[2020] UKTT 189 (TC)

TC07675

Appeal number: TC/2018/00501

INCOME TAX – High Income Child Benefit Charge ("HICBC") – penalties for failure to notify chargeability – potential lost revenue – was tax unpaid* by reason of *failure to notify – reasonable excuse, special circumstances.

FIRST-TIER TRIBUNAL
TAX CHAMBER

JAMES FULLER	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Respondents**

TRIBUNAL: JUDGE CHARLES HELLIER

Sitting in public in Bedford on 16 January 2020 with later written submissions

The Appellant in person

Connor Fallon for the Respondents

DECISION

The Appeal

1. Mr Fuller appeals against penalties charged under Sch 41 Finance Act 2008 ("Sch 41") for his failure to notify HMRC in accordance with section 7 Taxes Management Act 1970 ("TMA") that he was chargeable to income tax in the years 2013/14, 2014/15 and 2015/15.[1]

2. The penalties arise in relation to the high income child benefit charge (the "HICBC") imposed by section 641B ITEPA[2].

3. To my mind these penalties raise the uncomfortable spectacle of one arm of HMRC penalising a taxpayer for not telling them that another arm of HMRC made a payment to him or his partner.

The Statutory Framework

4. By section 681B ITEPA (which was inserted by Finance Act 2012 with effect for child benefit payments made after 7 January 2013) a person is liable to a charge to income tax, the HICBC, for a tax year if:

> (1) his adjusted net income[3] for the year is greater than £50,000;
>
> (2) his partner's ("partner" is defined in section 681G) adjusted net income is less than his, and
>
> (3) he or his partner are entitled to child benefit.

5. Section 7 TMA provides that if a person who has not been sent a tax return is chargeable to income tax he must notify HMRC of that fact within 6 months after the end of the tax year. But if his income consists of PAYE income and he has no chargeable gains he is not required to notify his chargeability to income tax unless he is liable to the HICBC. In the relevant tax years, as I understood the position, Mr Fuller's income was all PAYE income and he had no chargeable gains, but he was liable to income tax under the HICBC. He did not notify HMRC in relation to any of the relevant years. As a result he failed to comply with section 7 in each of those years.

6. Paragraph 1 Sch 41 provides that a person is liable to a penalty if he fails to comply with section 7 TMA. Para 6 Sch 41 provides that in the case of a "domestic matter" (which this is) where the failure was neither deliberate or concealed (as HMRC accept), the penalty is 30% of the "potential lost revenue" (see [8] below); but paras 12 and 13

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[1] This appeal was heard on the same day as two other appeals with similar subject matter. Much of the material in this decision is, where relevant, repeated, suitably modified, in the decisions in those other appeals.

[2] Income Tax (Earning and Pensions) Act 2003

[3] 'adjusted net income' is specifically defined but the definition is not relevant to this appeal.

provide for a reduction in that percentage in the case of prompted disclosure (which this was) where a taxpayer gives HMRC help in quantifying the unpaid tax (as Mr Fuller did), but subject to a minimum penalty rate of 10% if HMRC became aware of the failure less than 12 months after the tax "first becomes unpaid by reason of the failure" (para 13(3)(a)) and 20% otherwise. HMRC gave Mr Fuller the full reduction to 10% for 2015/16, and a reduction to 20% for 2013/14 and 2014/15 (on the basis that for those earlier years they had become aware of the failure in about 2017 more than 12 months after the tax became due).

7. Paragraph 14 Sch 41 provides that HMRC may reduce a penalty because of special circumstances (and by paragraph 19 the tribunal may do so where HMRC's decision in this regard is flawed). Paragraph 20 provides that liability to a penalty does not arise if the taxpayer satisfies HMRC or the tribunal on an appeal that he had a reasonable excuse for the failure.

8. "Potential lost revenue" in relation to a failure is, so far as relevant to this appeal, defined by paragraph 7 Sch 41 as:

> "…so much of any income tax…to which [the taxpayer] is liable as by reason of the failure is unpaid on 31 January following the tax year"

Findings of fact

9. Mr Fuller's wife claimed to child benefit in respect of their first child from 21 May 2012, and in respect of their second child from 29 September 2014. Payments were made to her bank account.

