



Neutral Citation: [2022] UKFTT 00185 (TC)

Case Number: TC08510

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Location: Decided on the papers

Appeal reference: TC/2021/08185

Income tax – Higher income child benefit charge – penalties for late filing and late payment – validity of penalties - reasonable excuse – special circumstances - appeal allowed in part

Judgment date: 13 June 2022

Decided by:

TRIBUNAL JUDGE MCGREGOR

Between

DAVID RUSSELL

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

The Tribunal determined the appeal on 13 June 2022 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 1 September 2021 (with enclosures), HMRC's Statement of Case dated 17 November 2021 and two bundles of documents: one document bundle of 73 pages and one authorities bundle of 132 pages.

DECISION

INTRODUCTION

1. This appeal concerned penalties for late filing of self-assessment tax returns under Schedule 55 of Finance Act 2009 (“**FA 2009**”) and late payment of tax in the form of the higher income child benefit charge (“**HICBC**”) under Schedule 56 to FA 2009 in respect of tax years 2016/17, 2017/18 and 2018/19.

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. ANI is defined in ITEPA 2003, s 681H. For each £100 in excess of £50,000 a 1% tax liability arises calculated on the amount of Child Benefit received. The amount of tax due is not in dispute in this case.

4. A person who is required to submit a self-assessment tax return but does not do so on time is charged a penalty for the lateness. Under paragraph 3 of Schedule 55 to FA 2009 a fixed £100 penalty is imposed if a self-assessment return is submitted late.

5. The filing date for the tax return is calculated by reference to section 8(1G) of Taxes Management Act 1970, which provides that if a notice in respect of Year 1 is given after 31st October in Year 2, a return (whether electronic or not) must be delivered during the period of 3 months beginning with the date of the notice.

6. When the tax due for a tax year is not paid by the due date paragraph 3 of Schedule 56 to FA 2009 imposes penalties of 5% of the unpaid tax for the late payment of income tax if it has not been paid:

- (1) On or before the penalty date;
- (2) 5 months after the penalty date;
- (3) 15 months after the penalty date.

7. The penalty date by reference to which the penalty is determined is established in accordance with columns 3 and 4 of the Table found in Schedule 56 to FA 2009. Where the amount is an amount of income tax payable in accordance with section 59B(3) or (4) of TMA 1970, the date is 30 days after the date specified in that subsection.

8. TMA 1970, s 59B(3) establishes the due date for the tax where notice of liability is given to HMRC within 6 months of the end of the year of assessment. TMA 1970, s 59B(4) provides that in other circumstances, the due date is 31st January next following the year of assessment.

9. The penalty date is defined under paragraph 1(4) of Schedule 56 to FA 2009 as the 31st day following the due date for payment.

10. Under paragraph 16 of Schedule 56 to FA 2009, liability to the penalty does not arise where the taxpayer has a reasonable excuse for the failure to pay on time. Under paragraph 23 of Schedule 55 to FA 2009, liability to the penalty for late filing does not arise where the taxpayer has a reasonable excuse. In both cases, the failure must be put right without unreasonable delay after the excuse has ended.

11. Paragraph 16 of Sch. 55 FA 2009 and paragraph 9 of Sch.56 FA 2009 provides HMRC with discretion to reduce any penalty charged under this Schedule if they think it right to do so because of “special circumstances”.

12. Where a person appeals against the amount of a penalty, paragraph 22(2) and (3) of Schedule 55 to FA 2009 and paragraph 15(2) and (3) of Schedule 56 to FA 2009 provide this Tribunal with the power to substitute HMRC’s decision with another decision that HMRC had the power to make if HMRC’s decision was ‘flawed when considered in the light of the principles applicable in proceedings for judicial review’.

FACTS

13. I find the following facts based on the evidence documents before me. Further findings of facts are set out later in the decision where necessary.

14. Child benefit was claimed (by Mr Russell’s partner) in respect of their twins from July 2015 (the specific date is not referred to in order to protect the privacy of Mr Russell’s children) through to 5 April 2019 (being the end of the period relevant to this appeal). The confirmation of child benefit was sent in a letter to Mr Russell’s partner on 3 September 2015.

15. On 23 January 2020, HMRC sent a letter to Mr Russell which referred to his circumstances having changed with regards to child benefit.

16. On 27 April 2020, HMRC received Mr Russell’s application to register for self-assessment, with a reference to the start date in July 2015.

17. On 11 August 2020, HMRC issued notices for fixed penalties of £100 for each of the three tax years for late filing of the returns.

