



TC07739

Income tax – Higher income child benefit charge – penalties for failure to notify – whether reasonable excuse – no – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2018/02504

BETWEEN

CHRISTOPHER DEVINE

Appellant

-and-

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

Respondents

**TRIBUNAL: JUDGE ABIGAIL MCGREGOR
DAVID BATTEN**

Sitting in public at Taylor House, London on 23 January 2020

Mr Christopher Devine, the Appellant

Mr Paul Davison, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. This appeal concerned penalties for failure to notify liability to income tax in the form of the higher income child benefit charge (HICBC) under Schedule 41 to Finance Act 2008 in respect of tax years 2012/13, 2013/14, 2014/15 and 2015/16.

Relevant background and law

2. The HICBC came into effect on 7 January 2013 and arises under section 681B of the Income Tax (Earnings and Pensions) Act 2003 (ITEPA 2003).

3. The HICBC imposes a charge to tax equal to the child benefit received for those individuals who have adjusted net income of over £60,000 in the tax year. The tax charge is reduced proportionally where adjusted net income (“ANI”) is between £50,000 and £60,000, but the way in which this applies is not in dispute in this case. ANI is defined in ITEPA 2003, s 681H.

4. A person who has an income tax (or capital gains tax) liability (and has not received a notice to file a tax return from HMRC) is obliged, under section 7 of the Taxes Management Act 1970 (“TMA 1970”), to notify his liability to tax by the 31 October after the end of the tax year in question. This is subject to some exceptions, but the exceptions do not apply if the person is subject to the HICBC.

5. A person who fails to comply with the obligation to notify liability to tax in accordance with TMA 1970, s 7 is liable to a penalty under paragraph 1 of Schedule 41 to Finance Act 2008.

6. The penalty is determined as a percentage of the potential lost revenue under paragraph 6 of Schedule 41 to Finance Act 2008. Where the failure or act is not deliberate, the percentage rate is 30%.

7. Under paragraphs 12 and 13 of Schedule 41 to Finance Act 2008, the penalty percentage can be reduced as a result of the taxpayer’s cooperation with and disclosure to HMRC. Where the disclosure is prompted, this can reduce the penalty to:

(1) 10% if HMRC become aware of the failure less than 12 months after the time when tax first becomes unpaid; and

(2) 20% in any other case.

8. Under paragraph 14 of Schedule 41 to Finance Act 2008, HMRC may reduce the penalty if there are special circumstances.

9. Under paragraph 20 of Schedule 41 to Finance Act 2008, liability to the penalty does not arise where the taxpayer has a reasonable excuse for the failure.

FACTS

10. We find the following facts based on the bundle of documents before us.

11. Prior to 2012/13 Mr Devine was not required to notify his liability to tax to HMRC or to complete a self-assessment return (“SATR”).

12. Following the introduction of HICBC, Mr Devine’s spouse received child benefit in tax years 2012/13, 2013/14, 2014/15 and 2015/16.

13. In respect of the four tax years in question, Mr Devine:

(1) was not issued with a notice to file a tax return;

- (2) did not notify his liability to income tax to HMRC; and
- (3) did not file a SATR.

14. Following initial correspondence, HMRC issued notices of assessment on 9 November 2017 for the HICBC based on Mr Devine’s ANI and the child benefit received by his spouse as follows:

Tax Year Adjusted Net	Income	Child benefit received	HICBC due
2012/13	£66,236.00	£612.00	£612.00
2013/14	£67,843.00	£2,449.00	£2,449.00
2014/15	£70,933.00	£2,475.00	£2,475.00
2015/16	£73,487.00	£2,549.00	£2,549.00

15. Mr Devine accepted that he owed these amounts of HICBC and duly paid them.

16. HMRC submitted at the hearing that the amounts of income were in fact higher than those shown on the assessments, but given a higher amount of income does not alter the outcome, it is not necessary to record those amounts.

17. Also on 9 November 2017, HMRC issued penalty assessments to Mr Devine for failing to notify his liability to income tax.

18. The penalties were calculated at a rate of 20% of the potential lost revenue for the first 3 tax years and at 10% for the final year, being judged by HMRC to be non-deliberate and reduced for “telling, helping and giving”.

19. The penalties assessed were as follows:

Tax Year	Liability to Tax	FTN penalty structure	Penalty range	Penalty percentage	Penalty charged
2012/13	£612.00	Non-deliberate, prompted	20%-30%	20%	£122.40
2013/14	£2,449.00	Non-deliberate, prompted	20%-30%	20%	£489.80
2014/15	£2,475.00	Non-deliberate, prompted	20%-30%	20%	£495.00
2015/16	£2,549.00	Non-deliberate, Prompted	10%-30%	10%	£254.90

20. Mr Devine received the penalty assessment and replied to HMRC to make an appeal on 7 December 2017 against the penalties.

21. HMRC responded on 12 January 2018 to Mr Devine’s appeal explaining that they did not believe he had a reasonable excuse. The letter therefore upheld the penalties.

22. Mr Devine requested a further review on 31 January 2018.

23. HMRC provided its review of the matter on 20 March 2018 upholding the penalties on the grounds that Mr Devine did not have a reasonable excuse and there were no special circumstances.

24. Mr Devine appealed to the Tribunal on 13 April 2018.

PARTIES ARGUMENTS

Appellant's contentions

25. The appellant contended that the penalties should be waived because:

- (1) He did not know that his wife had been receiving child benefit during the relevant years;
- (2) He did not know anything about the HICBC until the first letter arrived from HMRC in October 2017;
- (3) He has paid everything asked of him within weeks, so it is unfair to pursue him for penalties;
- (4) If HMRC had notified him much earlier of the missed returns and tax, then the number of penalties would not have accrued and he feels that HMRC should take some of the responsibility for that;
- (5) Pursuing him for penalties on a tax he knew nothing about is completely unfair; and
- (6) He feels that HMRC are challenging his integrity.