10. In order to claim the benefit Mrs Fuller filled in a form headed "HM Revenue & Customs Child Benefit claim form". The form sought details of the claimant, her partner (including his or her national insurance number) and the child. The form in use before 2013 contained no reference to the HICBC; that in use after 2012 contained a warning of the charge if the applicant or her partner had income over £50,000 per annum and a further explanation of the charge in the notes. It explained that the person with the higher income must notify HMRC and pay the tax.

11. Mr Fallon says that leading up to the coming into force of the HICBC on 7 January 2013, HMRC promoted an extensive publicity campaign. He exhibited a number of press releases dating from December 2012. I accept these were issued, but I also accept that none of them came to Mr Fuller's attention directly or indirectly.

12. Mr Fallon notes that HMRC provided details of the charge and help with its calculation on its website and via a telephone helpline. I accept that it did, but unless Mr Fuller was aware of the possibility of the charge he had no reason to use these facilities. I find he was not aware of them.

13. In 2013 Mr Fuller's basic salary before commission was about £38,000. In 2014 it was about £40,000. Commission payments took him over the £50,000 threshold in both years.

14. Mr Fallon says that on 17 August 2013 HMRC wrote to Mr Fuller explaining the HICBC and explaining that if the conditions for the charge were satisfied he must “register for self-assessment” so that he could declare the child benefit "you received".

15. Mr Fallon told me that this letter was sent everyone in the £50,000 category. (I said that I doubted this is because I had no record of receiving such a letter. It seems more likely that it was intended to be sent everyone in that category who had received, or whose partner had received, child benefit and did not usually complete a tax return.) It seems to me that the information necessary to send this letter to the partner of a person receiving child benefit must have come from the form which the applicant sent to HMRC when claiming benefit.

16. Mr Fallon exhibited a printout of HMRC's computer records showing that this letter had been sent to Mr Fuller. Mr Fuller told me he had no recollection of receiving this letter although with some candour he said that since his annual salary at that time was less than £50,000 he would not have paid it much attention he had received it.

17. I was not persuaded that Mr Fuller did not receive HMRC's letter of 17 August 2013. He told me that he could not remember receiving it that if he had he would not have paid it much notice as his salary at the time was £38,000 per annum. I concluded that it was on balance more likely than not that he had received it but for that reason ignored it and forgotten about it.

18. 4¾ years after the start of the HICBC, and 3½ years after the end of the 2013/14 tax year, HMRC wrote to Mr Fuller on 19 October 2017 saying that their records indicated that the HICBC might apply to him and setting out "the amounts you are due to pay".

19. Mr Fuller responded promptly to this letter by telephoning HMRC. He did not find the process easy or smooth, being handed from person to person, but he accepted the tax liability and provided any necessary information.

20. Following a telephone call on 30 October 2017 HMRC wrote with assessments of his tax liability and of penalties for the failure to notify under section 7. Mr Fuller paid the tax (albeit with some difficulty) and appealed against the penalties.

The parties' arguments.

21. Mr Fuller says that it is unfair that the charge was allowed to accumulate unbeknown to him and for HMRC to delay for 4 years before raising the issue. He also questions the rate of the penalty when compared to that in two reported appeals.

22. Mr Fallon says that given that the Mr Fuller accepts the amount of the tax liability, and given that the rate of the penalty is the lowest permitted by the statute, the only issues are whether Mr Fuller had a reasonable excuse or whether the special circumstances provision applies. He says that Mr Fuller’s only excuse is that he did not know of the charge and that ignorance of the law is not a reasonable excuse; he says that there were no special circumstances.

Discussion.

23. It is to my mind extraordinary that HMRC, the body which pays and administers child benefit, should expect a taxpayer to notify them that he or she or their partner (whose details they have) has received a payment from them before sending the taxpayer a tax return. (I am not saying that it is extraordinary that the legislation requires a taxpayer to notify; rather that it is extraordinary that HMRC did not act promptly on information arising from their own conduct.)