18. On 13 August 2020, Mr Russell filed tax returns for all three years online using his online tax account. Mr Russell’s appeal refers to this having been done on 8 August, but without any evidence to support it (for example a submission receipt email). HMRC’s case is that the returns were submitted on 13 August. HMRC included screenshots of the self-assessment electronic systems recording submission on 13 August and records showing Mr Russell’s log ins to the online tax account on 13 August. I accept HMRC’s evidence and find that the returns were submitted online on 13 August 2020.

19. On 18 August 2020, HMRC issued notices of late payment penalties in respect of each of the three tax years, as follows:

(1) £65 for each of the 30 day, 6 months and 12 months late payment for tax year 2016/17;

(2) £73 for each of the 30 day, 6 months and 12 months late payment for tax year 2017/18;

(3) £76 for each of the 30 day and 6 months late payment for tax year 2018/19 (note the tax was paid before the 12 month penalty point was reached).

20. Added together, these amount to penalties of £866.

21. The tax due in respect of all three years was paid on 8 November 2020.

PARTIES ARGUMENTS

Mr Russell’s arguments

22. Mr Russell submits that:

(1) He received confirmation of his Child Benefit entitlement by letter, in September 2015. In the section ‘Changes about me’ within the letter, there was no reference to the salary/benefits cap of £50,000.

(2) He received a letter on 23 January 2020, regarding Child Benefit and change in circumstances. It was the first notification in five years requesting that he ensure he was still entitled to receive Child Benefit. Until that point, he had had no idea he was no longer eligible due to salary increase.

(3) In April 2020, he began the process of registering for Self-Assessment in order to complete Self-Assessment returns for earlier years.

(4) He made an honest mistake and has learnt the hard way.

(5) The last two years have been extremely stressful, and he has suffered anxiety and experienced suicidal thoughts.

(6) He does not have the funds to pay the penalties (and the associated interest) because he has to repay the funds he borrowed to enable him to pay the tax bill in November 2020.

HMRC's arguments

23. HMRC submits that the late filing penalties were validly issued because:

(1) The notices to file were issued on or around 27 April 2020 and gave a filing date of 4 May 2020;

(2) The tax returns were submitted on 13 May 2020; and

(3) Therefore the tax returns were submitted 9 days late.

24. HMRC submits that the late payment penalties were validly issued because:

(1) The due date for payment was 31 January in the year following the end of the relevant tax years, i.e.:

(a) 31 January 2018 in respect of tax year 2016/17;

(b) 31 January 2019 in respect of tax year 2017/18; and

(c) 31 January 2020, in respect of tax year 2018/19;

(2) The actual date of payment was 8 November 2020; and

(3) Therefore the payments of tax were late in all three years, by more than 12 months for the first two years and by more than 6 months in the third year.

25. HMRC submits that Mr Russell does not have a reasonable excuse for his failures because:

(1) While the child benefit confirmation letter received in September 2015 did not explicitly refer to the £50,000 income threshold, it does remind the taxpayer to review the full accompanying notes;

(2) HMRC is unable to confirm whether the accompanying notes referred to the £50,000 income threshold;

(3) The child benefit application form and the accompanying notes at the time of the application included clear information regarding important changes if a claimant or their partner has an individual income of more than £50,000 a year.

(4) While it was a long time between the original claim and any notification from HMRC that he may not be entitled to receive the full amount of child benefit, it was Mr Russell's responsibility to ensure he was so entitled;

- (5) Ignorance of the law is not an excuse on its own but may be a reasonable excuse in some circumstances depending on whether it is objectively reasonable for the particular taxpayer in the circumstances of the case;
- (6) An honest mistake is not a reasonable excuse;
- (7) An insufficiency of funds is not a reasonable excuse.

26. HMRC submits that it has considered whether it should apply a special reduction to the penalties and concluded that no special circumstances exist, in particular that:

- (1) Financial hardship; and
- (2) The mental health impact on Mr Russell

Were not circumstances that merited special reduction.

27. HMRC noted that, should this appeal be unsuccessful, Mr Russell would be able to contact the debt management team within HMRC for assistance in dealing with the payment process for the penalties.

28. Finally, HMRC notes that, although it is raised by Mr Russell, the charging of interest is outside the remit of this Tribunal.

DISCUSSION AND DECISION

29. Firstly, interest is indeed outwith the powers of this Tribunal and therefore I do not deal with it in this decision.

30. With regards to the late filing penalties, it is HMRC's burden to show that the conditions for the penalty to arise have been met. As noted above, if a notice to file a return in respect of Year 1 is given after 31st October in Year 2, a return (whether electronic or not) must be delivered during the period of 3 months beginning with the date of the notice.

