



**TC07667**

*High Income Child Benefit Charge penalty*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**Appeal number: TC/2019/03394**

**BETWEEN**

**ANDREW DURHAM**

**Appellant**

**-and-**

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

**Respondents**

**TRIBUNAL: JUDGE SARAH ALLATT  
MS SUSAN STOTT**

**Sitting in public at Taylor House on 6 February 2020**

**The Appellant in person.**

**Mr O'Grady, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents.**

## DECISION

### THE APPEAL

1. This is an appeal against penalties amounting to £633.00, raised for the tax years & 2015/16 and 2016/17 charged under Schedule 41 to the Finance Act 2008 (FA08).
2. The penalties were charged as a result of the Appellant's failure to notify liability to the High Income Child Benefit Charge (HICBC). The penalties were raised and notified to the Appellant on 27 February 2019.
3. The failure to notify penalties are the only matter under appeal.
4. The Appellant represented himself at the hearing.

### BACKGROUND

5. From 7 January 2013 changes came into effect as to how the receipt of Child Benefit affected households where an individual's 'Adjusted Net Income' (ANI) exceeds £50,000 (within a tax year). For each £100 in excess of £50,000 a 1% tax liability arises calculated on the amount of Child Benefit received.
6. Consequently, where an individual's ANI reaches £60,000 the effect is that 100% of the Child Benefit received becomes liable to a tax charge – the HICBC.
7. Anyone liable to the HICBC who chooses to carry on receiving Child Benefit payments has a legal obligation to declare the amount of Child Benefit they or their spouse/partner receive, by registering for Self-Assessment (if they are not already registered) and filling in a tax return each year.
8. When the HIBC came in, neither the appellant nor his wife were earning over £50,000. They had 3 children when the HIBC came in, and a 4<sup>th</sup> child was born in July 2013. The Appellant and his wife are both police officers.
9. It was not until the tax year 15/16, when the Appellant received a promotion, that he started to earn over £50,000.
10. The Appellant receives child benefit for one child and his wife for three.
11. HMRC state that at the point of application for the child benefit for the 4<sup>th</sup> child, the form would have explained about the HICBC.
12. At that point due to their salaries the HICBC would not have applied to Mr Durham and his wife.
13. HMRC wrote to the Appellant in August 2018 advising him he may be liable to the HICBC.
14. The Appellant went online to the calculator, as suggested by the letter, and calculated that due to his pension contributions he would not be liable to the charge.
15. This is because the online calculator states 'salary before tax (with pension contributions deducted). There is no explanation, or link to any information, about which pension contributions should or should not be deducted, or how to do this.
16. As a result, the Appellant mistook how to apply the calculator, and was in fact liable to the HICBC.

17. On receiving an assessment letter, the Appellant phoned HMRC, and was informed by the HMRC employee on the telephone that a number of people found the online calculator misleading. He was informed of the correct method to perform the calculation. He also informed HMRC that their records were incorrect and he and his wife claimed child benefit for four children whereas HMRC had thought there were only 3 claims.

18. Revised assessment and penalties were issued on 27 February 2019.

19. After further correspondence the Appellant appealed to the Tribunal on 11 May 2019.

20. The following facts are not disputed for each of the years under appeal: -

(1) The amount of ANI

(2) The amount of child benefit received

(3) The Appellant was not issued with a notice to file a Self-Assessment return under section 8 TMA 1970.

(4) The Appellant did not file a Self-Assessment return under section 7 TMA 1970, and therefore did not notify his liability to the HICBC,

(5) The Appellant accepts the assessments and has paid all liabilities.

#### **GROUND OF APPEAL**

21. The Appellant's grounds of Appeal are as follows:

22. He was not aware of his liability to the HICBC until the letters he received in 2018. When the charge was brought in he was not within it until several years later.

23. The online calculator is misleading.

24. He did not receive a letter that HMRC told him was sent in October 2018 warning him he may be liable to HICBC.

25. He contacted HMRC as soon as he was aware there was a problem and has paid all tax due.

26. He is paid via PAYE and would have expected HMRC to contact him earlier than they did do to inform him of the new requirements.

27. HMRC submit that they are not obliged to inform taxpayers of a change in the law. They say there was a national campaign of information, but this was not something they were obliged to do.

28. HMRC say further that the fact that the calculator may be misleading is irrelevant, as the Appellant did not use the online calculator until long after the time he should have notified his obligation to file a return.

