TC07789

INCOME TAX – high income child benefit charge – penalties for failure to notify – reasonable excuse – no - appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/04698

BETWEEN

ANDREW TUCKER **Appellant**

-and-

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

TRIBUNAL: JUDGE DAVID BEDENHAM

The Tribunal determined the appeal on 22 July 2020 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 11 July 2019 (with enclosures), HMRC's undated Statement of Case, and a bundle of documents.

DECISION

INTRODUCTION

1. The Appellant appeals against penalties totalling £578.30 charged to him pursuant to Schedule 41 to the Finance Act 2008 ("FA 2008") as a result of his failure to notify liability to the High Income Child Benefit Charge ("HICBC").

2. The table below summarises the penalties issued to the Appellant:

Tax year	Penalty amount	Date penalty issued
2012/13	£43.80	14 February 2019
2013/14	£175.20	14 February 2019
2014/15	£177.00	14 February 2019
2015/16	£182.30	14 February 2019

FACTS

3. I find the following facts based on the documents provided to me:

4. In each of the 2012/13, 2013/14, 2014/15 and 2015/16:

   (a) The Appellant's adjusted net income exceeded £50,000;

   (b) The Appellant's wife was in receipt of Child Benefit;

   (c) The Appellant was liable to the HICBC;

   (d) The Appellant's employment income was taxed by way of PAYE;

   (e) The Appellant did not file a tax return (and did not therefore notify HMRC of his liability to HICBC); and

   (f) HMRC did not issue the Appellant with a notice to file.

5. On 3 September 2018, HMRC sent the Appellant an "awareness letter" which asked the Appellant to "check now to see if you need to pay the charge…". This letter set out the criteria for chargeability to HICBC (including "you have taxable income and benefits over £50,000 in a tax year").

6. On 5 September 2018, the Appellant emailed HMRC stating that his salary was now above £50,000 and asked HMRC to advise him as to whether he needed to pay the HICBC.

7. On 2 October 2018, HMRC sent to the Appellant a further "awareness letter".

8. On 8 October 2018, the Appellant contacted HMRC by telephone. The Appellant was advised to check his income figures and was directed to online resources relating to the HICBC.

9. On 13 October 2018, HMRC emailed the Appellant with further guidance in relation to the HICBC.

10. On 20 October 2018, the Appellant emailed HMRC. In that email the Appellant set out his income figures for the relevant years and his calculations of the HICBC due.

11. On 10 November 2018, HMRC emailed the Appellant to query the income figures and HICBC calculations provided in the email of 20 October 2018.

12. On 12 November 2018, the Appellant emailed HMRC statin that he understood that HICBC only applied to those with a salary above £60,000 and excluded bonuses, overtime and taxable benefits.

13. On 16 November 2018, HMRC emailed the Appellant stating that HICBC was calculated on the basis of adjusted net income. That email set out the income figures and HICBC calculations based on HMRC's records, and also set out the penalties that HMRC intended to issue to the Appellant.

14. On 19 November 2018, the Appellant asked HMRC to provide a breakdown of the figures cited in the 16 November 2018 email. The Appellant stated that he disagreed that he was liable to any penalties because he had not been aware of his liability to HICBC until September/October 2018 and HMRC had delayed in notifying the Appellant about HICBC and his liability to the same.

15. On 6 December 2019, HMRC provided the Appellant with a breakdown of the figures cited in the 16 November 2018 email.

16. On 21 January 2019, the Appellant emailed HMRC accepting that he was liable to HICBC in the amounts stated by HMRC. The Appellant disputed that he was liable to any penalty because "at no time did I consider I was liable until this year as I wasn't aware of the additional income calculations…and any bonuses which are not salary so any fault is at your end…"

17. On 14 February 2019, HMRC assessed the Appellant to HICBC and issued him with the penalties. The penalties were issued on a non-deliberate, unprompted basis with the full reduction given for disclosure.