31. HMRC submit that the notices were issued "on or around 27 April 2020" and that the due date for submission was recorded in those notices as 4 May 2020 (which included a 7 day window for postal receipt of the notice being provided by the computer system). In support of this, HMRC include a screen shot of the self-assessment record which notes that date alongside the words "Return issued date". However, the notices of return were not included in the bundle – HMRC included only specimen front pages of the returns that would have been issued.

32. I accept that something happened within HMRC's electronic systems on 27 April 2020 with regard to Mr Russell's self-assessment returns. However, I do not accept that HMRC has met the burden to show that the due date for those returns was 4 May 2020. Without evidence of when the returns were in fact posted to Mr Russell or the contents of the notice, I cannot find that the returns were filed late. Therefore I find that the late filing penalties for all three years were not validly issued.

33. Turning to the late payment penalties, as set out above, the law provides that the due date is 31 January in the year following the end of the tax year in circumstances where no notification of liability to tax has been made by 31 October following the year. There does not appear to be any dispute here that this is the relevant due date and I find that it is.

34. The date of payment of the tax on 8 November 2020 is also not in dispute.

35. The notices of penalties were also issued to Mr Russell, who received them.

36. Therefore, I find that HMRC have validly raised the penalties amounting to £566 in respect of the three years.

37. I must therefore consider whether Mr Russell had a reasonable excuse. As set out in Upper Tribunal, in *Christine Perrin v HMRC* [2018] UKUT 0156, I must take a three-step approach to considering whether Mr Russell has a reasonable excuse:

- (1) First, establish what facts the taxpayer asserts give rise to a reasonable excuse;
- (2) Second, decide which of those facts are proven; and
- (3) Third, decide whether, viewed objectively, those proven facts do amount to an objectively reasonable excuse for the default, eg by asking the question “was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?”.

38. Mr Russell submits that the letter they have on file confirming their child benefit application does not mention the £50,000 threshold. He also submits that the part of the letter entitled “Telling us about changes” also does not mention the £50,000 threshold.

39. Both of these submissions are undoubtedly true since Mr Russell included the letter in his appeal. The ‘changes’ set out in the letter deal instead with administration issues such as changing address, name and bank account, and also with a person leaving the country; as well as changes relating to the child themselves. The letter also has a box to provide details of any other changes. Finally the letter does, as HMRC submit, include an encouragement to read the accompanying notes. HMRC assert that this was likely to include a reference to the £50,000 threshold, but are unable to provide any evidence to corroborate that. I therefore cannot find that the notes did contain such a statement.

40. In addition, Mr Russell submits that he didn’t know about the change in the law and that he needed to submit a return and to make payments of HICBC. While it is unusual, ignorance of the law can be a reasonable excuse in some circumstances. While it may be true that Mr Russell did not know about these obligations, since the first claim for HICBC was in 2015, when the law had already been changed and the application forms undoubtedly included information about the £50,000 threshold.

41. Putting these matters together, I find that Mr Russell did not have a reasonable excuse for failing to pay his tax on time because I do not find that it was objectively reasonable for Mr Russell not to investigate his obligations in respect of claiming child benefit and paying the HICBC at the time.

42. Finally, I must consider special circumstances. Special circumstances are not defined, other than to exclude ability to pay (or balancing of payments between taxpayers) from being special circumstances.

43. I am therefore unable to consider the hardship of Mr Russell in considering whether any special circumstances may apply.

44. I must consider whether the decision of HMRC is flawed in the judicial review sense, by failing to take something relevant into account or taking something irrelevant into account or by being a decision that a reasonable decision maker could make based on the evidence.

45. I note that HMRC’s review letter refers to a letter apparently sent to Mr Russell during its 2012/13 campaign to highlight the new regime to taxpayers whose income exceeded the £50,000 threshold. HMRC’s officer suggested that this letter was relevant and that “it is still within a reasonable timescale for me to think that you would have been aware that you needed to check if you held any entitlement with HMRC when you children were born”. I find that included this letter as a piece of relevant information (albeit that it was referred to in the section on reasonable excuse not special circumstances) was not one a reasonable decision maker could

take. A standard letter about child benefit two years before a person even had children is not a relevant piece of information.

46. However, it does not render the whole decision flawed. In my view, the decision that no special circumstances existed was a reasonable one for HMRC to make.

DISPOSITION

47. I allow Mr Russell’s appeal with regard to late filing penalties of £300.

48. I dismiss Mr Russell’s appeal with regard to late payment penalties of £566.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

49. 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: 14 JUNE 2022