TC07790

INCOME TAX – high income child benefit charge – definition of "partner" - penalties – reasonable excuse – appeal against assessments allowed in part – appeal against penalties allowed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/04285

BETWEEN

PRUBJIT MANKU **Appellant**

-and-

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

TRIBUNAL: JUDGE DAVID BEDENHAM
DEREK ROBERTSON

Sitting in public at Nottingham Justice Centre on 30 January 2020

The Appellant appeared in person

Ms G Truelove, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

With further written submissions from HMRC dated 26 February 2020

DECISION

INTRODUCTION

1. The Appellant appeals against assessments raised under s 29(1) of the Taxes Management Act 1970 ("TMA 1970") in respect of his liability to the High Income Child Benefit Charge ("HICBC"). The Appellant also appeals against penalties 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 HICBC.

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

Year ending 5 April	Assessment amount	Date of assessment	Penalty amount	Penalty date
2016	£1097	28 February 2019	£252.31	5 March 2019
2017	£914	28 February 2019	£210.22	5 March 2019

THE ISSUES BEFORE THE TRIBUNAL

3. At the start of the hearing, Ms Truelove acknowledged that the Appellant has appealed against both the assessments and the penalties but said that HMRC had prepared the case on the basis that the appeal was against the penalties only.

4. We decided to proceed with the hearing. We did not see why the Appellant should be put to the inconvenience of having to attend a further hearing because HMRC had not properly understood the scope of the appeal.

5. The Appellant's appeal raises the following issues:

   (1) whether the Appellant was liable to the HICBC given that, for some of the period, he and his wife (who was the person receiving Child Benefit) were separated;

   (2) whether HMRC failed to notify the Appellant of the existence of HICBC and its applicability to him, and whether this constitutes a reasonable excuse within the meaning of paragraph 20 of schedule 41 FA 2008; and

   (3) whether the Appellant's lack of knowledge that his wife was in receipt of Child Benefit constitutes a reasonable excuse within the meaning of paragraph 20 of schedule 41 FA 2008.

6. Immediately prior to this appeal, we had heard the appeal of *Mark Haslam v HMRC* (TC/2018/06267). At the conclusion of Mr Haslam's appeal we asked HMRC to provide written submissions in relation to a number of issues that might have affected the validity of s 29(1) TMA 1970 assessments issued in relation to HICBC. Given that this appeal was against the s 29(1) TMA 1970 assessments (not just the penalties), we directed HMRC to file written submissions on the same issues in this appeal. These submission were filed on 26 February 2020. The Appellant was given an opportunity to respond but did not do so.

FINDINGS OF FACT

7. The following facts were clear from the document in the bundle and were not in dispute (save as otherwise indicated):

8. In the tax years 2015/16 and 2016/17:

   (1) the Appellant's adjusted net income exceeded £50,000; and

(2) the Appellant's wife was in receipt of Child Benefit.

9. The Appellant did not submit a tax return for the years in question. Tax on the Appellant's employment income was accounted for through the PAYE system.

10. HMRC did not send the Appellant a notice to file in relation to the years in question.

11. On 9 January 2019, HMRC wrote to the Appellant stating that "records indicate" that the HICBC "may apply to you and you did not register to receive a Self Assessment tax return for the tax years ended 5 April 2016 and 2017. The letter went on to set out the amount of HICBC that HMRC believed the Appellant was liable to pay, before stating "if you believe that you do not have to pay the Charge, you need to tell us why [before 8 February 2019]".

12. On 21 January 2019, the Appellant telephoned HMRC. There is some dispute as to exactly what was said during this call (HMRC asserted that the Appellant "disputed the figures that the Respondents have stated he earns", whereas the Appellant stated that he was calling to "question" the letter). On balance, we conclude that the Appellant called to query how HMRC had calculated his adjusted net income (this is not the same as "disputing the figures…he earns").

