such assessment, the date on which the amount of tax unpaid by reason of the relevant act or failure is ascertained.

…

30 17

(1) P may appeal against a decision of HMRC that a penalty is payable by P.

(2) P may appeal against a decision of HMRC as to the amount of a penalty payable by P.

35 …

19

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

The FTT's decision

15. The FTT reached the following conclusions, references being to paragraphs of the Decision:

(1) Mr Robertson failed in his obligation to notify liability, and as a result became liable to a penalty under paragraph 1 of Schedule 41: [61] to [66].

(2) The penalty is a percentage of potential lost revenue ("PLR"). PLR is defined by paragraph 7 of Schedule 41 as so much of the income tax to which the taxpayer is liable in respect of a tax year as "by reason of the failure" to notify is unpaid on 31 January in the year following that tax year: [67] to [68].

(3) The FTT's "first thought" was that the failure to notify in this case did result in the tax being unpaid: [75]. However, it then rejected that conclusion, stating as follows:

> "76. The contrary argument in this s 29 TMA assessment case would be that the difference in the due and payable date makes a difference. Whereas with a return and self-assessment it is meaningful to say that tax with a due and payable date of 31 January is unpaid on that date because of the failure, it cannot be said that tax which could only become due and payable much later than 31 January can meaningfully be described as unpaid on that date in any circumstances.
>
> 77. The wording of paragraph 7(1) Schedule 41 FA 2008 does not help to resolve this issue. But we can find nothing in eg the Explanatory Notes for Schedule 41 or the documents published during the consultation on HMRC Powers in 2007 and 2008 to suggest that any change in the law was contemplated in this area.
>
> 78. We have therefore considered paragraph 7(1)'s immediate predecessor, s 7(8) TMA (as inserted by substitution by paragraph 1 Schedule 19 FA 1994 with effect for the introduction in 1996 of self-assessment) to see if an archaeological exercise throws any light on the matter. That subsection says:
>
> "If any person, for any year of assessment, fails to comply with subsection (1) above, he shall be liable to a penalty not exceeding the amount of the tax—
>
> (a) in which he is assessed under section 9 or 29 of this Act in respect of that year, and
>
> (b) which is not paid on or before the 31st January next following that year."
>
> 79. This seems to us to be much clearer than paragraph 7. It caters for both the self-assessment case (a s 9 assessment) and an assessment which is not a self-assessment, although it is limited to a s 29 TMA assessment. The "PLR" in this previous enactment is either the tax shown on a self-assessment or an HMRC assessment under s 29 actually made for the year which is unpaid before 1 February in the later year, irrespective of the due date.
>
> 80. In this case then we accept that the PLR is the tax on the s 29 assessment, tax which was unpaid on 31 January in each of the later years. We reject the contrary argument set out in §76 as it would

irrationally discriminate between cases where a notice to file was give and one where a s 29 TMA assessment was made instead.

81. We would however add that where neither was done there can be no penalty for failure to notify based on a theoretical calculation, nor in an case where an assessment which is not a self-assessment and is not made under s 29 TMA is made.

82. Where there is what purports to be a s29 assessment, it must actually be a s 29 assessment which charges tax which becomes due and payable."

(4) The FTT then considered whether the assessments raised by HMRC were valid under section 29 TMA. It concluded that they were not, because the only relevant part of section 29 which could apply refers to a discovery by HMRC "that any income which ought to have been assessed to income tax [has] not been assessed", and HICBC was not a tax on "income". There had therefore been no valid assessment: [83] to [91].

(5) The FTT then set out its conclusions as follows:

"92. The conclusions we draw then are that

(1) in case of failure to notify within paragraph 1 Schedule 41, the PLR is the tax shown on any self-assessment actually made or on any s 29 TMA discovery assessment made on the taxpayer.

(2) in this case there was neither a self-assessment (because no notice to file was given) nor a s 29 TMA assessment (as the HICBC is not income, a requirement of s 29(1) TMA).