24. That HMRC had all the information necessary to make an assessment is shown by the fact that they wrote to the taxpayer with that information on 19 October 2017 before making the assessments.

25. HMRC had the details of what they had paid, to whom they had paid it, who the recipient's partner was, and in the case of individuals whose income was subject PAYE details of the amount of that income as returned by their employer by May after the end of the tax year. The tax would have been payable on the following 31 January so they had had all that information five months before the end of the period in which notification had to be given under section 7 (being 6 months after the end of the tax year).

26. And yet a taxpayer is potentially penalised[4] for not letting HMRC know that he has chargeable income so that they can send him a tax return in which he can tell them what they already know.

27. If the making of assessments had been done in 2014 or even 2015 one might say that HMRC might reasonably be expected to need time to get their information systems organised before they sent out notices requiring returns to (or wrote to, or assessed) those potentially liable. But to delay the process to 2017 seems to me unfair. If letters could be sent in 2013 to those within the possible charge, why could not tax returns be sent?

28. Mr Fallon cites Nicholson *v Morris* 51 TC 95 in which Walton J said:

> "It is idle for any taxpayer to say to the Revenue, "hidden somewhere in your vaults are the right answers: go thou and dig them out of the vaults". That is not a duty on the Revenue."

29. That case concerned estimated assessments made on a barristers' clerk. On his appeal against the assessments the clerk had offered no evidence to the General Commissioners and said that the Revenue could calculate his income by taking his fixed percentage of the income which would have been on the tax returns of the barristers for whom he clerked. The General Commissions confirmed the assessments on the basis of the evidence before them which did not include the barristers' tax returns.

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[4] HMRC are *required* to assess any penalty by para 16: they have no choice if a penalty is due; but they had a choice as to whether to send a tax return to those potentially liable at an earlier date which could have avoided the penalties.

30. In the High Court, on the appeal against the Commissioners' decision, Walton J cited section 50(6) TMA which provided, on an appeal against an assessment, that if by evidence it appeared to the Commissioners that the taxpayer was overcharged they should reduce the assessment. That, he said, put the onus on the taxpayer to show that the assessments were wrong. It was the taxpayer who was in the position to provide chapter and verse for the right answer.

31. That quotation therefore relates to procedure on appeal. It does not relate to the expectation one might reasonably have of the actions of HMRC in relation to the information they possess.

32. However, this tribunal has, in the case of an appeal against a penalty under Sch 41, no jurisdiction to review the actions of HMRC. The issue before the tribunal is whether by reference to the statutory provisions and the facts as found by the tribunal the penalty is properly due. If under the terms of the statute a penalty is due there is nothing which permits the tribunal to say that if HMRC acted outrageously, unfairly or overly slowly, the penalty is not due or cannot be assessed. There is no provision which says that what is sauce for the goose is sauce for the gander.

33. There is no doubt Mr Fuller failed to notify in accordance with section 7. The penalty is therefore due unless the reasonable excuse or special circumstances provisions apply. The only issues before me are therefore:

(1) was the penalty correctly calculated?

(2) was there a reasonable excuse?

(3) should the penalty be reduced by reason of special circumstances?

(1) the calculation of the penalty

34. Two issues arise under this heading.

35. The <u>first issue</u> which arises under this heading is that raised by Mr Fuller in relation to the cases of *Robertson* and *Lau*. Mr Fallon queries the percentage rate of the charge because he says that in the case of *Robertson* the effective rate was 8.6%, and in the case of *Lau*, 3.5%, whereas in his case it was in effect 15.5%.

36. I fear that I was not able to arrive the same percentage rates from the reports of these cases.

37. In *HMRC v James Robertson* [2019] UKUT 202 (TCC) the Upper Tribunal said at [7] that HMRC accepted that the penalties should be calculated at the 10% rate, "and we decide the appeal on that basis".

38. In *David Lau v HMRC* [2018] UKFTT 230 (TC) the tax assessment was for £776 (see para [24]) and the penalty £155.20 ([4]). That was therefore a 20% penalty.

