[2021] UKFTT (TC)

TC08290

INCOME TAX – high income child benefit charge – penalties – whether reasonable excuse – yes – whether remedied without reasonable delay – yes – appeal upheld

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/06353

BETWEEN

MICHAEL ANDERSON **Appellant**

-and-

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

TRIBUNAL: JUDGE ANNE FAIRPO
MR LESLIE HOWARD

The hearing took place on 22 April 2021. The hearing was held using the Tribunal video hearing platform. A face to face hearing was not held because of restrictions arising from the COVID-19 pandemic. The documents to which we were referred are a documents bundle of 106 pages and an authorities bundle of 656 pages.

The Appellant appeared in person

Ms McDonald, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

Introduction

1. This is an appeal against penalties for failure to notify liability to the High Income Child Benefit Charge (HICBC) for the tax years 2012/13 to 2016/17 (inclusive).

2. The penalties total £1,335.40 and were charged under Schedule 41 Finance Act 2008. They were notified to Mr Anderson on 27 February 2019.

3. The following are not in dispute:

4. (1) That the appellant's adjusted net income was in excess of £50,000 for each of the relevant tax years, and exceeded that of his partner;

5. (2) The amounts of child benefit received in each relevant year;

6. (3) That the appellant was not issued with a notice to file a self-assessment return and did not notify his liability to HMRC within the time limit required by statute (s7 Taxes Management Act (TMA) 1970).

7. 8. The appellant accepted that he was liable to pay the HICBC itself, and disputes only the penalties and interest.

8. The question for the Tribunal was whether the appellant had a reasonable excuse for failing to notify HMRC of the liability (para 20, Schedule 41 Finance Act 2008).

Appellant submissions

9. Mr Anderson contended that he had a reasonable excuse for the following reasons, in summary:

(1) He was not aware that his partner was claiming child benefit.

(2) He was not aware of the liability. All of his earnings were taxed under PAYE and HMRC had advised him some years ago, before the introduction of the High Income Child Benefit Charge, that he did not need to complete tax returns.

(3) He had not received letters sent by HMRC in August 2018 and October 2018 advising him of the liability. He only became aware of the liability when he received a letter dated 2 January 2019.

(4) The Post Office has on a number of occasions misdelivered items addressed to him (41 … Courtyard) to another property with a similar address (41 … Manor) (addresses redacted by the Tribunal). He has also received mail for the 'Manor' property, which is approximately a mile away from his address, and provided a photograph showing one such misdelivery. He does not know how much post has gone missing as a result.

(5) He had paid the liability, and the interest, as soon as he became aware of it, which showed that he was not trying to evade tax.

(6) He feels that he has been unfairly penalised.

HMRC submissions

10. HMRC argued that, in summary:

(1) HMRC are not legally obliged to notify changes in legislation to each individual, as set out in the decision in Johnstone.

(2) When the HICBC was introduced in January 2013, there was an extensive publicity campaign to raise awareness. The HICBC was considered in several Parliamentary debates. HMRC's website provided details of the child benefit helpline, for queries as to

the HICBC, and also a calculator for taxpayers to determine whether they have any liability to the HICBC.

(3) The law places the onus of notifying a liability on the taxpayer and not on HMRC, so there is no statutory duty on HMRC to notify an individual taxpayer.

(4) The responsibility is on the taxpayer to be aware of the conditions for benefit claims.

(5) Following the approach in *Christine Perrin* [2018] UKUT 0156 (TCC) ("*Perrin*"), the onus of proof that an Appellant has a reasonable excuse for failure rests with the Appellant, therefore it is for the Appellant to adduce any specific factors that acted upon them that contributed to their lack of awareness. In this regard, the Respondents contend that the Appellant has not provided the Tribunal with any information about any such factors.

(6) HMRC also contended that they had sent 'nudge' letters to Mr Cormack relating to the liability in August 2018 and October 2018 and that these had not been returned undelivered such that they should be presumed to have been received. Therefore, even if Mr Cormack should be regarded as having a reasonable excuse, such reasonable excuse was not remedied without undue delay.

Discussion

11. The issues for this Tribunal are whether:

(1) The penalty was correctly calculated and assessed; and

(2) Whether the appellant has a reasonable excuse for failing to notify his liability.

Whether the penalty was correctly calculated and assessed

12. s7(1) TMA 1970 requires, as relevant, that every person who is chargeable to income tax for a tax year, and has not received a notice requiring a return shall give notice of that chargeability to HMRC within six months of the end of the relevant tax year.

13. Para 1, Schedule 41, Finance Act 2008 states that a penalty is payable by a person where that person fails to comply with an obligation under s7 TMA 1970 to give notice of liability to income tax.

