[2020] UKTT 188 (TC)

TC07674

Appeal number: TC/2017/05719

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

JOSEPH CARTHY **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 Carthy 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 2012/13, 2013/14, and 2014/15.[1]

2. The penalties arise in relation to the high income child benefit charge (the "HICBC") imposed 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 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 Carthy'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 who has not been sent a tax return 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 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 Carthy 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" (paragraph 13(3)(a)) and

---

[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] Specifically defined but not in issue in this appeal

20% otherwise. HMRC gave Mr Carthy the reduction to 20% for each tax year (on the basis that they did not become aware of the failure until 2017.

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 Carthy's wife received child benefit payments in 2012/12, 2013/14 and 2014/15. The payments were in respect of their two children who were born in 2000 and 2007.

10. In each of these tax years Mr Carthy's income was such that he was liable to the HICBC on these payments.

11. I was not shown the form on which Mrs Carthy had claimed the benefit, but given that Mr and Mrs Carthy's children were born well before the introduction of the benefit Mrs Carthy would not have been made aware at the time of her application of the possible charge on the benefit. Mr Fallon did not suggest that she had been otherwise warned of the possible charge.

12. Mr and Mrs Carthy keep their financial affairs separate. The record of child benefit payments exhibited by HMRC suggests that the payments were made to a joint account but I find, on the basis of Mr Carthy's unchallenged evidence, that this account was operated only by Mrs Carthy and that Mr Carthy was unaware of the receipts.

13. Mr Carthy has for the majority of his working life paid tax only through the PAYE system. Before 2017 there had been only two occasions on which he had been required to complete a tax return. On both occasions HMRC had contacted him and asked him to complete a retrun without his making any prior notification to them. Although his tax affairs were simple he had always kept on top of his tax affairs.

14. 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 Carthy's attention directly or indirectly.

15. 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 Carthy was aware of the possibility of the charge he had no reason to use these facilities. I find he was not aware of them.

16. Mr Fallon says that on 17 August 2013 HMRC wrote to Mr Carthy explaining the HICBC and saying 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".

17. Mr Fallon told me that this letter was sent to 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[4].

18. Mr Fallon exhibited a printout of HMRC's computer records showing that this letter had been sent to Mr Carthy. Mr Carthy told me he had no recollection of receiving this letter.

19. I was not persuaded that Mr Carthy received HMRC's letter of 17 August 2013. But as he was unaware that his wife was receiving child benefit it is likely that if he did receive it he paid it little attention.

20. On 22 May 2017 (4 years after the end of 2012/13 and 4 ¼ years after the introduction of the HICBC) HMRC wrote to Mr Carthy saying that their records indicated that he might be liable to the HICBC. The letter set out the amount of tax "you are due to pay" for the years 2012/13 to 2014/15.

21. Mr Carthy phoned HMRC promptly on receipt of this letter, following which, on 5 June 2017 HMRC wrote to him with assessments of the tax due and the penalty assessments which are the subject of this appeal. Mr Carthy borrowed money to pay the assessments -within 10 days- and appealed against the penalties.

The parties' arguments.

22. Mr Carthy says

> (1) if penalties are due the rate should be 10% rather than 20%. The 10% rate was that applied in the parallel case of *Robertson* and is the rate which should be applicable here because HMRC's assertion that they sent him a letter on 17 August 2013 indicates that they would have known on 31 January 2014 (the first date on which the tax would have been payable on the 2012/13 child benefit) and subsequent payment dates that the HICBC was unpaid on those dates;
>
> (2) he did not know of the tax charge and had no reason to think that he might be liable because he did not know that his wife had received child benefit payments;
>
> (3) Given that his wife had not applied for child benefit after 2012 there was nothing which would have caused her to raise with Mr Carthy the issue of tax on her child benefit receipts;
>
> (4) in the past HMRC had sent him a tax return where he had income which did not fall within the simple operation of the PAYE system. By implication therefore that he could have expected such a return in relation to the HICBC; and
>
> (5) it was unreasonable for HMRC to wait 4 years before raising this issue. It was wrong to penalise a taxpayer for HMRC's failings.

23. Mr Fallon says that given that Mr Carthy accepts the amount of the tax liability, the only issues are: the minimum rate of the penalty, whether Mr Carthy had a reasonable excuse and

---

[4] The claim form in use in April 2011 sought details of the applicant's partner including his or her National Insurance number. I think it likely that the form in use in 2007 sought the same information

whether the special circumstances provision applies. He says that Mr Carthy' s only excuse is that he did not know of the charge and that ignorance of the law is not in this case a reasonable excuse; he says that there were no special circumstances.

24. Mr Fallon accepted that if HMRC operated the child benefit system they could have known on 31 January 2014 and on subsequent years' payment dates that the tax was unpaid, but he does not accept that they *did* know *or should* have known of that fact.

Discussion.

25. 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.)

26. That HMRC had all the information necessary to make an assessment or send a return is shown by the fact that they wrote to the taxpayer with that information on 22 May 2017 before making the assessments.