39. But the 10% minimum rate is that applicable where "HMRC become aware of the failure less than 12 months after the tax first becomes unpaid by reason f the failure|" or 20% where that is not the case. Now, the FTT in *Robertson)* said*:*

> "As to whether the minimum penalty here should be 10% the question is whether HMRC became aware of the failure less than 12 months after the time when the tax *first* becomes unpaid by reason of the failure. It is arguable that when the SA 252 [which is the equivalent of the letter of 17 August 2013 in this appeal] was issued HMRC must have been aware that the appellant earned more than £50,000 and that his wife received child benefit and had not stopped receiving it. That is how it seems the SA 252s were targeted. And that awareness arose within 12 months of the failure.

40. The FTT's decision was overturned on other grounds it seems to me that the acceptance of the 10% rate communicated by HMRC to the Upper Tribunal is evidence that HMRC accepted that in that case they must have been aware of the unpaid tax within 12 months of its becoming due and being unpaid. That suggests that they either were aware or should have been aware of it in Mr Fuller's case too.

41. I am unable to conclude from this that HMRC *were* so aware in Mr Fuller's case, and must therefore hold that, where used, the 20% minimum rate was correct, but I return to this issue in relation to the special circumstance provision.

42. The second issue is whether the "potential lost revenue" was the HICBC tax for which Mr Fuller was liable and which was unpaid at 31 January following the end of each relevant year (the amount of that tax being in this case the amount in the assessments made on Mr Fuller). If it was then the calculation was correctly made by reference to the rates of 10% and 20%.

43. At the hearing I became concerned about the proper construction of the words "by reason of the failure" in paragraph 7 (These words also appear in para 13(3)(a)(ii) which in effect trigger the 20% minimum penalty percentage rather than the 10% minimum if HMRC become aware of the failure more than 12 months "after the time when the tax becomes unpaid *by reason of* the failure"). . I gave directions for written submissions from the parties on questions in the directions. HMRC provided their submissions. In the directions I said:

> (1) [Paragraph 7] provides that the potential lost revenue (the amount on which any penalty is based) is so much of the taxpayer's tax liability for the relevant year as is unpaid on 31 January after the end of the year "*by reason of the failure"* to give the relevant notice (in this case notice under section 7 Taxes Management Act 1970).
>
> (2) How is "by reason of" to be construed? Do the words import a "but for" test? Does it have to be shown that if notice had been given the tax would have been paid? If there are two or more contributing factors to the non payment of tax is each a "reason" for the non payment, or does the section require the, or a, main reason to be found; or is the search for a proximate cause?

(3) The words of para 7(2) direct attention to the lack of payment, not the lack of liability to tax. Liability, of course, is not dependent upon assessment, but payment is in general dependent upon actual knowledge of liability, and knowledge of liability will in most circumstances be dependent upon assessment (whether under the self assessment procedure or under section 29 TMA). That directs attention to the reason(s) for the lack of any assessment.

(4) These questions arise in the context of the administration of child benefit.

(5) Pages 112-117 of the generic bundle indicated that a claim for child benefit was made by submitting a form to HMRC which included details of the claimant and his or her partner. It also appeared that the payment of the benefit was administered by HMRC. It thus seemed to be the case that HMRC had the information to ascertain whether a taxpayer could be liable to the HICBC for any year (assuming that a taxpayer's income was limited to that described in subsections (4) to (7) of section 7 TMA).

(6) If "by reason of" imports a "but for" test, did HMRC have to show that *if* notice had been given their systems would have ensured that the tax was timeously collected (by sending the taxpayer a return which gave rise to a self assessment, or making an assessment - thereby imparting knowledge of liability)? Given that it appeared that HMRC, as administrators of the benefit, had the information which would permit them to require a self assessment return or to assess and did not do so until much later, why would the same not be the case if notice had been given under section 7?

(7) If HMRC had the information to know whether the charge applied and could have sent the taxpayer a return, was the tax not paid on time "by reason of" HMRC's failure to use the information in its possession timeously? If so could it also be by reason of the taxpayer's failure to give notice?