#### **THE LAW**

29. The law is set out in the appendix to this decision.

#### **DISCUSSION**

30. We note that there is no disagreement that the penalties have been correctly calculated.

31. We note that HMRC have applied the maximum discounts available to the penalties within the legislation.

32. We agree with Judge Poon in *Johnstone v HMRC* [2018] UKFTT 689 (TC) where she addresses the question of whether HMRC were obliged to inform taxpayers of the change in legislation. She states (para 49):

(1) HMRC do not have a statutory duty to notify all taxpayers potentially affected by HICBC. By statutory duty, we mean a duty that is provided by Parliament and laid down by statute. For example, HMRC have a statutory 25 duty to issue a notice of assessment for any tax liability to be enforceable.

(2) What initiatives or measures HMRC had taken to raise awareness of HICBC were matters of internal policy decisions, over which this Tribunal has no jurisdiction.

33. We therefore then turn to the question of whether ignorance of the law is a reasonable excuse in this case.

34. There have been a number of cases where Tribunals have decided that ignorance of the law can be a reasonable excuse. It depends on the nature of the law in question and the characteristics of the taxpayer.

35. The Appellant appeared before us. His evidence was clear and straightforward. He was not aware of the law and at the time of the media campaign would not have thought it applied to him because at that point the salaries of him and his wife were under the threshold. He was not aware of whether or not the process for claiming child benefit for his 4<sup>th</sup> child had involved being told about this new charge, but at that point it would not have applied to them either.

36. He believed that HMRC had all the information they needed from his PAYE records. As soon as he was made aware of the additional liabilities he paid them.

37. He was very disappointed that HMRC had acknowledged to him that the online calculator was not clear with regards to pension payments, and yet one year later nothing had been done to change this.

38. We have considered the legislation and the case law regarding reasonable excuse. As the HICBC is relatively new, case law on this specific aspect of the legislation is minimal. We are aware that this Tribunal has found, for a professional individual, that ignorance of this law is not an excuse.

39. We believe in this case that the Appellant does not have a reasonable excuse. The combination of the information at the time of the claim for the 4<sup>th</sup> child, combined with his profession and capabilities, and the fact that HRMC had contacted him in August 2013 (at which point he would not have been liable but was being made aware) mean that he has not discharged the burden of proof to show that he had a reasonable excuse.

40. However, we have considered the application of special circumstances to this case. It was not clear whether HMRC had considered special circumstances in this particular case. HMRC had previously decided not to issue penalties in cases where an individual was not liable to the HICBC in 2013, and their income subsequently increased to over £50,000, but only for those individuals who did not make a new claim for child benefit in that period.

41. The Appellant therefore does not fall within that general concession from HMRC due to the new claim.

42. We have considered the particular circumstances of the Appellant. When the HICBC came out he and his wife were not within the charge. When he and his wife made the claim for child benefit for their 4<sup>th</sup> child, they were still not within the charge. We have not been presented with evidence that the claim form included a warning about HICBC, but even if it did, the Appellant did not expect to be within the charge and was not within the charge for over 2 years afterwards.

43. We consider that in these are 'special circumstances' within the meaning of the legislation, and we reduce the penalties charged to nil.

44. In these circumstances we consider that it was reasonable for the Appellant not to be aware he needed to file a tax return.

45. Accordingly, this appeal is allowed.

**RIGHT TO APPLY FOR PERMISSION TO APPEAL**

46. 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.

**SARAH ALLATT**

**TRIBUNAL JUDGE**

**RELEASE DATE: 8 APRIL 2020**

## APPENDIX

### Applicable Legislation Section 681B of ITEPA 2003

The provisions for HICBC is under s 681B of (ITEPA 2003) are as follows:

- (1) A person ('P') is liable to a charge to income tax for a tax year if—
  - (a) P's adjusted net income for the year exceeds £50,000, and
  - (b) one or both of conditions A and B are met.
- (2) The charge is to be known as a 'high income child benefit charge'.
- (3) Condition A is that—
  - (a) P is entitled to an amount in respect of child benefit for a week in the tax year, and
  - (b) there is no other person who is a partner of P throughout the week and has an adjusted net income for the year which exceeds that of P.
- (4) Condition B is that—
  - (a) a person ('Q') other than P is entitled to an amount in respect of child benefit for a week in the tax year,
  - (b) Q is a partner of P throughout the week, and
  - (c) P has an adjusted net income for the year which exceeds that of Q.