18. On 7 March 2019, the Appellant notified HMRC of an appeal against the penalties.

19. On 21 March 2019, HMRC emailed the Appellant stating that the decision to issue the penalties had been upheld.

20. On 15 April 2019, the Appellant emailed HMRC stating that he did not accept HMRC's decision. The Appellant said that "my belief until late last year was that HICBC was based on salary, so I did not have any reason to contact HMRC" .

21. On 2 May 2019, HMRC issued a "view of the matter" letter upholding the decision to issue the penalties.

22. On 15 May 2019, the Appellant requested that HMRC conduct a review of the decision to issue the penalties.

23. On 13 June 2019, HMRC notified the Appellant that the review had been concluded and that the decision to issue the penalties had been upheld.

24. On 11 July 2019, the Appellant filed a Notice of Appeal with the Tribunal.

THE APPELLANT'S GROUNDS OF APPEAL

25. In the "Grounds for appeal" section of the Notice of Appeal form, the Appellant stated:

> "Fines added as 'failure to notify' but I cancelled the payment immediately once I was made aware. HMRC claims I was notified but I dispute this and my justification for not cancelling earlier was due to unclear guidance and insufficient explanation by them of how 'earnings' were calculated therefore my belief until October last year was that my salary didn't warrant the charge for previous years. All six points in attached letter are still valid."

26. In an email response (dated 2 August 2019) to correspondence from the Tribunal asking for clarification as to his grounds of appeal, the Appellant stated:

> "My justification is simple:
>
> - HMRC are to blame for lack of notification
> - I cancelled the benefit immediately once aware
> - At no time did I believe that my earnings were above the limit."

RELEVANT LAW

27. The Finance Act 2012 ("FA 2012") inserted the provisions relating to the HICBC into the Income Tax (Earnings and Pensions) Act 2003. The charge took effect from the tax year 2012/13 in relation to child benefit amounts received after 6 January 2013. The relevant provisions are:

> *"681B High income child benefit charge*
>
> (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."
>
> …
>
> *681H Other interpretation provisions*
>
> (1) This section applies for the purposes of this Chapter.
>
> (2) *"Adjusted net income"* of a person for a tax year means the person's adjusted net income for that tax year as determined under section 58 of ITA 2007.
>
> (3) *"Week"* means a period of 7 days beginning with a Monday; and a week is in a tax year if (and only if) the Monday with which it begins is in the tax year."

28. FA 2012 also amended the provisions requiring notification of chargeability by the addition of a new section 7(3)(c) to the TMA 1970 which, at the relevant time, provided:

> "7.— Notice of liability to income tax and capital gains tax.
>
> (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.

…

(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 subsections (4) to (7) below,

(b) the person has no chargeable gains, and

(c) the person is not liable to a high income child benefit charge

…"

29. Paragraph 1 of Schedule 41 FA 2008 provides a penalty is payable by a person who fails to comply with an obligation under, *inter alia*, s 7 TMA 1970. Paragraphs 6-11 set out how the amount of the penalty is to be calculated. Paragraphs 12 and 13 provide for reductions for disclosure.

30. Paragraph 14 of Schedule 41 FA 2008 provides that if HMRC think it right because of special circumstances they may reduce a penalty.

31. Paragraph 17(1) of Schedule 41 FA 2008 provides that a person issued with a penalty may appeal against the decision that a penalty is payable. Paragraph 17(2) of Schedule 41 FA 2008 provides that a person issued with a penalty may appeal the amount of the penalty.

32. Paragraph 19 of Schedule 41 FA 2008 provides:

"(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 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."

33. Paragraph 20 of Schedule 41 FA 2008 provides:

"(1) Liability to a penalty under any of 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 an 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."

DISCUSSION AND DECISION

34. The Appellant does not dispute that he was liable to the HICBC or that he failed to notify that liability to HMRC. Therefore, unless he can establish a "reasonable excuse", the Appellant is liable to the penalties.

