[2018] UKFTT 230 (TC)

TC06463

Appeal number: TC/2017/04010

INCOME TAX – HICBC – Schedule 41 FA 2008 – distinguish liability and assessment – ignorance of the law – not reasonable excuse – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

DAVID LAU **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE SCOTT

Sitting in public at Aberdeen on Friday 13 April 2018

Having heard Mrs Lau for the Appellant and Mr Mason, Officer of HMRC for the Respondents

The issue

1. The appellant appeals against a penalty of £155.20 imposed under Schedule 41 Finance Act 2008 for the tax year 2014/15. The penalty was imposed in respect of a failure to notify HMRC that in 2014/15 his income exceeded the £50,000 threshold for High Income Child Benefit Charge ("HICBC").

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The facts

2. The facts are not in dispute. The appellant's income, as disclosed in HMRC's PAYE records, only exceeded the threshold for HICBC for the first time in 2013/14.

3. On 7 February 2017, HMRC wrote to the appellant intimating that their records indicated that he had not registered to receive a self-assessment tax return for the tax years ending 5 April 2014 and 2015. An assessment was raised under Section 29 Taxes Management Act 1970 ("TMA") for the year ending 5 April 2015 in the sum of £776. That represented the HICBC for that year since child benefit of £3,884 had been received. That tax has been paid by the appellant.

4. On 23 February 2017, the penalty assessment in the sum of £155.20 was issued.

5. On 10 March 2017, the appellant appealed that penalty on the basis that he always worked late on a daily basis, rarely read newspapers or watched news on TV and he was not aware of the need to notify HMRC and register for self-assessment until HMRC had contacted him. The imposition of the penalty was unfair.

6. On 20 April 2017, HMRC responded explaining the background to HICBC and upholding the penalty.

7. On 7 May 2017, the appellant appealed to the Tribunal on the basis that HMRC had not formally notified him of the existence of HICBC and the penalty is unfair.

The Law on HICBC

8. HICBC came into effect by virtue of Schedule 1 of the Finance Act 2012 which amended a number of legislative provisions but in particular, Chapter 8 Part 10 of the Income Tax (Earnings and Pensions Act) 2003 ("ITEPA"), which was inserted into ITEPA with effect for the tax year 2012–13 and subsequent tax years (although in 2012-13 the charge only applied with reference to child benefit amounts received in a week beginning after 6 January 2013).

9. The detail of the relevant legislation is set out at Appendix 1 but the policy to withdraw child benefit from higher rate taxpayers was set out as part of the Spending Review announced by the Government in October 2010. The detailed proposal had been announced in the 2012 Budget.

10. In summary, from 7 January 2013, if an individual had an income in excess of £50,000 a year and either that individual or his/her partner received any child benefit payments, then the partner with the higher income had to pay HICBC. The obligation is on the taxpayer to notify HMRC of the level of income and register to receive a self-assessment tax return.

11. The practical impact was that taxpayers could choose whether or not to claim child benefit but if they did then the taxpayer would have to notify liability and pay HICBC.

The Law on penalties for failing to notify liability for self-assessment

12. Paragraph 1 of Schedule 41 Finance Act 2008 ("Schedule 41") specifies that a penalty is payable where a taxpayer does not comply with the obligation to notify under section 7 TMA, as amended, and the relevant sub-paragraphs of section 7 read:

"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) has not received a notice under section 8 of this Act requiring a return for that year of his total income and chargeable gains,

shall, subject to subsection (3) below, within six months from the end of that year, 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. As can be seen from the portions highlighted in bold, if a taxpayer is chargeable to income tax and has not received a notice to file a return then there is an obligation to notify, **unless** there is no liability to HICBC. In this case the appellant was chargeable to income tax on his earnings from employment and, by virtue of section 681B ITEPA 2003 (see Appendix1) to HICBC.

14. The notification to HMRC has to be given within six months of the end of the year in question and, in this instance that would have been 6 October 2015. HMRC became aware of the failure more than 12 months after the tax became due and therefore in terms of paragraph 13 of Schedule 41, the penalty is calculated at 20% of the tax.

15. Paragraph 20 of Schedule 41 specifies that there will be no liability for the penalty if HMRC, or the Tribunal on appeal, is satisfied that there is a reasonable excuse for the failure to notify.

16. However, in the first instance, the onus is on HMRC to establish that the penalty has been appropriately assessed.

17. Mr Mason argued that any penalty imposed under Schedule 41 stands independently of the discovery assessment under Section 29 TMA.

18. There is no doubt that the appellant should have, but did not, notify liability in terms of Section 7 TMA, as amended and that the penalty arises under paragraph 1 of Schedule 41.

19. Paragraph 6 of Schedule 41 sets out the quantum of a penalty payable in terms of paragraph 1 and that is calculated by reference to "the potential lost revenue" ("PLR"). PLR is defined in paragraph 7 of Schedule 41. Paragraph 7(2) reads:

> "In the case of a relevant obligation relating to income tax … the potential lost revenue is so much of any income 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."

20. I have highlighted in bold the word "liable" since HMRC argue that it is the liability which is the key to the penalty rather than any assessment.

21. The Shorter Oxford English Dictionary defines "liable" as being "answerable at law" or "subject to a tax, penalty, etc". That is the case in this instance.

22. Paragraph 16 of Schedule 41 deals with both liability and assessment. The relevant paragraphs read:-

> "16(1) Where P becomes **liable** for a penalty under any of the paragraphs 1 to 4 HMRC shall —
>
> (a) assess the penalty,
> (b) notify P, and
> (c) state in the notice the period in respect of which the penalty is assessed …
>
> 16(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 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."

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.

24. In this case the Notice of Assessment in the sum of £776 was issued on 22 February 2017. The penalty itself was issued on 23 February 2017.

