[2020] UKFTT 316 (TC)

TC07798

INCOME TAX - HIGH INCOME CHILD BENEFIT CHARGE (HICBC) — *taxpayer with liability did not complete tax returns – Discovery assessments under s29(1)(a) TMA 1970 – "income" assessable to income tax? – purposive construction applied to statute – reasonable excuse found exonerating taxpayer's delay - appeal against penalties allowed*

Appeal number: TC/2019/06048 A/V

FIRST-TIER TRIBUNAL
TAX CHAMBER

Mr VIVIAN HILL **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN MANUELL
Mrs JANE SHILLAKER

The hearing took place on 7 July 2020. The Tribunal heard the Appellant in person and Mr Connor Fallon, Litigator, of HM Revenue and Customs' Solicitor's Office for the Respondents.

With the consent of the parties, the form of the hearing was by remote video link using the Tribunal video platform. The issues for the Tribunal were narrow and we decided a remote hearing was appropriate and so had granted the request. The documents to which we were referred consisted of the agreed bundle as prepared by HMRC, together with a generic HICBC bundle, both in electronic form by the Appellant and the Tribunal.

The hearing was held in public and there were two observers.

DECISION

Introduction

1. The Appellant appealed a series of HMRC's decisions relating to HICBC, all dated 1 March 2019, as follows:

Tax year	**Decision**	**Amount**
2014/15	Discovery Assessment	£900.00
2015/16	Discovery Assessment	£2,549.00
2016/17	Discovery Assessment	£2,501.00
2014/15	Failure to Notify Penalty	£227.70 (reduced on review to £198.00)
2015/16	Failure to Notify Penalty	£586.27 (reduced on review to £509.80)
2016/17	Failure to Notify Penalty	£575.23 (reduced on review to £250.10)

2. In each of the relevant tax years, the Appellant's income exceeded £50,000 and he and his partner received Child Benefit. The Appellant was not registered for Self Assessment. On 25 September 2019 HMRC wrote to the Appellant. Correspondence followed and the decisions under appeal were issued as noted above.

Background

3. 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") exceeded £50,000 within a tax year, whereby a tax liability of 1% arises for each £100 in excess of £50,000, calculated on the amount of Child Benefit received. This is graduated and the effect is that where an individual's ANI reaches £60,000 100% of the Child Benefit becomes subject to HICBC. Anyone liable to HICBC who elects to continue receiving Child Benefit has a legal obligation to declare that Child Benefit by registering for Self Assessment ("SA") and filing a tax return for each such year.

4. It was not in dispute that:

> (a) the Appellant had an ANI exceeding £50,000 for each of the tax years under appeal and that the Appellant's wife had received Child Benefit for each of those tax years;

(b) the Appellant was never issued with a notice to file a SA return (under section 8 TMA 1970), did not file a SA return and did not notify HMRC of his liability to HICBC.

The law

5. Under Chapter 8 Part 10 of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA" 2003), section 681B, a person (P) is liable to a HICBC charge for a tax year if (amongst other circumstances) (1) P's ANI for the tax year exceeds £50,000; (2) a person (Q) other than P is entitled to an amount in respect of child benefit for a week in the tax year; (3) Q is a partner of P (which includes a person to whom P is married, if they are not separated) throughout the week; and (4) P's ANI for the year exceeds Q's.

6. Sub-section 29(1) of the Taxes Management Act 1970 ("TMA 1970") provides that 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 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 that has been given is or has become excessive, the officer or, as the case may be, the Board may (subject to provisions not relevant in the present appeal) make an assessment in the amount, or further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.

7. Section 7 TMA 1970 imposes an obligation to notify HMRC of chargeability to income tax (where the person has not received a notice under section 8 TMA 1970) unless three conditions are satisfied, one of which is the person is not liable to HICBC in the tax year. (Another condition is, in broad terms, that all of the person's income is subject to PAYE).