44. Mr |Fallon replied that the words "by reason of" should be given their ordinary meaning in their context. Given that schedule 41 was concerned with the taxpayer's failure (rather than any hypothetical failure of HMRC) he says the words should be read as:

> "the liability that remains unpaid due to **the taxpayer's** failure to comply ..."

45. I agree that the "failure" referred to in the section is that of the taxpayer. To my mind that is made clear by paragraph 7(1) which refers to a "failure to comply with a relevant obligation" and paragraph 1 Sch 41 which defines a relevant obligation to include an obligation to give notice under section 7 - an obligation imposed only upon the taxpayer so that the failure referred to in subparagraph (2) can be a reference only to a failure of the taxpayer.

46. But I do not think this takes matters much further. The question remains: what is to be regarded as underpaid *by reason of* the taxpayer's failure? Suppose for example P fails to comply with section 7 but has also run out of money and has paid none of the

tax which is liable. Is the tax underpaid by reason of his impecuniosity or by reason of his failure to notify? Does it have to be shown that if he had complied the tax would not have been unpaid?

47. Mr Fallon says that for there to be a failure there must be an obligation, and since HMRC had no relevant obligation there could be no failure by HMRC which contributed to the tax being underpaid.

48. I accept that there to be a failure there must be some sort of obligation (and that the statute does not impose a requirement on HMRC to collect all tax timeously), but the paragraph asks what tax is unpaid by reason of the taxpayer's failure - and if tax is unpaid for other reasons - whether or not those reasons involved the failure to comply with an obligation - it may be that it cannot be said that the failure to notify caused the tax to be unpaid at the relevant date.

49. Mr Fallon contends that there can be no 'but for' test because the onus is on the taxpayer by virtue of the mandatory words of section 7. He says that "the only thing that can "cause" the P[otential] L[ost] R[evenue] to occur is the taxpayer's failure – as he is the only one with any obligations" He says that taxpayers may seek to provide reasons for the failure but these are matters which fall within the criteria for reasonable excuse rather than being an alternative cause of PLR for the purpose of paragraph 7(2).

50. In my judgement this cannot be right. It deprives the words "by reason of" of their normal meaning and construes them as meaning "in connection with" or "in relation to". The words, as he acknowledges in his argument import causality, and that involves asking whether the taxpayer's failure caused the unpaid tax, not whether it was in some way associated with it.

51. In relation to the question of whether, if a 'but for' test was required by the words "by reason of", HMRC had to demonstrate that they would have collected the liability had notice been given, Mr Fallon said that if notice had been given HMRC would have issued a self-assessment return which would place the burden on the taxpayer to declare and pay the relevant tax. There was no absolute burden placed on HMRC to collect the tax: the responsibility to connect was subject to managerial discretion as to the best means of obtaining the highest net tax returns as practical. He says there is no need to demonstrate that HMRC would have collected the liability.

52. Again I agree that HMRC had no absolute duty to collect. However, if "by reason of" is construed as containing a "but for" test it would have to be shown that if notice had been given tax would have been paid. That, as I suggested in the question, would ordinarily be dependent upon the taxpayer having completed a return, and that would in turn be dependent upon his receiving one. Thus, assuming a "but for" test, unless HMRC could show that they would have sent a return to the taxpayer it could not be said that tax would have been unpaid.

53. The statute asks how much tax is unpaid by reason of the failure. It does not say that the PLR is the whole of any unpaid tax, or that the PLR is the whole of the unpaid tax if there has been a failure. Instead it requires the isolation of that part of the unpaid

tax which is related to the failure by the words "by reason of". These words require the consideration of what has caused the tax to be unpaid and an attribution of the unpaid amount to one or more causes or reasons, isolating that part of it which arises by reason of the failure to notify. Just because A happened and B happened is not enough to conclude that A was the reason for B.

