



[2020] UKFTT 0111 (TC)

TC07605

Income tax – high income child benefit charge – hearing of objection to granting permission to make late appeal to Tribunal – was appeal notified on time to HMRC? – yes – was a review offered to, or requested by, appellant? – no – s49D TMA 1970 applied - held: appeal was not notified to Tribunal late

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2019/03610

BETWEEN

WINFRIED KROEN

Appellant

-and-

**THE COMMISSIONERS FOR
HER MAJESTY’S REVENUE AND CUSTOMS**

Respondents

**TRIBUNAL: JUDGE ZACHARY CITRON
MR CHARLES BAKER**

Sitting in public at Taylor House London EC1 on 12 February 2020

We heard the Appellant in person and Mr J Gyasi, Litigator of HM Revenue and Customs’ Solicitor’s Office for the Respondents.

DECISION

1. The Tribunal decided that HMRC’s objection to Mr Kroen’s appeal, on grounds that the appeal had been notified to the Tribunal late, would be dismissed: the notification of Mr Kroen’s appeal to the Tribunal had not been late. The appeal can progress to substantive hearing and the Tribunal will issue directions to that effect on or around the date of this decision notice.

Findings of fact

2. On 8 January 2018 HMRC wrote to Mr Kroen regarding the high income child benefit charge (“HICBC”). In that letter HMRC said: “The following table shows the assessments you will receive shortly which have been made under Section 29 of the Taxes Management Act 1970”. There followed a table showing assessment amounts for the tax years 2014-15 and 2015-16. Although the letter said that penalties were also to be charged, we were informed by Mr Gyasi at the hearing that HMRC subsequently decided to withdraw the penalty assessments.

3. Mr Kroen responded in a letter dated 17 January 2018. At the end of that letter, he stated: “Due to the above points, I therefore do not agree or accept the decision or unclear course of

action the HMRC states either I or it should take and request a full complaint and appeal procedure and process be sent to me as soon as possible and be put in place regarding my case.”

4. The HICBC assessments, as described in HMRC’s 8 January letter, were sent with a letter to Mr Kroen from HMRC dated 24 January 2018. At the end of both notices of assessment, this was written:

“What to do if you disagree

If you disagree with this assessment, you can appeal. To do this, you need to write to us within 30 days of the date on this assessment, telling us why you think our decision was wrong. We will then contact you to try to settle the matter. If we cannot come to an agreement, we will write to you and tell you why. You can then either:

- have the matter reviewed by an HMRC officer who has not previously been involved in the case
- ask for an independent tribunal to decide the matter”

5. Mr Kroen wrote to HMRC on 2 February 2018, saying he was returning certain income tax forms because, in his words, “I am unsure what these are for as I am employed and have always paid my tax through my employer ... I believe these have been sent incorrectly so please amend your records accordingly ...”

6. On 16 February HMRC wrote to Mr Kroen in response to his letter of 17 January, including a form for him to fill out as to whether he agreed with the income figures originally sent to him by HMRC.

7. Mr Kroen responded on 25 February 2018. He said he was returning a “notice to pay” letter as he did not know what it was for, and that he did not think he was liable to any tax penalties.

8. HMRC responded on 27 March 2018, giving further information about HICBC and defending the raising of penalties.

9. Mr Kroen in turn responded on 3 April 2018, continuing to contest any liability to HICBC. At the end of the letter he said: “I have therefore asked for the appeals or complaints procedure from yourselves which I am still waiting to receive”.

10. HMRC responded on 23 April 2018. After thanking Mr Kroen for his 3 April letter, the letter said: “You are appealing against the [HICBC] assessments, issued under Section 29, Taxes Management Act 1970 for the following amount”. There was then a box showing the amounts assessed for the two tax years. It then said: “Your appeal is based on the following grounds”, which was followed by a number of bullet points. The letter then said: “Whilst I accept your appeal against the imposition of the penalties outlined above, I do not accept you have valid grounds to appeal”. The letter then summarised the background to HMRC’s enquiry. There was then a sub-heading, “Failure to Notify penalties”. Four paragraphs down from this, in the penultimate paragraph of the letter, this was written: “I will be grateful if you please withdraw your appeal or provide valid grounds within 30 days of this letter, by 21 May 2018”.

