[2017] UKFTT 11 (TC)

TC05577

Appeal number: TC/2016/03013

INCOME TAX – High income child benefit charge – whether discovery assessment valid – yes, appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Mrs GAIMIN NONYANE **Appellant**

- and -

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

TRIBUNAL: JUDGE ABIGAIL MCGREGOR

Sitting in public at Fox Court, London on 7 November 2016

The Appellant did not attend and was not represented

Neil Nagle, presenting officer for HM Revenue and Customs

DECISION

Introduction

1. The appeal is against a discovery assessment, issued on 2 November 2015, under section 29 of the Taxes Management Act 1970 (TMA 1970) in respect of the year ended 5 April 2014 in the amount of £1055, representing the high income child benefit charge accruing for that year.

2. The appellant, Mrs Gaimin Nonyane, did not attend and was not represented at the hearing. The Tribunal was notified on the morning of the hearing that she had emailed explaining that she was unable to attend due to a family illness and asking to be kept informed of the next developments. Since this did not appear to be a request for the hearing to be postponed and the Tribunal had before it her notice of appeal and other supporting documents, I was therefore satisfied that it was in the interests of justice to proceed with the hearing.

Evidence

3. Mrs Nonyane had submitted:

(1) a notice of appeal; and

(2) a letter supporting her appeal which set out her arguments.

4. HMRC had submitted a bundle containing the exchange of letters between the appellant and HMRC.

Law

5. HMRC have the power to raise a discovery assessment under TMA 1970, s 29, which provides as follows (to the extent relevant):

> (1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment—
>
> > (*a*) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or
> >
> > (*b*) that an assessment to tax is or has become insufficient, or
> >
> > (*c*) that any relief which has been given is or has become excessive,
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> the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.

(2) Where—

(a) the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, and

(b) the situation mentioned in subsection (1) above is attributable to an error or mistake in the return as to the basis on which his liability ought to have been computed,

the taxpayer shall not be assessed under that subsection in respect of the year of assessment there mentioned if the return was in fact made on the basis or in accordance with the practice generally prevailing at the time when it was made.

(3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above—

(a) in respect of the year of assessment mentioned in that subsection; and

(b) in the same capacity as that in which he made and delivered the return,

unless one of the two conditions mentioned below is fulfilled.

6. The time limits for making such an assessment are set out in TMA 1970, s 34, to the extent relevant:

(1) Subject to the following provisions of this Act, and to any other provisions of the Taxes Acts allowing a longer period in any particular class of case, an assessment to income tax or capital gains tax may be made at any time not more than 4 years after the end of the year of assessment to which it relates.

7. The High Income Child Benefit Charge (HICBC) arises under section 681B of the Income Tax (Earnings and Pensions) Act 2003 (ITEPA 2003), which provides as follows:

(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.

8. The HICBC came into effect from 7 January 2013, under paragraph 7 of schedule 1 to Finance Act 2012.

9. Adjusted net income is defined, under ITEPA 2003, s 681H, by reference to section 58 of the Income Tax Act 2007 (ITA 2007), which provides that:

(1) For the purposes of Chapters 2 and 3, an individual's adjusted net income for a tax year is calculated as follows.

Step 1 Take the amount of the individual's net income for the tax year.

Step 2 If in the tax year the individual makes, or is treated under section 426 as making, a gift that is a qualifying donation for the purposes of Chapter 2 of Part 8 (gift aid) deduct the grossed up amount of the gift.

Step 3 If the individual is given relief in accordance with section 192 of FA 2004 (relief at source) in respect of any contribution paid in the tax year under a pension scheme, deduct the gross amount of the contribution.

Step 4 Add back any relief under section 457 or 458 (payments to trade unions or police organisations) that was deducted in calculating the individual's net income for the tax year.

The result is the individual's adjusted net income for the tax year.