HMRC's contentions

26. HMRC submits that:

- (1) the Appellant was liable to the HICBC and was required to give notice of his liability to HICBC within 6 months from the end of the year of the tax year in question;
- (2) the Appellant did not make such a notification;
- (3) in accordance with the decision in *Johnstone v HMRC* [2018] UKFTT 689 (para 30):

“In the absence of a challenge against the s 29 assessments, there is a prima facie case that the requirement under para 1 for the imposition of a Sch 41 penalty has also been met.”
- (4) the penalties were validly assessed in accordance with paragraph 16(1) of Schedule 41 to Finance Act 2008;
- (5) The potential lost revenue on which the penalties must be assessed is the amount of income tax to which Mr Devine was liable in respect of the tax years in question by reason of his failure to notify, in accordance with the decisions in *Robertson v HMRC* [2019] UKUT 0202 and *Lau v HMRC* [2018] UKFTT 230;
- (6) The amount of income tax to which Mr Devine was liable is not in dispute in this case;
- (7) The behaviour of the Appellant is determined as ‘non-deliberate’ and ‘prompted’, allowing for a penalty up to 30% of the PLR. The failure to notify penalties for tax years 2012/13 to 2014/15 have been charged at a rate of 20%, and 10% for the 2015/16 tax year. This represents full mitigation for the Appellants quality of disclosure, when prompted;
- (8) The reasons set out by the Appellant do not constitute a reasonable excuse for this failure to notify in accordance with the four step test set out in *Perrin*; and in particular:
 - (a) It was not credible that Mr Devine did not know about his wife had been claiming child benefit when she had been receiving it for 13 years prior to the new rules coming into effect;

(b) as per *Lau, Hesketh, and Nonyane* [2017] UKFTT 11, the Appellant's failure to notify cannot be attributed to a failure by HMRC to inform the Appellant that the liability was due; and

(c) the Appellant's ignorance of the change in the law does not excuse the failure.

DISCUSSION

27. We considered the contentions put forward by Mr Devine and HMRC and the bundle of documents put together by HMRC, which included the notice of assessment of the penalties issued to Mr Devine.

28. We considered the decisions in *Robertson* and *Lau* and agree with HMRC that the principle established (which is binding upon us) is that the PLR on which the penalties must be based is the amount of income tax to which the taxpayer was liable in respect of the tax years in question by reason of his failure to notify, not the amount on which he was assessed. However, this distinction is not significant in this case as Mr Devine had accepted that the assessments raised were appropriate and represented the income tax for which he was liable.

29. We also considered the cases to which HMRC referred on the relevance of ignorance of the law in considering reasonable excuse since this was a considerable part of Mr Devine's appeal. We find that these cases support the conclusion that ignorance of the law should not, of itself, represent a reasonable excuse, because:

(1) To allow it would be to favour taxpayers who choose to remain ignorant of the law over those who try to find out the law in order to follow it;

(2) HMRC's failure to inform the taxpayers sufficiently of the law cannot make ignorance a reasonable excuse, since HMRC's decision not to inform did not cause the ignorance of the law, but rather failed to alter the taxpayer's state of ignorance.

30. Having reviewed the documents and the arguments of both parties, we find as follows:

(1) The penalty assessments were validly raised and notified in accordance with the requirements of paragraph 16(1) of Schedule 41 to Finance Act 2008;

(2) The amount of PLR is not in dispute in this case;

(3) In determining the amount of the penalties

(a) the percentages were correctly applied to the PLR in respect of a non-deliberate disclosure; and

(b) the maximum reduction in the penalties was appropriately made by HMRC to reflect Mr Devine's cooperation with HMRC once the issue was raised.

31. We do not need to come to a conclusion on whether it was credible for Mr Devine to assert that he did not know that his wife was claiming child benefit due to the length of time she had been claiming it. HMRC did not provide any evidence to support its contention. We have not considered it in coming to our conclusion on reasonable excuse.

32. We find, based on the principles from case law set out in paragraph 29 above, that Mr Devine did not have a reasonable excuse for his failure to notify, in particular noting that ignorance of the law in this case is not a reasonable excuse; and

33. There is nothing exceptional in Mr Devine's circumstances that would give rise to the application of reduction for special circumstances in accordance with paragraph 14 of Schedule 41 to Finance Act 2008.

34. For completeness, we note:

(1) that the penalties being assessed are for failing to notify his liability for income tax to HMRC for the purposes of issuing a SATR and they do not relate to late payment. Therefore, the fact that Mr Devine paid the assessments of income tax promptly when the assessments were made is not relevant to this appeal;

(2) there has not been any suggestion of deliberate or fraudulent behaviour by Mr Devine – the penalties have been reduced to the minimum possible level in accordance with the law as a result of Mr Devine’s co-operation with HMRC;

(3) we do not have jurisdiction to consider the fairness of the penalties, in accordance with the decision in *Hok v HMRC* [2012] UKUT 363; and issues on, for example, HMRC’s approach to sending reminder letters, are matters either for Parliament or for HMRC administration and are not matters which are within the jurisdiction of this Tribunal.

DECISION

35. For the reasons given above, we uphold the penalties assessed in respect of the 2012/13, 2013/14, 2014/15 and 2015/16 tax years and dismiss Mr Devine’s appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

36. 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 MCREGOR

TRIBUNAL JUDGE

RELEASE DATE: 15 JUNE 2020