8. Under section 8 TMA 1970, a person may be required by a notice given to him by an officer of HMRC to make and deliver a tax return.

9. An appeal may be brought against any assessment which is not a self-assessment (section 31(1)(d) TMA 1970). If the appellant notifies the appeal to the Tribunal, the Tribunal is to decide the matter in question (section 49D TMA 1970).

10. Concerning the meaning of "discover" in section 29 TMA 1970, Floyd LJ said in *Tooth v HMRC* [2019] STC 1316 at [60]: "Both parties accepted that the legal approach to whether there is a 'discovery' is correctly set out in this first passage from the decision of the Upper Tribunal in *Charlton v Revenue and Customs Commissioner* [2012] UKUT 770 (TCC) at [37], where the tribunal said: '[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, change of opinion, or correction of an oversight.' The UT continued in a second passage: 'The requirement for newness does not relate to the reason for the conclusion

reached by the officer, but to the conclusion itself. If an officer has concluded that a discovery assessment should be issued, but for some reason the assessment is not made within a reasonable period after that conclusion is reached, it might, depending on the circumstances, be the case that the conclusion would lose its essential newness by the time of the actual assessment.' [61] I agree with the UT's approach in both passages."

11. In *Reeves v HMRC* [2018] STC 2056, the Upper Tribunal gave guidance on statutory interpretation. The following are extracts (edited) from [34], [35] and [37]: (a) In *Barclays Mercantile Business Finance Ltd v Mawson* [2005] STC 1, the House of Lords held that a taxing statute is to be applied by reference to the ordinary principles of statutory construction, i.e., by giving the provision a purposive construction in order to identify its requirements and then deciding whether the actual transaction answers to the statutory description. The question is always whether the relevant provision of the statute, upon its true construction, applies to the facts as found.

12. (b) The role of the court in correcting anomalies created by the literal wording of tax legislation has been considered on many occasions. In *Jenks v Dickinson* [1997] STC 853 Neuberger J cited passages from earlier authorities including *Mangin v IRC* [1971] 1 All ER 179, where Lord Donovan had said that the object of the construction of the statute being to ascertain the will of the legislature, it may be presumed that neither injustice nor absurdity was intended. If therefore a literal interpretation would produce such a result, and the language admits of an interpretation which would have avoided it, then such an interpretation may be adopted. Further the history of an enactment and the reasons which led to it being passed may be used as an aid to its construction.

13. (c) In *Inco Europe Ltd v First Choice Distribution (a firm)* [2000] 2 All ER 109, the House of Lords was considering an application for a stay of High Court proceedings on the grounds that they had been brought in respect of a matter which the parties had agreed to refer to arbitration in the Netherlands. The first instance judge had dismissed the application on the grounds that the arbitration agreement was void. A question arose as to whether the Court of Appeal had jurisdiction to entertain an appeal. Lord Nicholls of Birkenhead recognised that the relevant provision in the Schedule to the Arbitration Act 1996 'read literally and in isolation from its context' precluded any right of appeal. His Lordship held that 'Several features make it plain beyond a peradventure that on this occasion Homer, in the person of the draftsman … nodded' and that something had gone awry in the drafting. Having regard to the purpose of the provision and its context, that is that it was intended to be a consequential amendment rather than making a major legislative change, he held that the proper interpretation of the provision should give effect to Parliament's intention. He referred to the court's role in correcting obvious drafting errors. In suitable cases, in discharging its interpretative function the court will add words, or omit words or substitute words: *Inco Europe Ltd* at [115]. However, the power was strictly confined 'to plain cases of drafting mistakes': 'The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1)

the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation …'