35. The Appellant submits that in circumstances where:

(1) HMRC did not (until September 2018) write to him about HICBC;

(2) he understood that liability to HICBC was based solely on salary; and

(3) as soon as he understood he was liable to HICBC, he took steps to cancel the Child Benefit

he ought not to be liable to a penalty for failing to notify to HMRC his liability to HICBC.

36. In *Christine Perrin v HMRC* [2018] UKUT 0156 (TCC), the Upper Tribunal considered an appeal relating to a late filing penalty in which the Appellant submitted there was a reasonable excuse because she genuinely believed that her tax return had already been filed (even though it had not been) and that was why she did not file the return on time. The Upper Tribunal stated:

"71. In deciding whether the excuse put forward is, viewed objectively, sufficient to amount to a reasonable excuse, the tribunal should bear in mind all relevant circumstances; because the issue is whether the particular taxpayer has a reasonable excuse, the experience, knowledge and other attributes of the particular taxpayer should be taken into account, as well as the situation in which that taxpayer was at the relevant time or times (in accordance with the decisions in *The Clean Car Co* and *Coales*).

72. Where the facts upon which the taxpayer relies include assertions as to some individual's state of mind (e.g. "I thought I had filed the required return", or "I did not believe it was necessary to file a return in these circumstances"), the question of whether that state of mind actually existed must be decided by the FTT just as much as any other facts relied on. In doing so, the FTT, as the primary fact-finding tribunal, is entitled to make an assessment of the credibility of the relevant witness using all the usual tools available to it…

73. Once it has made its findings of all the relevant facts, then the FTT must assess whether those facts (including, where relevant, the state of mind of any relevant witness) are sufficient to amount to a reasonable excuse, judged objectively.

74. Where a taxpayer's belief is in issue, it is often put forward as either the sole or main fact which is being relied on – e.g. "I did not think it was necessary to file a return", or "I genuinely and honestly believed that I had submitted a return". In such cases, the FTT may accept that the taxpayer did

> indeed genuinely and honestly hold the belief that he/she asserts; however that fact on its own is not enough. The FTT must still reach a decision as to whether that belief, in all the circumstances, was enough to amount to a reasonable excuse. So a taxpayer who was well used to filing annual self-assessment returns but was told by a friend one year in the pub that the annual filing requirement had been abolished might persuade a tribunal that he honestly and genuinely believed he was not required to file a return, but he would be unlikely to persuade it that the belief was objectively a reasonable one which could give rise to a reasonable excuse."

37. I wish to make clear that there is no suggestion at all that the Appellant deliberately sought to avoid paying the HICBC. I accept that he genuinely did not appreciate that he was liable to the HICBC. But even though the Appellant genuinely did not know that he was liable to HICBC, I have to ask whether that was objectively reasonable. I do not consider it was.

38. The case advanced by the Appellant amounts to arguing that his ignorance of the law gives rise to a reasonable excuse. I am of the view that ignorance of the law cannot here constitute a reasonable excuse. I agree with and endorse the observations and approach of Judge Scott at paragraphs 29-38 of *Lau v HMRC* [2018] UKFTT 230 (TC).

39. To the extent that the Appellant bases his appeal on "unfairness" (whether arising out of HMRC's 'delay' in contacting him or otherwise); if a penalty is lawfully imposed (which I find the penalty in this instance was), I do not have the power to discharge or adjust it on the basis of a perceived unfairness (see *HMRC v HOK Ltd* [2012] UKUT 363 (TCC)).

40. No challenge is made in relation to the amount of the penalties but, for the sake of completeness, I record that I am satisfied that the penalties were properly calculated in accordance with paragraphs 6-13 of Schedule 41 FA 2008. Further, I conclude that HMRC's view that there were no special circumstances justifying a reduction in the penalty amount cannot be said to be flawed in any way.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

41. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

DAVID BEDENHAM:

TRIBUNAL JUDGE

RELEASE DATE: 27 JULY 2020