### Subsection 58(1) of ITA 2007

'Adjusted net income' is defined under s 681H of ITEPA 2003, by reference to sub-s 58(1) of the Income Tax Act 2007 (ITA 2007), which provides, *inter alia*, that:

For the purposes of Chapters 2 and 3, an individual's adjusted net income for a tax year is calculated as follows.

*Step 1* Take the amount of the individual's net income for the tax year.

*Step 2* If in the tax year the individual makes, or is treated under section 426 as making, a gift that is a qualifying donation for the purposes of Chapter 2 of Part 8 (gift aid) deduct the grossed up amount of the gift.

*Step 3* If the individual is given relief in accordance with section 192 of FA 2004 (relief at source) in respect of any contribution paid in the tax year under a pension scheme, deduct the gross amount of the contribution.

*Step 4* Add back any relief under section 457 or 458 (payments to trade unions or police organisations) that was deducted in calculating the individual's net income for the tax year.

The result is the individual's adjusted net income for the tax year.

## **Section 7 of TMA 1970**

If the adjusted net income of an individual in a tax year gives rise to HICBC, then under s 7 of TMA 1970, it is provided:

(1) Every person who –

- (a) is chargeable to income tax or capital gains tax for any year of assessment, and
- (b) falls within subsection (1A) or (1B),

shall, subject to subsection (3) below, within the notification period, give notice to an officer of the Board that he is so chargeable.

(1A) A person falls within this subsection if the person has not received a notice under section 8 requiring a return for the year of assessment of the person's total income and chargeable gains.

(1B) A person falls within this subsection if the person –

(a) has received a notice under section 8 requiring a return for the year of assessment of the person's total income and chargeable gains, and

(b) has received a notice under section 8B withdrawing the notice under section 8.

[...]

(3) A person shall not be required to give notice under subsection (1) above in respect of a year of assessment if for that year –

(a) the person's total income consists of income from sources falling within subsection (4) to (7) below,

(b) the person has no chargeable gains, and

(c) the person is not liable to higher income child benefit charge.

## **Section 86 to TMA 1970**

Section 86 of TMA provides for the charge of interest on any outstanding tax liability after its due date. Sub-section 1(b) provides as follows:

... any income tax or capital gains tax which becomes due and payable in accordance with section 55 or 59B of this Act, shall carry interest at the rate applicable under section 178 of the Finance Act 1989 from the relevant date until payment.

## **Schedule 41 to FA 2008**

Paragraph 1 sets out the condition for the imposition of the penalty as referential to a 'Failure to notify':

(1) A penalty is payable by a person (P) where P fails to comply with an obligation specified in the Table below (a 'relevant obligation').

Income tax ... : Obligation under section 7 of TMA 1970 ...

The penalty percentage is set with reference to the 'Degrees of culpability' caterogised under para 5 as follows:

**5** (1) A failure by P to comply with a relevant obligation is –

(a) 'deliberate but concealed' if the failure is deliberate and P makes arrangements to conceal the situation giving rise to the obligation, and

(b) 'deliberate but not concealed' if the failure is deliberate and P does not make arrangements to conceal the situation giving rise to the obligation.

The standard amount of penalty is provided under para 6 in accordance with the degree of culpability giving rise to the failure.

**6** (1) This paragraph sets out the penalty payable under paragraph 1.

- (2) If the failure is in category 1, the penalty is –
  - (a) for a deliberate but concealed failure, 100% of the potential lost revenue,
  - (b) for a deliberate but not concealed failure, 70% of the potential lost revenue, and
  - (c) for any other cases, 30% of the potential lost revenue.
- (3) If the failure is in category 2, the penalty is –
  - [150%, 105% or 45% depending on the degrees of culpability].
- (4) If the failure is in category 3, the penalty is –
  - [200%, 140% or 60% depending on the degrees of culpability].(italics being paraphrasing)

**6A** [defines category 1, 2, and 3 failures]

The standard amount of penalty can be reduced by taking into account the quality of disclosure. Paragraphs 12 and 13 provide for ‘Reductions for disclosure’ as follows:

- (1) Paragraph 13 provides for reductions in penalties under paragraphs 1 to 4 where P discloses a relevant act or failure
- (2) P discloses a 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.
- (3) Disclosure of a relevant act or failure –
  - (a) 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, and
  - (b) otherwise, is “prompted”.
- (4) In relation to disclosure “quality” includes timing, nature and extent.
  - (1) If a person who would otherwise be liable to a penalty of a percentage shown in column 1 of the Table (a ‘standard percentage’) has made disclosure, HMRC must reduce the standard percentage to one that reflects the quality of the disclosure.
  - (2) But the standard percentage may not be reduced to a percentage that is below the minimum shown for it –
    - (a) for a prompted disclosure, in column 2 of the Table, and
    - (b) for an unprompted disclosure, in column 3 of the Table.
  - (3) Where the Table shows a different minimum of case A and case B–
    - (a) the case A minimum applies if –
      - (i) the penalty is one under paragraph 1, and
      - (ii) HMRC become aware of the failure less than 12 months after the time when the tax first becomes unpaid by reason of the failure, and
    - (b) otherwise, the case B minimum applies.

Standard %	Minimum % for prompted disclosure	Minimum % for unprompted disclosure
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30%	Case A:10% Case B 20%	Case A:0% Case B 10%
45%	Case A:15% Case B 30%	Case A:0% Case B 15%
60%	Case A:20% Case B 40%	Case A:0% Case B 20%
70%	35%	20%
100%	50%	30%
105%	52.5%	30%
140%	70%	40%
150%	75%	45%
200%	100%	60%

After applying any reduction for disclosure, further reduction to the penalty percentage may be made if there are special circumstances:

(1) If HMRC think it right because of special circumstances, they may reduce a penalty under any of the paragraphs 1 to 4.

(2) In sub-paragraph (1) ‘special circumstances’ does not include –

(a) ability to pay, or

(b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

(3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to –

(a) staying a penalty, and

(b) agreeing a compromise in relation to proceedings for a penalty.

Paragraph 16 provides that HMRC shall ‘assess’, ‘notify’ and ‘state in the notice in respect of which the penalty is assessed’ (sub-para 16(1)). The time limit for raising a penalty assessment is under sub-para 16(4), whereby:

(4) An assessment of a penalty ... must be made before the end of the period of 12 months beginning with –

(a) the end of the appeal period for the assessment of tax unpaid by reason of the relevant act or failure in respect of which the penalty is imposed, or

(b) if there is no such assessment, the date on which the amount of tax unpaid by reason of the relevant act or failure is ascertained.

Paragraph 17 provides a right to appeal against a penalty assessment:

**17** (1) P may appeal against a decision of HMRC that a penalty is payable by P.

(2) P may appeal against a decision of HMRC as to the amount of a penalty payable by P.

The Tribunal's jurisdiction in relation to an appeal against a penalty assessment is provided under para 19 as follows:

- (1) On an appeal under paragraph 17(1) the tribunal may affirm or cancel HMRC's decision.
- (2) On an appeal under paragraph 17(2) the tribunal may –
  - (a) affirm HMRC's decision, or
  - (b) substitute for HMRC's decision another decision that HMRC had power to make.
- (3) If the First-tier tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 14 –
  - (a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point),or
  - (b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 14 was flawed.
- (4) In sub-paragraph (3)(b) 'flawed' means flawed when considered in the light of the principles applicable in proceedings for judicial review.

Paragraph 20 provides for the 5 defence of 'Reasonable excuse':

- 20 (1) Liability to a penalty under any of the paragraphs 1, 2, 3(1) and 4 does not arise in relation to an act or failure which is not deliberate if P satisfies HMRC or (on appeal notified to the tribunal) the tribunal that there is a reasonable excuse for the act or failure.
- (2) For the purposes of sub-paragraph (1) –
- (a) an insufficiency of funds is not a reasonable excuse unless attributable to events outside P's control,
  - (b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the relevant act or failure, and
  - (c) where P had a reasonable excuse for the relevant act or failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the relevant act or failure is remedied without unreasonable delay after the excuse ceased.

Paragraph 21 has as its title '**Agency**', and where agency is involved, sub-para 21(1) provides that:

In paragraph 1 the reference to a failure by P includes a failure by a person who acts on P's behalf; but P is not liable to a penalty in respect of any failure by P's agent where P satisfies HMRC or (on an appeal notified to the tribunal) the tribunal that P took