



TC07769

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/2018/01565

BETWEEN

VIRENDRA PATEL

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

The Appellant did not attend and was not represented.

Mr Harry Robison, 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.

APPELLANT NOT ATTENDING

2. Mr Patel did not attend the hearing and had made no request to adjourn the hearing. The Tribunal telephoned Mr Patel on the morning of the hearing to establish whether he was intending to attend or had sent a representative.

3. Mr Patel confirmed that he had received the emails from the Tribunal but had not been aware that he needed to attend. He was a little confused but had thought that either HMRC or the Tribunal were to represent him at the hearing.

4. We decided to proceed with the hearing in accordance with rule 33 of the Tribunal Procedure Rules (SI 2009/273) because we were satisfied that Mr Patel had received notification of the hearing and that was in the interests of justice to proceed with the hearing.

5. Mr Patel may apply for this decision to be set aside in accordance with rule 38 of the Tribunal Procedure Rules.

Relevant background and law

6. 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).

7. The HICBC imposes a charge to tax equal to the child benefit received for those individuals who have adjusted net income (“ANI”) of over £60,000 in the tax year. The tax charge is reduced proportionally where 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.

8. 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.

9. 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.

10. 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%.

11. 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.

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

13. 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

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

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

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

17. In respect of the four tax years in question, Mr Patel:

- (1) was not issued with any notice to file a tax return;
- (2) did not notify his liability to income tax to HMRC; and
- (3) did not file a SATR.

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

Tax Year Adjusted Net	Income	Child benefit received	HICBC due
2012/13	£56,560.32	£438.00	£188.00
2013/14	£55,696.10	£1,752.00	£560.00
2014/15	£59,741.87	£1,770.00	£1,416.00
2015/16	£64,287.96	£1,823.00	£1,823.00

19. Mr Patel accepted that he owed these amounts and duly paid them.

20. Also on 13 December 2017, HMRC issued penalty assessments to Mr Patel.

21. 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”.

22. The penalties assessed were as follows:

TaxYear	Liability to Tax	FTN penalty structure	Penalty range	Penalty percentage	Penalty charged
2012/13	£188.00	Non-deliberate, prompted	20%-30%	20%	£37.60
2013/14	£560.00	Non-deliberate, prompted	20%-30%	20%	£112.00
2014/15	£1,416.00	Non-deliberate, prompted	20%-30%	20%	£283.20
2015/16	£1,823.00	Non-deliberate, Prompted	10%-30%	10%	£182.30

23. HMRC also charged interest on the late payment.

24. Mr Patel received the penalty assessment and replied to HMRC to make an appeal on 9 January 2018 against both the penalties and the interest

25. HMRC responded on 26 January 2018 to Mr Patel's appeal explaining that they did not believe he had a reasonable excuse and that the interest was not a matter on which he could appeal. The letter therefore upheld both the penalties and the interest.

26. Mr Patel appealed to the Tribunal on 26 February 2018.

PRELIMINARY MATTERS

27. Firstly, Mr Patel's appeal to the Tribunal was made one day late. It was explained in the notice of appeal that Mr Patel had had to travel to India to attend to his father who subsequently died on 28 January, meaning that he had not returned to the UK until 10 February and was catching up on paperwork.

28. HMRC did not object to the late appeal.

29. Given the very short delay, the explanation given and the fact that HMRC did not object, we considered that it was in the interests of justice to allow the late appeal.

30. Secondly, Mr Patel included in his notice of appeal an appeal against the charges to interest.

31. HMRC submitted that the charging of interest is statutory as prescribed by TMA 1970, s 86 and carries no appealable rights and that therefore the Tribunal has no jurisdiction to determine interest charges. HMRC relied on the Upper Tribunal decision of *HMRC v Neil & Megan Gretton* [2012] UKUT 261 (TCC) which concludes "There is no discretion on the part of the First-tier Tribunal to determine that interest should not be payable...".

32. That decision is binding on us and we therefore strike out this part of Mr Patel's case on the basis that we do not have jurisdiction to consider an appeal against interest charged on overdue tax.

PARTIES ARGUMENTS

Appellant's contentions

33. The appellant contended in his notice of appeal that the penalties should be waived because:

- (1) He was unaware of the HICBC legislation and was not alerted to his liability by HMRC;
- (2) If he had been aware of it, he would have complied with his obligations;
- (3) HMRC have deliberately waited 5 years to advise of his liability in order to incur more penalty charges.

HMRC's contentions

34. 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 Patel 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 Patel 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) 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

(b) the Appellant’s ignorance of the change in the law does not excuse the failure.

DISCUSSION

35. We considered the contentions put forward by Mr Patel in his notice of appeal and the bundle of documents put together by HMRC, which included the notice of assessment of the penalties issued to Mr Patel.

36. 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 Patel had accepted that the assessments raised were appropriate and represented the income tax for which he was liable.

37. We also considered the cases to which HMRC referred on the relevance of ignorance of the law in considering reasonable excuse since this was the main thrust of Mr Patel’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.

38. 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 Patel's cooperation with HMRC once the issue was raised;

(4) Mr Patel 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;

(5) There is nothing exceptional in Mr Patel'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.

39. For completeness, we also note that we do not have jurisdiction to consider the fairness of the penalties, in accordance with the decision in *Hok v HMRC* [2012] UKUT 363.

DECISION

40. 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 refuse Mr Patel's appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

41. 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 MCGREGOR

TRIBUNAL JUDGE

RELEASE DATE: 3 JULY 2020