The Appellant's case

14. The Appellant submitted that none of the discovery assessments or penalties should stand. HMRC had not informed him that he would be liable to HICBC (see HMRC's leaflet October 2014). He was thus unaware of the consequences of applying for child benefit after the birth of his third child in November 2014. In 2013 when HICBC was introduced, the Appellant and his partner were full time working parents of two children. In 2014 the Appellant's partner ceased employment and the Appellant supported his family on his salary alone, then below £50,000. Child Benefit was received until October 2018 when the Appellant was alerted to HICBC by HMRC. The Appellant's income exceeded £50,000 by early 2015 and has remained above that level. Neither the Appellant nor his wife was aware of HICBC when it was introduced, and HMRC did not inform him. They were unaware of HMRC's publicity campaign. HMRC had known of his increased income from 2014 yet failed to notify him of HICBC. The Appellant's third child was disabled and the child benefit was needed by her. The Appellant had cooperated fully with HMRC as soon as enquiries began.

15. In addition to the Notice of Appeal, the Appellant had set out his case explicitly in correspondence with HMRC. After the birth of his third child, neither the Appellant nor his wife received the "bounty pack" which is usually sent. They did not pursue that as they were already experienced parents. They received a letter dated 1 December 2014 from the Child Benefit Office confirming how child benefit would be paid, with an explanatory leaflet, which as advised they retained and produced in evidence. There was no mention in either document about HICBC, despite notification of changes which were required to be notified to HMRC. Thus the Appellant had no reason to be aware of HICBC until being directly informed of the liability by HMRC in October 2018.

16. These facts and matters were confirmed by the Appellant in the course of his submissions, during which he responded to questions from the Tribunal and reiterated that he was unaware of the public debate which surrounded the introduction of HICBC and of HMRC's publicity campaign. There was no cross examination despite the opportunity offered.

The Respondent's case

17. HMRC's position is that it has no obligation in law to notify changes in legislation to individual taxpayers. Nevertheless, HICBC was debated in Parliament after its

announcement by the Chancellor of the Exchequer in the 2012 budget. Full details of HICBC are provided on HMRC's website, with a calculator available. There was an extensive publicity campaign to raise public awareness.

18. The Discovery Assessments were all validly raised. On 20 December 2019, Officer Potts of HMRC had established the facts indicating that the Appellant had an HICBC liability for each of the tax years in question. Subsequent disclosure of information by the Appellant was prompted, and categorised as "non deliberate", making him liable to a penalty of up to 30%. The penalties imposed were fixed at 20%, 20% and 10% on review.

19. Applying the tests set out in *Perrin* [2018] UKUT 158 (TC), no reasonable excuse could be shown. HICBC was widely notified. It was the Appellant's decision to continue to receive Child Benefit after his income rose above £50,000. There were no grounds for a special reduction. The appeal should be dismissed.

Burden and standard of proof

20. The burden of proof lies on HMRC to show that the discovery assessments were validly made. The standard of proof is the normal civil standard, the balance of probabilities. The burden of proof to show that there is a reasonable excuse and/or special circumstances lies on the Appellant to the same civil standard.

Evidence

21. Two separate bundles of documents were served prior to the hearing by HMRC, the first incorporating the Appellant's documents, together with a generic bundle of authorities and materials relevant to HICBC cases. Both bundles were extensive. We will be referring to few of the documents as the appeal turns largely if not entirely on points of law.

Submissions

22. Mr Fallon for HMRC relied on HMRC's Statement of Case, which has been summarised briefly above. He also submitted separate detailed written submissions dated 18 July 2020 by agreement with the Tribunal after the hearing (copied to the Appellant) as to the meaning of "income" in the HICBC context, for the purposes of section 29(1) of TMA 1970 and the validity of the Discovery Assessments in the present appeal. The following is only a summary.

23. Mr Fallon accepted that the meaning of "income" in the context of section 29 has given rise to debate. On a narrow reading, it could be said that Child Benefit is not the taxpayer's income at all, but rather payments made to assist children. (This was how the Appellant saw it, but it was not correct.)