Facts

10. The following facts are not in dispute:

(1) Mrs Nonyane earned over £69,000 in the tax year 2013-14;

(2) Mrs Nonyane claimed and received child benefit in respect of one child for the whole of the tax year 2013-14, amounting to £1055.60;

(3) Mrs Nonyane did not submit a tax return in relation to tax year 2013-14;

(4) HMRC did not issue Mrs Nonyane with a tax return in respect of tax year 2013-14;

(5) HMRC issued a letter to Mrs Nonyane dated 17 September 2015 which:

(a) stated that Mrs Nonyane was liable to pay a charge of £1055, based on a whole year of receiving child benefit for one child;

(b) gave a month (until 19 October 2015) for Mrs Nonyane to respond to the letter; and

(c) confirmed that if she did not contact HMRC by 19 October 2015 it would raise an assessment for £1055;

(6) Following a phone call between HMRC and Mrs Nonyane on 2 October 2015, HMRC issued a letter stating that it would shortly be issuing an assessment for £1055 for the tax year 2013-14;

(7) HMRC issued a notice of assessment in the amount of £1055 for the tax year 2013-14 on 2 November 2015;

(8) Mrs Nonyane wrote a letter of appeal, dated 11 December 2014 but assumed to have been written on 11 December 2015 (and received by HMRC on 17 December 2014), against the assessment;

(9) HMRC responded in a letter dated 11 February 2016, rejecting her appeal on the basis that none of Mrs Nonyane's grounds of appeal were valid;

(10) Mrs Nonyane then requested a review of the decision, in a letter dated 15 February 2016;

(11) HMRC replied, in a letter dated 19 April 2016, that they were unable to provide a review because the initial appeal had been rejected on the grounds that the appeal had been invalid and that the only way to continue the dispute was by notifying an appeal to the Tribunal; and

(12) Mrs Nonyane appealed to the Tribunal on 20 May 2016.

Parties arguments

Mrs Nonyane's arguments

11. Mrs Nonyane submitted, in her notice of appeal and covering letter, that HMRC should only collect the HICBC from the date that HMRC notified her of the change in law, which was in October 2015, on the grounds that:

(1) she was not aware of the change to the child benefit rules that came in with effect from 7 January 2013 because she had not received any notification from HMRC and had not seen or heard any of the public advertising from HMRC because she did not listen to the radio or watch television and had not visited places where billboard advertising had been placed;

(2) HMRC was under an obligation to notify all taxpayers who would or could be directly affected by a change in law and, instead, it chose to notify only those who had income in excess of £50,000 in the tax year 2011-12, which happened not to include her and therefore put her at an unfair disadvantage;

(3) HMRC's reliance on using advertising campaigns on the television, radio, social media and public billboards is an inappropriate way to inform people who might be affected by a change in law, particularly when compared with those who were sent letters;

(4) if she had been aware of the change, then she would have opted out of receiving child benefit.

HMRC's arguments

12. HMRC submitted arguments on two matters:

(1) the validity of the discovery assessment; and

(2) a response to Mrs Nonyane's arguments on the obligation to notify taxpayers of law changes.

13. HMRC submitted that the discovery assessment was valid because:

(1) the officer had made a discovery that income that ought to have been assessed had not been assessed, therefore meeting the requirements of TMA 1970, s 29(1);

(2) the discovery assessment had been made within the time limit set out in TMA 1970, s 34; and

(3) no other conditions applied to Mrs Nonyane because she had not submitted a tax return in relation to tax year 2013-14.

14. HMRC submitted detailed arguments in support of these contentions.

15. The HICBC applied, under ITEPA 2003, s 681B, for the whole of tax year 2013-14 to any person whose adjusted net income exceeded £50,000.

16. Mrs Nonyane's taxable income for that year exceeded £69,000 and therefore the HICBC was due in respect of the whole of the child benefit received, which amounted to £1055 and there was therefore an insufficiency of tax in the amount of £1055.

17. HMRC receives information, in bulk form, from the Child Benefit Office, which sets out who receives child benefit in a given year and how much they receive.

18. HMRC then uses its own records, including whether those taxpayers have registered for self-assessment, to undertake a risk assessment to establish whether that information suggests an insufficiency of tax.

19. HMRC submit that the risk assessment is the discovery for the purposes of TMA 1970, s 29 and that the officer then acted upon that discovery by sending Mrs Nonyane the letter, dated 17 September 2015, which alerted Mrs Nonyane to the insufficiency and requested further information before making an assessment;

20. The case of Charlton v HMRC [2012] UKFTT 770 (para 37) supports HMRC's case because it states that "discovering" does not require any new information of fact or law: "All that is required is that is has newly appeared to an officer, acting honestly and reasonably, that there is an insufficiency in an assessment."