11. HMRC again wrote to Mr Kroen on 16 May 2018, saying that this was a response to his 2 February letter. This letter was signed by HMRC’s “Appeals and Complaints Team” (whereas all the other HMRC correspondence summarised here was sent by HMRC’s “Campaigns and Projects Team”). The letter went over HMRC’s position on HICBC and, towards the end, said this: “Please find attached a copy of our appeal response dated 23 April 2018. In this letter we decided that you do not have valid grounds to appeal, and offered you 30 days to withdraw your appeal or provide valid grounds. We would be grateful if you would do this by 21 May 2018”.

12. Mr Kroen responded to HMRC's 23 April and 16 May letters on 19 May 2018. He again defended his position on HICBC. He again said, at the end of the letter, "I have previously asked for the appeals or complaints procedure from yourselves which I am still waiting to receive".

13. HMRC responded to Mr Kroen's 19 May letter on 4 June 2018. It started, like their letter of 23 April, by stating that Mr Kroen had appealed against the assessments for the two tax years. It went through, and responded to, the points made by Mr Kroen. On his point about complaint and appeal procedure, the letter first gave a link to an online form for complaints. It then said:

"In regards to our appeal procedure, our letter dated 23 April 2018 explained to you that HMRC has considered your correspondence dated 3 April 2018 as an appeal.

The appeal period officially opened with our correspondence which was dated 24 January 2018, as explained within our correspondence, this period was then open for 30 days from 24 January 2018.

The appeal period would have finished on 23 February 2018, but as HMRC received correspondence, the appeal period was held open until taken on, in our correspondence dated 23 April 2018.

As mentioned above, [HMRC's] view of the matter is, you have written to us accepting our offer to provide further grounds for your appeal. You have still not provided no (sic) valid grounds.

What you can do if you disagree

If you want to appeal to an independent tribunal

You can notify your appeal to an independent tribunal who will decide whether they perceive the grounds put forward to be valid. If you want to notify your appeal to the tribunal, your request must reach the Tribunal Services within 30 days of the date shown on this letter, **4 July 2018**.

14. Mr Kroen responded to HMRC on 29 June 2018, reiterating his arguments. He said at the end of the letter that he had contacted the Tribunal in the previous week.

15. HMRC wrote back to Kroen on 11 July 2018, reiterating their arguments. At the end of the letter they noted that they had not received a notification from the Tribunal that Mr Kroen had notified his appeal to the Tribunal.

16. Mr Kroen notified his appeal to the Tribunal on 16 May 2019. In answer to the question on the Tribunal notification form, "Is the appeal in time?", Mr Kroen said "I am not sure". In answer to the next question – "Reason for late appeal" – he said: "I am unsure, as I am not getting accurate or detailed responses or information from the HMRC regarding the charges or money they are claiming I owe".

Reasons for the decision

17. The hearing was listed to hear an objection from HMRC to Mr Kroen's seeking permission to notify his appeal to the Tribunal late.

18. Such permission would only be required if Mr Kroen had notified his appeal to the Tribunal late.

19. Statutory references in what follows are to the Taxes Management Act 1970.

20. Section 49D sets out the conditions under which an appeal may be notified to the Tribunal.

21. Under sub-section 49D(1), a prerequisite is that notice of appeal have been given to HMRC.

22. It is clear from the correspondence described in our findings of fact, and was acknowledged by Mr Gyasi at the hearing, that HMRC regarded Mr Kroen as having given HMRC valid notice of appeal. We agree. As a legal matter, this conclusion is reached either by regarding Mr Kroen's letter of 2 February 2018, read in the context of his earlier letter of 17 January 2018, as satisfying the requirements of section 31A; or, alternatively, that Mr Kroen was not taken as notifying his appeal until his letter of 3 April 2018, but, under sub-section 49(2)(a), HMRC agreed to the late notice.