13. On 15 February 2019, HMRC wrote to the Appellant stating "we have not had a response to our letter of 9 January 2019. In that letter we stated that if we did not get a reply we would take it to mean that you were liable for the High Income Child Benefit Charge…If you think you will not be liable to pay [the HICBC] or you think the amount of the assessment is wrong, please phone us by 22 February 2019…"

14. On 28 February 2019, HMRC assessed the Appellant pursuant to s 29(1) TMA 1970.

15. On 5 March 2019, HMRC issued to the Appellant penalties totalling £462.53 pursuant to Schedule 41 FA 2008.

16. On 17 March 2019, the Appellant wrote to HMRC stating:

> "I would like to put forward an appeal for the penalty and also notify some discrepancies in the amounts being charged.
>
> Firstly, I would like to outline reasons for appeal against the penalty charges:
>
> Throughout 2015-2018, I suffered from depression, stress and anxiety. This had an impact on my personal relationships including my marriage, my job and also my personal financial affairs.
>
> Ultimately the depression and stress led me to being signed off from my work for a period of over 6 months, resulted in a breakdown in my marriage and then me having to leave the employment which I had held for 9 years. I'm now working as an non-skilled employee earning half the amount I had done previously whilst I build up my confidence and overcome the mental health battles which I have endured over the past few years and trying to rebuild my life with my family.
>
> Some other points to note are:
>
> During my employment I have always been a PAYE employee so have not needed to complete a self assessment.
>
> I have never been notified of the high income child benefit charge, nor have I seen any media campaigns relating to it and my only awareness of the media campaign was explained to me on the phone by one of your colleagues when I called to question the initial and second letter.

> My son was born in November 2014 at which time I was earning circa £40k per annum with benefits and bonuses. Only in later years had I gone over the £50k amount due to having a company car and incremental bonuses.
>
> My wife had applied for the child benefit and I had no awareness of her being in receipt of this benefit and have never received any of the money that has been paid to her.
>
> With regards to the discrepancies my wife and I separated for just over a year, from September 2015 to October 2016, this was due to the mental health issues that I had been having which impacted our relationship as well as my employment and finances which I mentioned earlier in the letter. She moved back to live with her parents during this period.
>
> My understanding is that due to our separation some form of recalculation would need to take place to reassess the amounts of HICBC if any would need to be repaid for this period/s."

It is clear to us that in addition to appealing against the penalties, the Appellant also appealed against the amount of HICBC for which he was said to be liable.

17. On 8 April 2019, HMRC replied to the Appellant's 17 March 2019 letter. HMRC stated that none of the ground put forward by the Appellant constituted a reasonable excuse for failing to notify liability to the HICBC. HMRC explained that the penalty had been calculated on the non-deliberate, prompted basis and that full reduction had been given for the "helping" and "giving" elements of disclosure but the full reduction had not been given for the "telling" element because "you failed to reply to our letters (dated 17 September 2018, 23 October 2018, 9 January 2019 and 15 February 2019)". HMRC also stated that "in order for us to review your [HICBC] for the time period September 2015 to October 2016, we require documentation [such as council tax documentation] to demonstrate that you were not residing with your wife".

18. On 15 April 2019, the Appellant wrote to HMRC repeating that "my wife and I separated from September 2015 to October 2016 so we were not a 'family unit'". The Appellant provided a series of store card statements in the name of his wife showing the address of her parents (rather than the marital home). The Appellant stated that "we did not amend the council tax status as were working to reconcile our marriage…and did not have a definitive period of when we would become a 'family unit' again or how long we [would] remain separated…This was also not a priority due to the mental health issues I was dealing with…".

19. In ignorance of the Appellant's 15 April 2019 letter, HMRC wrote to the Appellant stating that it now considered the appeal to have been settled and that "all tax, penalties and interest outstanding are due and payable".

20. On 7 May 2019, the Appellant telephoned HMRC whereby it became clear that HMRC had not received his letter of 15 April 2019. By letter of 7 May 2019, the Appellant forwarded to HMRC his previous letter of 15 April 2019.

21. On 30 May 2019, HMRC replied to the Appellant's 7 May 2019 letter. HMRC repeated the view that the Appellant has not established a reasonable excuse for failing to notify liability to the HICBC. In relation to the Appellant's submission that between September 2015 and October 2016 he and wife were not living together, HMRC stated "the evidence needed is official documentation, and copies of your partners Next Credit account is unfortunately not conclusive enough to show that you had separated from your partner and lived in separate households from September 2015 to October 2016".

22. On 18 June 2019, the Appellant filed an appeal with the Tribunal. The Notice of Appeal made clear that the Appellant was appealing against both the penalties and the underlying

HICBC (on the basis that he was separated from his wife between September 2015 and October 2016).

