TC07833

Income tax – high income child benefit charge – penalty for failure to notify – appellant unaware of the charge as was living in Australia for ten years up to 2015 – his wife made child benefit claim and did not convey information about the charge on the form to the appellant – held: there was a reasonable excuse for failure to notify – penalty cancelled

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2020/00462

BETWEEN

ANDREW O'CONNOR **Appellant**

-and-

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

TRIBUNAL: JUDGE ZACHARY CITRON

The Tribunal determined the appeal without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 26 January 2020 (with enclosures) and HMRC's Statement of Case (acknowledged by the Tribunal on 2 June 2020); the Tribunal also had before it two pdf bundles prepared by HMRC: a hearing bundle pdf of 63 pages and a legislation, pro formas and press releases and case law bundle pdf of 440 pages (the "generic bundle").

DECISION

INTRODUCTION

1. This was an appeal against penalties of £178.80 for failure to notify liability to income tax by reason of the high income child benefit charge (the "Charge").

THE APPEAL

2. On 26 November 2019 HMRC raised assessments to the Charge on the appellant, Mr O'Connor, for the tax years 2016-17 and 2017-18, each in the amount of £1,788. On the same date HMRC raised a "failure to notify" penalty assessment in respect of 2016-17 only (the "tax year in question") in the amount of £178.80. The penalty was calculated as 10% of potential lost revenue ("PLR").

3. Mr O'Connor appealed against the penalty assessment to HMRC on 18 December 2019.

4. On statutory review of the penalty assessments by HMRC, HMRC's review conclusion letter of 13 March 2020 upheld them.

5. Mr O'Connor notified his appeal against the penalty assessments to the Tribunal by notice dated 26 January 2020.

THE CHARGE

6. The Charge was introduced as a new charge to income tax by Finance Act 2012, with effect for the 2012-13 tax year and subsequent tax years. In broad terms it applies where someone's "adjusted net income" in a tax year exceeds £50,000 and that person, or his or her partner, is entitled to an amount in respect of child benefit for a week in the tax year.

7. Finance Act 2012 also provided that anyone liable to the Charge (and who had not received a notice to file a self-assessment tax return) had to notify liability to income tax to HMRC within six months of the end of the tax year (even if that person were otherwise exempt from such notification by reason of his or her total income being subject to PAYE).

8. Mr O'Connor did not appeal against the assessment to the Charge for the tax year in question – it was only in respect of the "failure to notify" penalties that he appealed.

FINDINGS OF FACT

9. Mr O'Connor and his wife, Mrs O'Connor, had two younger children in respect of whom Mrs O'Connor received child benefit during the tax year in question. Mr and Mrs O'Connor each have their own bank account.

10. The O'Connor family lived in Australia for ten years, returning to the UK in July 2015.

11. Mrs O'Connor completed a child benefit application form shortly after the family's return to the UK in 2015. The form contained information about the Charge under the heading "Is your or your partner's income more than £50,000?" Mrs O'Connor did not convey this information about the Charge to her husband. Mr O'Connor did, however, know that Mrs O'Connor had claimed child benefit.

12. Mr O'Connor's adjusted net income for the purposes of the Charge exceeded £50,000 in the tax year in question (it did not in the prior tax year).

13. Mr O'Connor did not notify HMRC that he was chargeable to income tax for the tax year in question, within six months of the end of those tax years. Nor did he receive notice to file a tax return from HMRC.

14. HMRC wrote to Mr O'Connor in October 2019 informing him that he might be liable to the Charge. Shortly after this, Mr O'Connor provided information to HMRC and paid the amount of the Charge owing for the tax year in question as well as the subsequent tax year; and Mrs O'Connor cancelled the child benefit claim.

15. HMRC did not raise a "failure to notify" penalty for the 2017-18 tax year because they regarded Mr O'Connor's disclosure as "unprompted" and made less than 12 months after the tax in question first became unpaid by reason of the failure to notify; and so, under the law (see [19] below), the penalty percentage for that tax year was 0%.

LAW RELATING TO NOTIFYING LIABILITY TO TAX AND PENALTIES FOR FAILURE TO DO SO

16. Under section 7 Taxes Management Act ("TMA")1970, a person who is chargeable to income tax for a tax year, and who has not received a notice under section 8 of that Act requiring a return for that year of his or her income and chargeable gains, is required to give notice to HMRC of his or her chargeability. There are certain exceptions to this in sub-section 7(3), but these do not apply where the person is liable to the Charge.

17. Under paragraph 1 Schedule 41 Finance Act 2008, a penalty is payable by a person where he or she fails to comply with an obligation to give notice of liability to income tax under section 7 TMA 1970. (References in what follows to "paragraphs" are to paragraphs of Schedule 41 Finance Act 2008).