27. 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 in May after the end of the tax year. The tax would have been payable by the following 31 January so they had all that information by the May 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).

28. And yet a taxpayer is potentially penalised[5] 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.

29. 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 tax returns to (or wrote to, or wrote to assess) 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?

30. 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."

31. 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

---

[5] 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.

Commissions confirmed the assessments on the basis of the evidence before them which did not include the other barristers' tax returns.

32. In the High Court, on the appeal against the Commissioners' decision, Walton J cited section 50(6) TMA which provided that on an appeal against an assessment, 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.

33. 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.

34. 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.

35. There is no doubt Mr Carthy 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

36. Two issues arise under this heading.

37. The <u>first issue</u> which arises under this heading is the minimum percentage rate for the penalty. Should it be 10% - the rate applicable where "HMRC become aware of the failure less than 12 months after the tax first becomes unpaid by reason of the failure" or should it be 20% where that is not the case?

38. The FTT in *HMRC v James Robertson [2018] UKFTT 158 (TC) 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.

39. The FTT's decision was appealed, see *HMRC v James Robertson* [2019] UKUT 202 (TCC) and overturned on other grounds, but 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".

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

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

42. The second issue is whether the "potential lost revenue" was the HICBC tax for which Mr Carthy 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 Carthy). If it was then the calculation is correctly made when made by reference to the relevant minimum rate.

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 triggered the 20% minimum penalty percentage rather than the 10% minimum if HMRC became 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 for 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 collect 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 form 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 Carthy’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 Carthy 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 the evidence showed that this was the case then, given that Mr Carthy would be likely to have complies 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 if Mr Carthy had notified his chargeability a return would have been sent to him 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 Carthy in August 2013 which indicated that if notice were given (if the taxpayer "registered for self assessment") HMRC might require a return. Although that evidence was somewhat contradictory, I think it more likely than not that notification would have resulted in the receipt of 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 Carthy's attention.

61. I have said that I was not persuaded that Mr Carthy had received HMRC's letter of 17 August 2013.

62. I therefore accept Mr Carthy's evidence that he did not know of the charge.

63. An excuse is a reason something did not happen. The reasons why Mr Carthy did not notify (his only excuses) are: (i) that he did not know of the receipt, and (ii) that he was not aware of the charge and not so aware of the need to notify. The question is whether either of those are reasonable excuses.

64. In relation to the first of these, Mr Fallon says: that a taxpayer with reasonable regard to the law and their responsibilities would be aware of the need to consider his or her partner's income, and contends that, with this in mind, the objectively reasonable taxpayer with proper regard to their legal and financial responsibilities would ask their partner one or both of the following questions, or an alternative to the same effect: a) Are you claiming Child Benefit? b) Do you have an adjusted net income of over £50,000?

65. I accept that if a taxpayer knew of the charge and knew of the possibility that his or her partner might be receiving child benefit these would be reasonable questions to ask. I think that if Mr Carthy had been aware of the charge he would have asked them. But he did not know of the charge. So the only issue is whether that lack of knowledge was a reasonable excuse in his circumstances.

66. 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.

67. 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 tax expert might reasonably be expected not to know the details of some complex provision or perhaps one of uncertain construction.

68. 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.

69. But in Mr Carthy's case I can see no reason for any expectation that he would have been notified of any new law. I have therefore concluded that the lack of such notification did not provide a reasonable excuse

70. 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 moght have a reasonable excuse.

71. 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.

72. 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.”

73. 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 a taxpayer’s income is not 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.

74. 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".

75. 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 surely have 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 a taxpayer could 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?

76. Where a 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.

77. Mr Carthy did not make the claim child benefit and did not know it was being paid. 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.

78. Did Mr Carthy's previous experience of receiving a tax return whenever his tax affairs were more complicated than the receipt of simple PAYE income give rise to a reasonable expectation that the same would be the case in relation to any other sources of income?

79. On both the occasions Mr Carthy had been asked to fill in a tax return, it had been because of complications in his *employment income*. Mr Carthy was a conscientious taxpayer: I believe that if, for example, he had started to let a property or acquired a source of interest he would have taken steps to declare it without expecting to be asked to fill in a return. Thus, if he had known about the HICBC he would have asked to declare it. As a result I conclude that his previous dealings with HMRC did not give rise to a reasonable expectation that he would be sent a tax return if he became liable to additional tax as a result of a change in the law.

80. I conclude therefore that Mr Carthy did not have a reasonable excuse for his failure.

(3) Special circumstances

81. There was no indication that the special circumstances provision had been considered by HMRC. I find it was not. The failure to consider it means that HMRC 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.

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

83. 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. It was implicitly accepted in *Robertson* that HMRC knew of the unpaid tax at an earlier date. If they did not know, then their delay in addressing the issue caused them to become aware of the unpaid tax later. Further, 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 specific to a specific class of taxpayers affected by the particular way the income which gave rise to the tax arose. These circumstances were, to my mind, special and warrant a reduction in the 20% penalties to 10%.

Conclusion.

84. I reduce the penalties so that they are to be calculated at 10% rather than 20%.

Rights of Appeal

85. 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