23. We also make the following findings of fact:

(1) HMRC did not contact the Appellant in relation to HICBC at any point prior to 9 January 2019. Our finding in this regard is based on the fact that, despite at the hearing Ms Truelove asserting that "awareness" letters were sent to the Appellant on 17 September 2018 and 23 October 2018 (and showing the Tribunal documents which were said to be a record of those letters being sent out), HMRC's written submissions filed after the hearing stated that HMRC have no record of these letters (or any other letters prior to 9 January 2019) having been sent to the Appellant. The Appellant also denies receiving any such letters prior to 9 January 2019 – we accept his evidence.

(2) From the summer of 2014 through to January 2019, the Appellant suffered from mental health issues which left his mood low, caused him to "put his head in the sand" and led to a breakdown in communication and, for a period, relationship with his wife. Our finding in this regard is based on the Appellant's evidence which we accept and which was not challenged by HMRC (indeed, the Tribunal specifically asked Ms Truelove whether this account was disputed and it was confirmed that it was not). Ms Truelove did, however, submit that as the Appellant was able to continue to work, he would also have been in a position to manage other aspects of his life.

(3) Between September 2015 and October 2016, the Appellant and his wife lived separately (with his wife and child living with her parents some distance from the Appellant). Our finding in this regard is based on the Appellant's evidence, which we accept and which was not challenged by HMRC (indeed, the Tribunal specifically asked Ms Truelove whether this account was disputed and it was confirmed that it was not).

(4) During the period of separation, the Appellant "hoped" that he and his wife could "work through" their difficulties and reconcile but he could not be confident that it would be achieved and the separation might well have continued permanently. Our finding in this regard is based on the Appellant's evidence which we accept and which was not challenged by HMRC.

(5) Ms Truelove submitted that the Appellant was simply "living separately" from his wife and this did not constitute "separation" within the meaning of s 681G of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA 2003"). However, from the (unchallenged) evidence given to us by the Appellant we are satisfied that during the period September 2015 and October 2016 he was separated from his wife in circumstances in which the separation was likely to be permanent. This was not a case where, following a dispute, one of the parties to a marriage had gone to stay with a friend or a relative on a short term basis. Rather, after as a result of a significant breakdown in the relationship, the Appellant's wife (and child) had moved out of the family home and into the Appellant's wife's parents' home on what looked to be a permanent basis. Whilst the Appellant *hoped* that there would be reconciliation, the signs (including that the Appellant's wife's credit card registered to her parents' address) were that this separation was likely to be permanent.

(6) The Appellant did not know that his wife was claiming Child Benefit until he received the 9 January 2019 letter. The Appellant's wife did not tell him she was claiming Child Benefit and the Child Benefit was paid into his wife's bank account. Our finding in this regard is based on the Appellant's evidence, which we accept and which was not challenged by HMRC (indeed, the Tribunal specifically asked Ms Truelove whether this account was disputed and it was confirmed that it was not). Ms Truelove submitted,

however, that the Appellant could have contacted HMRC to ask whether his wife was claiming Child Benefit.

RELEVANT LAW

24. The Finance Act 2012 ("FA 2012") inserted the provisions relating to the HICBC into ITEPA 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."
>
> …
>
> *681G Meaning of "partner"*
>
> (1) For the purposes of this Chapter a person is a "partner" of another person at any time if either condition A or condition B is met at that time.
>
> (2) Condition A is that the persons are married to, or civil partners of each other and are neither—
>
> (a) separated under a court order, nor
>
> (b) separated in circumstances in which the separation is likely to be permanent.
>
> (3) Condition B is that the persons are not married to, or civil partners of, each other but are living together as if they were a married couple or civil partners.
>
> *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."

25. FA 2012 also amended the provisions requiring notification of chargeability by the addition of a new s 7(3)(c) to the TMA 1970 which 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
>
> …"

26. Section 29 TMA 1970 provides in relevant part:

> "(1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment
>
> (a) that any income, unauthorised payments under section 208 of the Finance Act 2004 or surchargeable unauthorised payments under section 209 of that Act or relevant lump sum death benefit under section 217(2) of that Act which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax have not been assessed, or
>
> (b) that an assessment to tax is or has become insufficient, or
>
> (c) that any relief which has been given is or has become excessive,
>
> the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax."