18. The standard amount of the penalty is 30% of PLR in a case (like this one) where the failure was not deliberate (paragraph 6).

19. Paragraph 13 provides for reductions in penalties where there has been disclosure. A 30% penalty can be reduced down to 10% for "prompted" disclosure where HMRC first become aware of the failure within 12 months after the time when the tax first becomes unpaid by reason of the failure; otherwise, it can only be reduced down to 20% for "prompted" disclosure. (If the disclosure is "unprompted", the reductions may be down to 0% if within this 12 month period, and otherwise down to 10%).

20. A person discloses the relevant act or failure by (a) telling HMRC about it, (b) giving HMRC reasonable help in quantifying the tax unpaid by reason of it, and (c) allowing HMRC access to records for the purpose of checking how much tax is so unpaid (sub-paragraph 12 (2)).

21. A disclosure is "unprompted" if made at a time when the person making it has no reason to believe that HMRC have discovered or are about to discover the relevant act or failure (sub-paragraph 12(3)).

22. Under paragraph 14, if HMRC think it right because of special circumstances, they may reduce a penalty under paragraph 1.

23. On an appeal to the Tribunal, the Tribunal may rely on paragraph 14 to a different extent than HMRC have done, but only if the Tribunal thinks that HMRC's decision in respect of the application of paragraph 14 was flawed (when considered in the light of the principle applicable in proceedings for judicial review) (sub-paragraphs 19(3) and (4)).

24. Liability to a penalty under paragraph 1 does not arise in relation to an act or failure which is not deliberate if a person satisfies HMRC (or on an appeal to the Tribunal, the Tribunal) that there is a reasonable excuse for the act or failure (paragraph 20).

25. In *The Clean Car Co Ltd v C&E Comrs* [1991] VATTR 234 Judge Medd QC set out his understanding of "reasonable excuse":

> "One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?...
> It seems to me that Parliament in passing this legislation must have intended that the question of whether a particular trader had a reasonable excuse should be judged by the standards of

reasonableness which one would expect to be exhibited by a taxpayer who had a responsible attitude to his duties as a taxpayer, but who in other respects shared such attributes of the particular appellant as the tribunal considered relevant to the situation being considered. Thus though such a taxpayer would give a reasonable priority to complying with his duties in regard to tax and would conscientiously seek to ensure that his returns were accurate and made timeously, his age and experience, his health or the incidence of some particular difficulty or misfortune and, doubtless, many other facts, may all have a bearing on whether, in acting as he did, he acted reasonably and so had a reasonable excuse."

29. That this is the correct test was confirmed by the Upper Tribunal in *Perrin v HMRC* [2018] UKUT 156. At [81] of that judgment, the Upper Tribunal also set out a recommended process for this Tribunal when considering whether a person has a reasonable excuse:

"(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.

(3) Third, decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default….In doing so, the Tribunal 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 Tribunal, 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?"

(4) Fourth, having decided when any reasonable excuse ceased, decide whether the taxpayer remedied the failure without reasonable 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."

26. In the following paragraph ([82]), the Upper Tribunal went on to say:

"One situation that can sometimes cause difficulties is when the taxpayer's asserted reasonable excuse is purely that he/she did not know of the particular requirement that has been shown to have been breached. It is a much-cited aphorism that "ignorance of the law is no excuse", and on occasion this has been given as a reason why the defence of reasonable excuse cannot be available in such circumstances. We see no basis for this argument. Some requirements of the law are well-known, simple and straightforward but others are much less so. It will be a matter of judgement for the FTT in each case whether it was objectively reasonable for the particular taxpayer, in the circumstances of the case, to have been ignorant of the requirement in question, and for how long."

BURDEN AND STANDARD OF PROOF

27. The burden of establishing that the appellant is prima facie liable for a penalty which has been properly notified and assessed lies with HMRC. The burden of establishing that the appellant should not be liable for the penalty because, for example, there is a reasonable excuse for his failure, or that the decision by HMRC that special circumstances do not apply in this case is flawed, lies with the appellant. In each case the standard of proof is the balance of probabilities.

THE PARTIES' ARGUMENTS

28. Mr O'Connor's points included:

(1) Prior to receiving a letter from HMRC about the Charge in October 2019, he was unaware of the Charge as it was brought in during the time his family was living in Australia

(2) HMRC did not charge a penalty for the 2017-18 tax year – so they should not have charged one for the tax year in question

(3) Mr O'Connor says that when he initially contacted HMRC, he was told that no penalty would be charged

(4) Mr O'Connor says that on returning to the UK, his wife was advised by someone at the DWP to apply for child benefit – but she was not told about the £50,000 threshold for the Charge

(5) Mr O'Connor had to take out a loan to pay the liability to the Charge for the tax year in question and subsequent tax year.