25. If the arguments of Judge Thomas in *Robertson v HMRC*[1] 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.

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[1] 2018 UKFTT 0158 (TCC)

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*[2] 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*[3], I entirely agree.

28. I therefore find that:

(a) the appellant was liable to income tax on his employment earnings,

(b) the appellant was liable to the charge to income tax in terms of section 681B ITEPA, whether or not an assessment was raised,

(c) he did not notify liability in terms of the statutory requirement and therefore that charge to tax could not be recovered via PAYE (see Appendix 1), or by assessment since HMRC did not know that he was liable,

(d) the income tax for which he was liable remained unpaid in terms of paragraph 7(2) of Schedule 41, and

(e) the penalty was correctly assessed and calculated.

Reasonable excuse

29. The onus now moves to the appellant.

30. Was there any reasonable excuse? There is no statutory definition of reasonable excuse but *Rowland v HMRC*[4] at paragraph 18 makes it clear that a reasonable excuse "… is a matter to be considered in the light of all the circumstances of the particular case".

31. I agree with Judge Tildesley in *Schola UK Limited v HMRC*,[5] where he states that in considering a reasonable excuse the Tribunal must consider the actions of the appellant from the perspective of a prudent taxpayer exercising reasonable foresight and due diligence whilst also having proper regard for his responsibility under the Tax Acts.

32. As indicated above, the appellant's only argument in relation to reasonable excuse is that HMRC had not notified him directly of the changes and he was unaware of the change in the law notwithstanding the extensive publicity.

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[2] 1926 AC 37

[3] 2015 UKFTT 0660 (TC)

[4] 2006 STC (SCD) 536

[5] 2011 UKFTT 130 (TC)

33. Firstly, HMRC are under no obligation to notify individual taxpayers. In fact, they did send what they described as "awareness" letters in Autumn 2012 to taxpayers who earned in excess of £50,000 in order to make those people aware of the changes and give them the opportunity to make an informed choice on whether they wished to continue to receive child benefit and pay tax on it, or simply stop claiming child benefit. At that point, as can be seen from paragraph 2 above, the appellant's income was not in that bracket so no such letter was sent to him.

34. The crucial issue is that the change in the law meant that taxpayers in the same position as the appellant had a statutory obligation to notify chargeability.

35. Secondly, I agree with Judge Staker in *Julie Aston v HMRC* [6] where he said:

> "In the present case, it is argued that the Appellant was unaware of her obligation under tax law to return the additional payments and to pay tax on those additional payments. In effect this is a plea of ignorance of the law … The Tribunal considers that a prudent and reasonable taxpayer must at the very least be expected to take prudent and reasonable steps to ascertain what are his or her tax obligations".

36. Ignorance of the law is not an excuse for failing to comply with it. As Judge Mosedale said in *Qualapharm*[7]:

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

37. Parliament cannot have intended ignorance of the law to be a reasonable excuse because Parliament must have enacted the law with the intention that it would be obeyed.

38. In all these circumstances, ignorance of the law simply cannot amount to a reasonable excuse.

Special Circumstances

39. Paragraph 16 of Schedule 55 allows HMRC to reduce the penalty below the statutory minimum if they think it right to do so because of special circumstances. As long ago as 1971, in a House of Lords decision dealing with special circumstances in the Finance Act 1965, Lord Reid in *Crabtree v Hinchcliffe (Inspector of Taxes)*[8] said "Special must mean unusual or uncommon - perhaps the nearest word to it in this context is 'abnormal'".

40. HMRC have confirmed that they did consider whether there were any special circumstances in this case and concluded that there are none. They have patently considered all relevant circumstances.

41. I did consider whether HMRC had acted in a way that no reasonable body could have acted, or whether they took into account some irrelevant matter or disregarded something to which they should have given weight. I think not. I have also

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[6] 2013 UKFTT 140 (TC)

[7] 2016 UKFTT 100 (TC)

[8] 1971 3 All ER 967

considered whether HMRC have erred on a point of law. They have not. I find no reason to disagree with their conclusion. HMRC’s decisions in that regard are not flawed when considered in light of the principles applicable in proceedings for judicial review.

General

42. Parliament has laid down a deadline for submission of tax returns and has provided for penalties in the event of default. Although those penalties have been described by some as harsh, nevertheless they are widely held to be proportionate. In this instance they are within the bounds of proportionality. Furthermore *HMRC v Anthony Bosher*[9] makes it clear that I do not have the jurisdiction to consider the proportionality of fixed penalties such as those charged in this appeal. I am bound by that decision and have no discretion.

43. The decision of the Upper Tribunal in *HMRC v Hok*[10] is binding on me and that makes it explicit at paragraph 58 that this Tribunal has no jurisdiction to discharge penalties on the ground that their imposition was unfair.

Decision

44. In all the circumstances the appeal is dismissed and the penalty is confirmed.

45. 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 SCOTT

TRIBUNAL JUDGE
RELEASE DATE: 23 APRIL 2018

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[9] 2013 UKUT 579 (TCC)

[10] 2012 UKUT 363

APPENDIX 1

HICBC

1. 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.

2. 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

3. Section 684 ITEPA 2003, as amended, at paragraph 2ZA reads:-

"2ZA Provision—

(a) for deductions to be made, if and to the extent that the payee does not object, with a view to securing that income tax payable for a tax year by the payee by virtue of section 681B (high income child benefit charge) is deducted from PAYE income of the payee paid during that year,

(b) for payments to be made in a tax year, if and to the extent that the payee does not object, in respect of any amounts overpaid on account of income tax under that section for that tax year, and

(c) as to the circumstances and manner in which a payee may object to the making of deductions or repayments."