27. In *Charlton v HMRC* [2012] UKFTT 770 (TCC) (a decision of the Upper Tribunal, despite the neutral citation), the Upper Tribunal stated at paragraph 37:

> "In our judgment, no new information, of fact or law, is required for there to be a discovery. All that is required is that it has newly appeared to an officer, acting honestly and reasonably, that there is an insufficiency in an assessment. That can be for any reason, including a change of view, a change of opinion, or correction of an oversight. The requirement for newness does not relate to the reason for the conclusion reached by the officer, but to the conclusion itself…".

28. Paragraph 37 of *Charlton* was cited with approval by the Court of Appeal in *Tooth v HMRC* [2019] EWCA Civ 826 at [60]. The Court of Appeal in *Tooth* also held that it was

possible for a discovery to become "stale" such as to render invalid an assessment under s 29(1) TMA 1970.

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 to 11 set out how the amount of that 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

The s29(1) TMA 1970 assessment

34. We are satisfied that there was a "discovery" within the meaning of s 29(1) TMA 1970. That discovery took place in early 2019 (either on 9 January 2019 or 15 February 2019). The assessments were issued on 5 March 2019. In those circumstances, the discovery was not "stale". Further, for the reasons explained in *Mark Halsam v HMRC*, we are satisfied that s 29(1) TMA 1970 can be used to assess someone in the position of the Appellant to HICBC.

35. The assessments issued to the Appellant relate to the tax years ended 5 April 2016 and 5 April 2017. For a portion of each of those years, the Appellant did not have a partner (within the meaning of s 681G ITEPA 2003) who was in receipt of Child Benefit (and he was not in receipt of Child Benefit himself). Accordingly, for that period the Appellant was not liable to the HICBC. The Appellant's evidence, which we have accepted, was that he was separated from his wife from September 2015 to October 2016. In the absence of specific dates within those months having been provided, we conclude that the Appellant is not liable for HICBC from 5 October 2016 to 28 September 2016.

Penalties: reasonable excuse

36. The Appellant submits (and we accept) that HMRC did not notify him about (and he was otherwise unaware of) the HICBC. However, we are of the view that ignorance of the law cannot here, in and of itself, constitute a reasonable excuse. We agree with and endorse the observations and approach of Judge Scott at paragraphs 29-38 of *Lau v HMRC* [2018] UKFTT 230 (TC).

37. However, the Appellant also argues that the fact that his wife did not tell him that she was claiming Child Benefit and that he was otherwise unaware of his wife receiving that benefit can amount to a reasonable excuse.

38. 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" .

39. Applying the approach in *Perrin*:

(1) We have found:

(a) The Appellant did not know that his wife was in receipt of Child Benefit and therefore did not know that he was liable to HICBC and needed to file a tax return. It was not until January 2019 that he discovered that his wife was in receipt of Child Benefit.

(2) Judged objectively the Appellant's lack of knowledge of his wife's receipt of Child Benefit (and therefore his liability to HICBC) was reasonable given that:

(a) the Appellant's wife did not tell him she was in receipt of Child Benefit (and the Child Benefit was paid into her bank account);

(b) he had no reason to ask (his wife or HMRC) whether she was receiving Child Benefit (not, for example, having received any "awareness" letters that might have prompted him to ask about this); and

(c) he was suffering with mental illness which led to a breakdown in communication with his wife and more generally left the Appellant in a low mood and caused him to "bury his head".

40. Accordingly, we find that the Appellant had a reasonable excuse throughout the relevant period such that he is not liable to the penalties.

Penalties: amount

41. We have found above that the Appellant is not liable to the penalties because he had a reasonable excuse. Had we not found that the Appellant had a reasonable excuse, we would have held that the penalties should be reduced so as to:

(1) reflect the reduced HICBC liability (see paragraph 35 above); and

(2) give the Appellant the full reduction for disclosure. HMRC's rationale for not giving the full reduction for "telling" was that the Appellant had failed to respond to letters sent to him. However, we have found that the 2018 letters were not sent to him, and the Appellant did respond to the 2019 letters (by way of the telephone call on 21 January 2019 and the letter dated 17 March 2019).

42. Accordingly, the Appellant's appeal against the s 29(1) TMA 1970 assessments is allowed in part and the Appellant's appeal against the Schedule 41 FA 2008 penalties is allowed in full.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

43. 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: 28 JULY 2020