(3) therefore there is no PLR within the terms of paragraph 7

(4) there can be no penalties."

(6) Having cancelled the penalties on the basis of these conclusions, the FTT made a number of further pronouncements in relation to the calculation of the penalty; the likelihood of any discovery assessment being invalid because it was stale; reasonable excuse; special circumstances, and the related interest charge: [94] to [100].

Potential lost revenue

16. The first issue which we must determine is whether the FTT was correct in concluding that the PLR is the tax shown in an assessment (whether an SATR or a section 29 assessment). If it was wrong on that issue, then the remainder of its reasoning and its conclusion that the penalties were nil fall away. In particular, it would then be unnecessary to determine the validity of the section 29 assessments. We therefore consider this issue first.

HMRC's submissions

17. Mr Yates made the following submissions for HMRC:

(1) The FTT fell into error in believing that HMRC had to validly assess Mr Robertson in order for PLR to exist.

(2) The FTT appears to have assumed that without such an assessment there was no income tax for which Mr Robertson was "liable" which remained unpaid by the January following the relevant tax year. This wrongly confused the system of enforcement by which tax debts become enforceable with the charging provisions which give rise to the liability in the first instance.

(3) The distinction between liability and assessment is long-standing and is set out clearly in *Whitney v Commissioners of Inland Revenue* [1926] A.C. 37. It was recently recognised by the Supreme Court in *R(Derry) v Revenue & Customs Commissioners* [2019] UKSC 19.

(4) The only question that the FTT ought to have asked was whether Mr Robertson was *liable* for HICBC for the years in question. The answer was obviously "yes".

(5) The FTT impermissibly sought to interpret paragraph 7 of Schedule 41 by reference to predecessor legislation. That was wrong for two reasons. First, paragraph 7 is not ambiguous. Second, Schedule 41 did not purport to be consolidating legislation, but rather was intended to regularise the penalty rules across a wide range of taxes.

(6) Paragraph 16(4)(b) of Schedule 41 makes it clear that a penalty can still be valid even where there has been no assessment.

(7) In a case decided after the Decision, a differently constituted FTT reached the conclusion on this issue put forward by HMRC: *Lau v Revenue & Customs Commissioners* [2018] UKFTT 230 (TC).

Discussion

18. Paragraph 7 of Schedule 41 defines PLR as "so much of any income tax…to which P is *liable* in respect of the tax year as by reason of the failure to notify is unpaid on 31 January following the tax year" (emphasis added). At paragraph [75] of the Decision the FTT stated as follows:

> "It is of course obvious that the tax payable as a result of the assessment was unpaid on 31 January in each of the later years concerned."

19. Having made this determination, it is clear in our view that the FTT should then have concluded that the PLR had been correctly calculated. In persuading itself instead that PLR was limited to and determined by the tax shown in an assessment, the FTT fell into error.

20. We agree with Mr Yates that the distinction between liability and assessment is well established. As Lord Dunedin stated in the House of Lords decision in *Whitney*, at 52:

> "…Now, there are three stages in the imposition of a tax: there is the declaration of liability, that is the part of the statute which determines

> what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend on assessment. That, ex hypothesi, has already been fixed. But assessment particularizes the exact sum which a person liable has to pay. Lastly, come the methods of recovery, if the person taxed does not voluntarily pay."

21. In commenting on *Whitney*, Lord Carnwath in *Derry* stated as follows, at 35:

> "While it may be true, as Henderson LJ said, that modern tax legislation in general is much more complex than at the time of Lord Dunedin's classic statement, the purpose of the tax law rewrite was to restore a measure of simplicity and coherence to the principal tax statutes. In any event, one does not need high judicial authority to make the obvious point that the first step in the imposition of a tax is to establish (in Lord Dunedin's words) "what persons in respect of what property are liable"."