54. It does not seem to me that the it can be said that A causes B simply because if A had not occurred B would not have occurred. If Eve had not eaten the apple the second world war would not have occurred, but one would not say that Eve's consumption caused the war. Some greater connection is required. The reason one would not say that Eve's transgression caused the war is because it is too remote from the war, or putting it another way there were too many other events between Eve's transgression and the war which also needed to take place and may not have taken place before the war would take place (one of which, of course was Adam's sin). The chain of causation is too uncertain

55. It seems to me that there is implicit in the statutory words a hypothetical question: if the failure had not occurred what tax would have been unpaid – a "but for" test. If A had failed to notify but was bankrupt then, even if A had notified, the tax would have remained unpaid: in those circumstances it does not seem to me that the failure caused the lack of payment. Such a formulation requires a view to be taken on the likelihood of the events occurring which would have turned the notification into payment – if it is likely that they would have occurred then the unpaid amount arises by reason of the failure. Such an approach is broadly the same as a test which permits A to be said to be the reason for B only if A is not too remote from B.

56. In Mr Fuller's case, had he notified under section 7, would the tax have all been paid? It seems to me that if HMRC had issued a return to Mr Fuller he would have filled it in and paid the tax, but would HMRC have issued a return?

57. Mr Fallon said that on receipt of section 7 notification HMRC "simply issue a self-assessment return". If this was found to be the case then, given that Mr Fuller would be likely to comply with a statutory obligation notified to him, it seems likely that the return would have been completed and the tax paid.

58. The evidence before me in relation to whether a return would have been sent to Mr Fuller was: (i) Mr Fallon's statement in his response, (ii) to the contrary HMRC's failure to issue a return on the basis of the information they already had as to who was paid what and when, and details of the recipient's partner, and (iii) the terms of the letter HMRC sent to Mr Fuller in August 2013 which indicated that if notice were given (if the taxpayer "registered for self assessment") HMRC might require a return.

59. I conclude with some hesitation that it is more likely than not that HMRC would have issued a return. Thus I conclude that the potential lost revenue was the HICBC.

(2) Reasonable Excuse.

60. I accept that HMRC had no duty to notify taxpayers of the new HICBC. I also accept that they made an effort to publicise the new charge. But I have accepted that their

public efforts did not come to Mr Fuller's attention. I also accept his evidence that he did not know of the charge.

61. I have said that I concluded that it was on balance more likely than not that Mr Fuller had received HMRC’s letter of 17 August 2013 but because his income was at the time he received it less than the threshold, either ignored it or forgotten about it.

62. Mr Fuller did not suggest that he did not know that his wife was receiving a payment or that he did not know that his income in the relevant years was greater than hers and exceeded £50,000. Thus if he had known of the charge he would have known that he had to pay it.

63. Thus the only excuse Mr Fuller has is that he was not aware of the charge and not aware of the need to notify. The question is whether that is a reasonable excuse.

64. Generally it may be expected that a reasonable taxpayer will keep abreast of the law which affects him, and in that sense ignorance of the law does not afford a reasonable excuse for a failure to comply with the law.

65. But sometimes ignorance of the law can be a reasonable excuse: a person of limited mental capacity might reasonably be expected not to know laws other than the most simple; and a person who is not a lawyer, accountant or taxpayer might reasonably be expected not to know the details of some complex provision or perhaps one of uncertain construction.

66. In general it seems to me that if a person had reasonable expectation that HMRC would tell him of any change in law and they did not, that could, depending on all the other circumstances, provide a reasonable excuse for failure to comply with the new law. Such a reasonable expectation could be acquired for example by assurances or by a course of conduct even when HMRC did not have a duty to tell the taxpayer of the change.

67. But in Mr Fuller's case I can see no reason for any expectation that he would have been notified of any new law and none of his other circumstances provide a reasonable excuse for his lack of knowledge.

68. I asked HMRC to comment on whether it might be said that the taxpayer could have a reasonable expectation that HMRC would collect tax on payments which were made by them with reasonable expedition: so that if a taxpayer who had received such payments had not been assessed or received a letter from HMRC advertising taxability in relation to Years 1 and 2, he could reasonably expect that he was not chargeable in respect of the same income in Year 3 so that at least in relation to that year he might have a reasonable excuse.