29. HMRC's position was that the penalty assessments were validly raised as Mr O'Connor had not notified his chargeability to income tax within six months of the end of the tax year in question; that the disclosures made by Mr O'Connor regarding the failure to notify were "unprompted"; and they had given Mr O'Connor the maximum reduction in the penalties under the rules in Schedule 41 Finance Act 2008. (The finding of fact at [15] above reflects HMRC's position on 2017-18).

30. HMRC argued that there was no reasonable excuse for Mr O'Connor's failure to notify; and that their decision that there were no special circumstances, was not flawed. In particular HMRC submitted that:

(1) the Government publicised the Charge when it was introduced

(2) there was information on the Charge on the HMRC website

(3) it was not credible that Mrs O'Connor was unaware of the £50,000 threshold for the Charge, given the information provided on the child benefit application form

(4) even if Mr O'Connor had not been involved in the child benefit claim made by Mrs O'Connor, as taxpayers with reasonable regard to the law and their responsibilities, Mr and Mrs O'Connor would be expected to have a conversation discussing the matter as it concerned Mr O'Connor's income and Mrs O'Connor's child benefit claim

(5) Mr O'Connor stated in correspondence that Mrs O'Connor claimed "tax credits" following their return to the UK, but had to make repayments as she was not entitled to these. HMRC would expect a reasonable taxpayer in these circumstances to check his eligibility for other benefits they were receiving at that time to ensure they were entitled to them or to at least check the criteria for those benefits to confirm they continue to be eligible.

DISCUSSION

31. The matter in question for the Tribunal here is the penalty raised by HMRC for failure to notify liability – there was no appeal against Mr O'Connor's underlying liability to the Charge for the tax year in question. I have found that Mr O'Connor did not notify his income tax chargeability to HMRC within six months of the end of the tax years in question. Given that HMRC accept Mr O'Connor's disclosures in 2019 as "unprompted", this means the penalties were validly raised, subject only to the "defences" of reasonable excuse (as the failure to notify was not deliberate) and special circumstances. As the Tribunal informed Mr O'Connor in its letter of 16 March 2020, the Tribunal has no powers in respect of the interest charged.

32. The principal excuse given by Mr O'Connor for failing to notify HMRC his liability to income tax by reason of the Charge was that he was not aware of the Charge (and the consequent obligation to notify liability), having been living in Australia for ten years prior to returning to the UK in 2015 – his absence from the UK coincided with the time when the Charge was introduced and the Government publicised the change in law.

33. I accept the facts comprised in the above excuse above as proven. As Mr O'Connor is saying that he was not aware of the legal requirement (to notify liability to income tax), it is a matter of judgement for me in this case as whether it was objectively reasonable for Mr O'Connor, in his circumstances, to have been ignorant of this requirement, and for how long.

34. In my view, Mr O'Connor's absence from the UK during the time the Charge was publicised by the Government does make his lack of awareness objectively reasonable. HMRC argue that this position should have changed after Mrs O'Connor claimed child benefit, given the information on the Charge given in the child benefit application form. I have found that the child benefit form completed by Mrs O'Connor shortly after their return to the UK did contain information on the Charge – however, I have also found, by inference from Mr O'Connor's evidence that he was not aware of the Charge until HMRC wrote to him about it in October 2019, that Mrs O'Connor did not convey that information to her husband. Whilst these facts may indicate that Mrs O'Connor's conduct did not meet the standard of a reasonably conscientious taxpayer, I do not find that this can be said of Mr O'Connor – it cannot be said that because Mr O'Connor left the claiming of child benefit to his wife, and did not enquire actively with her as to what information was on the child benefit form, that he fell short of what would be expected of a reasonably conscientious taxpayer. After all, the claiming of child benefit was not, in itself, a tax matter; due to the Charge, it had tax consequences; but the point here is that Mr O'Connor was unaware of this.

35. I have not therefore accepted HMRC's submission, summarised at [30(4)] above. Nor do I accept the submission summarised at [30(5)] above: the fact that one's wife's claim for "tax credits" was incorrect does not create an expectation that a reasonably conscientious taxpayer would then begin actively to research whether her claiming of a different benefit, child benefit, had tax implications.

36. Having found that Mr O'Connor's principal excuse was a reasonable one, it is unnecessary to consider the other excuses put forward or the possibility that HMRC's decision not to reduce the penalties on the grounds of there being special circumstances, was flawed,

CONCLUSION

37. HMRC's decision to raise this "failure to notify" penalty is CANCELLED.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

38. 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.

ZACHARY CITRON
TRIBUNAL JUDGE

RELEAE DATE: 08 SEPTEMBER 2020