14. As the HICBC itself was not appealed and the appellant does not dispute that he notified HMRC after the statutory deadline, there is a prima facie case that the requirements for the penalty to be imposed have been met. Although the appellant did not appeal the amount of the penalty, the burden of proof is on HMRC to show that the penalty was correctly calculated and assessed.

15. Paragraph 5, Schedule 41, Finance Act 2008 sets out the amounts that may be charged as a penalty, based on the behaviour of the relevant taxpayer. In this case, HMRC categorised the behaviour as 'non-deliberate' and 'prompted' and allow the maximum mitigation, reducing the penalty to the minimum permitted by statute of 20% of the potential lost revenue for 2012/13 to 2015/16. The penalty for 2016/17 was reduced to 10% as the appellant had notified HMRC within 12 months of the statutory deadline for that year.

16. The potential lost revenue is the amount of income tax to which the appellant was liable in respect of the relevant tax years which was unpaid on 31 January following the end of each such tax years (per *Robertson* [2019] UKUT 202).

17. As it was not disputed that the appellant was liable to the HICBC, nor was the amount of the HICBC disputed and the appellant agreed that he had not notified HMRC within the statutory time limit, we find that the penalty was correctly assessed and calculated.

Whether the appellant has a reasonable excuse

18. Para 20, Schedule 41 states that liability to a penalty in this context does not arise if the taxpayer satisfies HMRC or (on an appeal notified to the tribunal) the tribunal that there is a reasonable excuse for the act or failure. Where the taxpayer had a reasonable excuse for the relevant act or failure but the excuse has ceased, the taxpayer is to be treated as having continued to have the excuse if the relevant act or failure is remedied without unreasonable delay after the excuse ceased.

19. The Upper Tribunal decision in *Perrin* sets out a four stage approach to be taken when considering whether a person has a reasonable excuse (§81):

> "(1) First, establish what facts the taxpayer asserts give rise to a reasonable excuse (this may include the belief, acts or omissions of the taxpayer or any other person, the taxpayer's own experience or relevant attributes, the situation of the taxpayer at any relevant time and any other relevant external facts).
>
> (2) Second, decide which of those facts are proven.
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> (3) Third, decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default and the time when that objectively reasonable excuse ceased. In doing so, it should take into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times. It might assist the FTT, in this context, to ask itself the question "was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?"
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> (4) Fourth, having decided when any reasonable excuse ceased, decide whether the taxpayer remedied the failure without unreasonable delay after that time (unless, exceptionally, the failure was remedied before the reasonable excuse ceased). In doing so, the FTT should again decide the matter objectively, but taking into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times.

20. Mr Anderson stated that he was unaware of the liability to HICBC before receipt of the letter in January 2019 and stated in the hearing that he had not been aware that his partner was claiming child benefit. HMRC did not challenge his evidence on this point. We note from the records provided by HMRC that Mr Anderson's partner has been claiming child benefit for two children born in 2003 and 2005, in each case well before the date on which the HICBC was introduced. We also note that there is no requirement for a person to generally be aware of their partner's financial affairs and that there is a principle of separate taxation in respect of individuals (which may be somewhat eroded by the HICBC).

21. Mr Anderson also stated that he had not received the letters sent in August and October 2018 and that there were postal difficulties with his address. Although there is a presumption of delivery of letters that presumption can be rebutted, and we conclude on the evidence before us that Mr Anderson did not receive the letters of August and October 2018 so that the first time that he became aware of the liability was January 2019. HMRC did not contend that they had sent any correspondence to him about the HICBC prior to August 2018.

22. Viewed objectively, we consider that these facts amount to a reasonable excuse for the failure to notify. Mr Anderson was not aware that his partner was claiming child benefit, and HMRC did not contend that they had sent any material to his partner which might have prompted her to realise that Mr Anderson might be subject to the charge. Given he was also not aware of the HICBC, and that all of his tax affairs were dealt with via PAYE, we do not

consider that there was any way he would be able to identify a liability to file a self-assessment return for the relevant tax years.

23. As we have concluded that Mr Anderson did not receive the letters of August and October 2018, we consider that the reasonable excuse ended sometime in January 2019 when Mr Anderson received a letter from HMRC dated 2 January 2019. HMRC records show that Mr Cormack confirmed his liability to HMRC on 12 February 2019 and, as such, we find that the failure to notify was remedied without unreasonable delay.

24. As we have found that there was a reasonable excuse such that no penalty arises, there is no requirement to consider whether or not special circumstances apply, nor whether the penalty is fair.

Conclusion

25. The appeal is upheld and the penalties are not payable.

Right to apply for permission to appeal

26. 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.

ANNE FAIRPO
TRIBUNAL JUDGE

RELEASE DATE: 4 OCTOBER 2021