69. Mr Fallon submitted that an objectively reasonable taxpayer should have been aware of the existence of the charge, and being aware of what the law required could not reasonably expect that HMRC would collect the liability.

70. In this context Mr Fallon says that "even if one was to consider the data held by the Respondents, in the majority of cases liability to the HICBC would still be impossible to establish, as suggested by Judge Poon in *Johnstone v HMRC* [2018] UKFTT 689 at [49]:

> "The cohort of taxpayers likely to be affected by HICBC is not readily identifiable from the information held by HMRC, especially when the recipient of the child benefit and the taxpayer liable to HICBC are not the same person, as is the case here."

71. I fear I do not follow this passage. If HMRC receive a claim for child benefit the claim will name the claimant and his or her partner. Those two persons are part of the "cohort of taxpayers likely to be affected" by the payment HMRC make. HMRC could either send them both a return or use the PAYE information they hold to make an initial determination as to whether one or the other might be liable to the charge and send that one return. (I accept that in some cases, for example where a recipient's partner has changed or where a taxpayer's income is not all PAYE income this will not be possible, but the majority of the cohort will be identifiable.) And that process must actually have been conducted by HMRC in 2017 to give rise to the letter preceding the assessments made in this case.

72. Mr Fallon says that HMRC contends that "the taxpayer having an expectation that the Respondents would collect the liability, refuse a child benefit claim from the outset or cease to pay the Child Benefit if they were liable to the HICBC, is simply an alternative way of saying that they were ignorant of the legal requirements placed upon them".

73. I do not think that is right. The premise is that the taxpayer did not know it was a legal duty. The question is whether the taxpayer had a reasonable excuse for that ignorance. The postulated answer is "yes in relation to Years 2 and 3": because if the tax charge had arisen, HMRC, since they had all the information, would have surely taken steps to collect the tax, and the fact that they did not suggested that tax was not payable. In other words HMRC's inaction in relation to this *particular source* of taxable income would have created an expectation that the taxpayer did not have to worry. If such expectation were reasonable taxpayer would have a reasonable excuse. So the question is: would it have been (objectively) reasonable for a taxpayer to expect that sums paid to his partner by HMRC were not taxable because HMRC had not sought to tax them last year or the year before?

74. Where taxpayer fills in a claim form, submits it to HMRC and receives payments from HMRC, it seems to me that it would be reasonable to expect HMRC to assess the recipient or at very least to send him a return if he was potentially liable to charge. The position is different however for the partner of a recipient who would not necessarily see that the payer was HMRC and might reasonably assume it was another arm of government.

75. Mr Fuller did not make the claim child benefit. I do not consider that it was shown that he had a reasonable expectation that HMRC would, if tax was due, have sought by a return or otherwise to collect tax from him on monies they paid him or his partner.

76. I conclude therefore that Mr Fuller did not have a reasonable excuse for his failure.

(3) Special circumstances

77. Mr Fallon said that the special circumstances provision had not been considered by HMRC. The failure to consider it means that they should be treated as having made a flawed decision for the purposes of this paragraph 14. It is thus open to this tribunal to consider whether any reduction should be allowed.

78. Was there anything which could be called special in Mr Fuller's circumstances? I do not think that the receipt by his wife of the benefit, or the state of his knowledge of the law were peculiar to him or so out of the ordinary that they could be called special.

79. But the delay HMRC exhibited in addressing the taxation of these payments was to my mind a contributing factor to the size of the penalty. Had they addressed the issue sooner they would have been aware of the import of the information they already held sooner. If they had been aware of it sooner the minimum penalty rate would have been smaller. To my mind the delay was a reason the tax was not paid on time even though another sufficient reason was the taxpayer's failure to give notification. This delay was special. To my mind it warrants a reduction in the 20% penalties to 10%.

Conclusion

80. I confirm the penalty for 2015/16.

81. I reduce the penalties for 2014/15 and 2015/16 so that they are to be calculated at 10% rather than 20%.

Rights of Appeal

82. 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.

CHARLES HELLIER
TRIBUNAL JUDGE

RELEASE DATE: 9 APRIL 2020