22. In this case, Mr Robertson had not appealed against the discovery assessments, but the FTT nevertheless considered their validity. Ironically, section 29 assessments sharply illustrate the distinction between a liability to tax and its assessment. It is not unusual in a discovery case for the *liability* to tax to be agreed, with the dispute being confined to whether HMRC can validly *assess* the taxpayer for that liability outside the normal time limits.

23. We also agree with Mr Yates that, for the reasons he gives, the FTT erred in finding support for its conclusion by referring to predecessor legislation. The relevant passages of the Decision appear to be *per incuriam*, no arguments having been heard on the issue, with the FTT having decided to consider the predecessor legislation "to see if an archaeological exercise throws any light on the matter": [78].

24. We consider that paragraph 7 is clear on its wording. However, in so far as there is any room for doubt, paragraph 16 of Schedule 41, not referred to by the FTT in reaching its decision, makes it clear that PLR does not depend on an assessment. As set out at [14] above, paragraph 16(4) deals with the time limits for an assessment of a penalty in two situations; where there has been a tax assessment and (in paragraph 16(4)(b)) where there has not.

25. In *Lau*, the FTT (Judge Anne Scott) set out paragraph 16 and then stated as follows (so far as relevant) at paragraph 23:

> "23. It is clear from the reading thereof:
>
> (a) that liability occurs in the first instance and an assessment would follow on from that; and
>
> (b) when establishing time limits, Parliament has envisaged two possible scenarios being one where an assessment has been raised and one where there is no such assessment.
>
> …
>
> 25. If the arguments of Judge Thomas in *Robertson v HMRC* were to be adopted I would find that there was no valid Section 29 TMA

assessment and there was no PLR within the terms of paragraph 7 and accordingly no penalty.

26. I do not agree with much of the reasoning in that decision and I am not bound by it. I do not intend to distinguish every argument. However, specifically, I do not accept the bland assertion at paragraph 80 that "we accept that the PLR is the tax on the s.29 assessment" or at paragraph 92 that the PLR is the tax shown on any assessment. I observe in passing that PLR is "potential" lost revenue and not quantified lost revenue.

26. 27. In quoting paragraphs 7 and 16 of Schedule 41 I have highlighted in bold the word "liable". What is the significance of that? Lord Dunedin at paragraph 52 in *Whitney v Commissioners of Inland Revenue* said: -

"63. … A statute is designed to be workable, and the interpretation thereof by a Court should be to secure that object, unless crucial omission or clear direction makes that end unattainable. Now, there are three stages in the imposition of a tax: there is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend on assessment. That, ex hypothesi, has already been fixed. But assessment particularises the exact sum which a person liable has to pay. Lastly, come the methods of recovery, if the person taxed does not voluntarily pay …".

Not only am I bound by that, but like Judge Gammie in *Bloomsbury Verlag GmBH v HMRC,* I entirely agree."

27. We consider that the FTT in *Lau* adopted the correct approach to the calculation of PLR. In this appeal the FTT made an error of law.

Other issues

28. That conclusion is sufficient to dispose of the appeal in HMRC's favour. 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 recognise that there are respectable arguments on both sides, but the issue should be fully considered and determined when it is dispositive to the case.

29. We make no comment on the FTT's musings on whether the discovery assessments if otherwise valid were "stale".

30. We agree with the FTT's conclusion (at [98]) that Mr Robertson did not have a reasonable excuse in relation to the penalties, and its conclusion (at [99]) that HMRC's decision that "special circumstances" did not exist was not unreasonable.

Disposition

31. The appeal is allowed, and the penalties are upheld in the amount sought by HMRC, calculated at 10% of the PLR.

32. Mr Yates informed us that in all the circumstances HMRC did not intend if they were successful in the appeal to make any application for costs, and we consider that they were right to reach this decision.

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JUDGE THOMAS SCOTT **JUDGE KEVIN POOLE**

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RELEASE DATE: 2 July 2019