23. Sub-section 49D(1) is therefore satisfied. This means that Mr Kroen could notify the appeal to the Tribunal under sub-section 49D(2) – which does not impose a time limit – unless either of the scenarios in sub-section 49D(4) apply.

24. The first such scenario is that HMRC have given a notification of their view of the matter under section 49B. This can only have been the case if:

(1) Mr Kroen had notified HMRC in writing that he required HMRC to review the matter to which the appeal relates (see sub-section 49B(1));

(2) HMRC had notified Mr Kroen of their view of the matter within 30 days of receiving that notification; and

(3) HMRC had reviewed the matter in accordance with section 49E.

25. We find that the first of the requirements was not satisfied here. HMRC said, on raising the assessments on 24 January 2018, that if Mr Kroen appealed and the matter could not be settled, Mr Kroen could then have the matter reviewed by an HMRC officer who had not been involved in the matter. HMRC said no more about this in the ensuing correspondence and, in our view, Mr Kroen never requested it in his letters. He certainly argued his case and asked HMRC on several occasions about procedures for “appeals” and “complaints”; but he never requested that HMRC conduct a “review” of the matter. We suspect this was because he did not focus on the mention of a possibility of a review in the 24 January 2018 assessments – and because HMRC never mentioned the possibility of a “review” again, it never occurred to Mr Kroen to ask for one.

26. This is enough to demonstrate that the first scenario, in sub-section 49D(4)(a), was not the case here. We would add, though, that we find that the third requirement set out at [24] above is also not satisfied: HMRC did not in fact conduct a review the matter in dispute. They did set out their views in a number of letters, including the letter of 4 June 2018 – but neither that letter, nor any others from HMRC, indicate that they are the outcome of a process of review. We acknowledge that the nature and extent of the review are matters within HMRC's discretion: see sub-section 49E(2). But there must be a review of some kind; and that was not the case here. We suspect that is for the simple reason that HMRC never offered the kind of review previewed in the 24 January 2018 assessments; not did Mr Kroen ask for one.

27. The second of the scenarios set out in sub-section 49D(4)(b), is that HMRC have given a notification under section 49C in relation to the matter to which the appeal relates. This can only have been the case if HMRC had notified Mr Kroen of an offer to review the matter.

28. A review by an HMRC officer who had not been involved with the case was mentioned in the assessments of 24 January 2018 as an option that Mr Kroen would have if he appealed and the parties were unable to settle. This was not, in our view, an offer of a review. Rather, it was an indication that a review would be offered at a future date, if certain things were to happen (or not to happen). Following those assessments, Mr Kroen did indeed appeal; and the parties, despite further correspondence, were unable to settle; but HMRC never then sent an offer of a review. Rather, they sent a reiteration of their views, by the same “Campaigns and Projects” team that had conducted the previous correspondence, on 4 June 2018; this letter,

too, gave no offer of a review. The text at the end of that letter, informing Mr Kroen that he had 30 days to notify his appeal to the Tribunal, is the kind of text one would expect at the end of a statutory review letter by an HMRC officer who had not been involved in the matter; but, as we have already found, this was not such a letter.

29. Mr Gyasi submitted that HMRC's letter of 23 April 2018 was an offer of a review; we do not agree, as the letter simply reiterates HMRC's views and ends by asking Mr Kroen to withdraw his appeal or "provide valid grounds" by a certain date.

30. It follows that neither of the scenarios of sub-section 49D(4) were the case here; sub-section 49D(2) accordingly applied, such that there was therefore no timing requirement as to Mr Kroen's notification of his appeal to the Tribunal; and so the notification he gave to the Tribunal on 16 May 2019 was not late.

31. 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.

**ZACHARY CITRON
TRIBUNAL JUDGE**

RELEASE DATE: 24 FEBRUARY 2020