21. The case of *Jonas v Bamford* [1973] STC 519 at 540 also supports HMRC's case:

> "…once the inspector comes to the conclusion that, on the facts which he has discovered, [the taxpayer] has additional income beyond that which he has so far declared to the Inspector, then the usual presumption of continuity will apply. The situation will be presumed to go on until there is some change in the situation, the onus of proof of which is clearly on the taxpayer."

22. HMRC issued the discovery assessment within the time limit set out in section TMA 1970, s 34, i.e. within 4 years of the end of the year of assessment, because the year of assessment ended on 5 April 2014 and the notice of assessment was issued on 2 November 2015;

23. The other conditions for issuing a discovery assessment in TMA 1970, s 29(2) and (3) do not apply to Mrs Nonyane because she did not submit a tax return for the tax year 2013-14, as supported by the statement of Judge Thomas in Murat Anik [2016] UKFTT 395 (TC):

> "In a case where the appellant has not made a return for a period there are no preconditions apart from the time limits to the making of the assessment."

24. On the arguments put forward by Mrs Nonyane relating to the obligation to inform taxpayers, HMRC submitted that:

(1) it issued over 1 million letters explaining the HICBC from November 2012 to taxpayers who had been in receipt of income in excess of £50,000 in the tax year 2010-11 (because that was the most recent year on which HMRC had figures);

(2) Mrs Nonyane had not received such a letter because she did not have income in that bracket at the relevant time;

(3) in addition to sending those letters, HMRC had published a calculator and information on its website and conducted advertising campaigns in mainstream media and on public billboards in relation to the introduction of HICBC; and

(4) ignorance of the law cannot be accepted as a reasonable excuse, relying on HMRC v Qualapharm [2016] UKFTT 100 (TC) in which Judge Mosedale stated, at paragraph 113, that:

> "Ignorance of the law cannot be a reasonable excuse as that would result the law in favouring persons who choose to remain in ignorance of the law over those who sought to know the law in order to obey it."

(5) the burden is on the taxpayer to check that her tax affairs are dealt with correctly.

Discussion and decision

25. As there is no dispute that Mrs Nonyane did not submit a tax return in relation to the tax year 2013-14 (see paragraph 11(3) above), I agree with HMRC's submission that the only pre-condition for the validity of the discovery assessment is that it is made within the time limits in TMA 1970, s 34.

26. I find that HMRC did make the assessment within the 4 year time limit and that it was based on a discovery made during the course of 2014 and 2015 arising from data provided by the Child Benefit Office.

27. I find that the HICBC rules applied to Mrs Nonyane during the tax year 2013-14 because she had adjusted net income in excess of £69,000 and received child benefit in relation to one child for the entirety of that tax year and Mrs Nonyane raised no arguments relating to the application of conditions A and B in ITEPA 2003, s 681B. I therefore find that there was an insufficiency of tax amounting to £1055.

28. I agree with HMRC's submissions that it is not obliged to notify all taxpayers of changes in the law.

29. The statements made by Judge Mosedale in *Qualapharm* in relation to reasonable excuse apply equally in this context. Ignorance of the law cannot provide an advantage to one taxpayer over another.

30. In *HMRC v Noor* [2013] UKUT 071, the Upper Tribunal concluded that the First-tier Tribunal does not have any general supervisory jurisdiction by way of judicial review (para 25). In the case of an appeal against a discovery assessment, the taxpayer's right of appeal is granted by TMA 1970, s 31(1)(d) and the Tribunal's powers are set out in TMA 1970, s 50. Under that section, if the Tribunal decides that the appellant has been overcharged by an assessment other than a self-assessment, the assessment shall be reduced accordingly, but otherwise the assessment shall stand good. If the taxpayer wishes to bring proceedings to challenge HMRC's decision making in relation to the notification of some but not other taxpayers of a change in law, the avenue for such proceedings is by way of judicial review, not an appeal against the assessment.

31. I therefore find that the discovery assessment was valid and that the appeal must be dismissed.

32. 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: 30 DECEMBER 2016