24. Whether or not Child Benefit is to be viewed as "income", Parliament's plain intention was to make Child Benefit subject to an income tax charge if a taxpayer's income exceeded £50,000. The result is that each £1 of Child Benefit received results in an equivalent income tax charge for those affected.

25. Income tax was charged not only on income itself, but via direct charges to income tax such HICBC: see section 3 of the Income Tax Act 2007 ("ITA 2007"), which provides for income to be charged to income tax and direct charges to tax to be made by reference to the provisions of the acts specified. The HICBC liability was created by section 681B(1) of ITEPA 2003. It was not an exceptional situation, as there were other examples such as student loans. They could not be described as income on any basis, nevertheless an income charge arose. Transactions carried out by registered pension schemes can give rise to a charge to income tax, the unauthorised payment charge, which can be imposed on employers or on scheme members. "Income" in section 29(1)(a) TMA 1970 means "any amount liable to income tax" and should not be read restrictively.

26. Parliament cannot have legislated to impose a charge to tax yet at the same time have intended for HMRC to be prevented from assessing that charge in certain cases. See, e.g.,*Whitney v IRC* [1926] AC 37 at 52, Lord Dunedin:

"My Lords, I shall now permit myself a general observation. Once it is fixed that there is a liability, it is antecedently highly improbable that the statute should not go on to make it effective. A statute is designed to be workable and the interpretation thereof by a Court should be to secure that object, unless a crucial omission or clear direction make that end unattainable."

27. Once the liability arises, the taxpayer is obliged to notify their chargeability to HMRC, after which HMRC will normally issue a section 8 notice to file a SA return. A taxpayer can arrange for the liability to be collected via PAYE in future years or can elect to discontinue receipt of Child Benefit. The Appellant was required to but had failed to notify that he was chargeable to HICBC. Alternative collection scenarios were not workable.

28. There were various routes open to HMRC to remedy the situation, provided that "income" was not interpreted restrictively, which would undermine the income tax system. Simply issuing a section 8 TMA 1970 notice was not an adequate remedy, as it was time limited, and HMRC might be unaware of the HICBC liability and might not become aware until several years after the fact. Nor should taxpayers be relieved of their obligation to report the liability.

29. Thus the s29(1)(a) TMA 1970 Discovery Assessment process was available to HMRC and had been validly exercised on the undisputed facts of the case.

30. The Appellant had failed to declare that Child Benefit had been received while his income exceeded £50,000. There was no reasonable excuse shown on the facts. The appeal should be dismissed on all grounds.

31. The Appellant relied on his Notice of Appeal and related correspondence, which has already been sufficiently summarised above.

Discussion

32. HICBC has some complexity and it seems also some degree of legislative infelicity. In *Robertson* [2019] UKUT 0202 (TCC) at [28] the Upper Tribunal noted that the meaning of "income" in its section 29(1) TMA 1970 context was open to doubt and that respectable arguments either way were available. The Upper Tribunal were not required to determine the issue which was left open. In *Wilkes* [2020] UKFTT 256 (TC), Tribunal Judge Citron and Mrs Jane Shillaker held that the Discovery Assessments in that appeal were invalid as they did not relate to "income". That decision is not, of course, binding on us and may become the subject of a permission to appeal application.

33. Having had the advantage of receiving further written submissions from HMRC, we take the view that a purposive interpretation of statute makes it plain that "income" in section 29(1) TMA 1970 for HICBC purposes include amounts received as Child Benefit. That was in our view the plain intention of Parliament. (The Appellant who was not legally represented made no detailed submissions on the issue which we assured him would not prejudice a future permission to appeal application in the event that he wished to have a ruling on this point of law from the Upper Tribunal.)

34. Applying the purposive interpretation propounded on behalf of HMRC by Mr Fallon means that all of the Discovery Assessments in the present appeal have bene validly raised and so must stand. The Appellant is accordingly liable to HICBC as notified to him on 1 March 2019.

35. Questions of the fairness or otherwise of HICBC (including whether there should be special provisions for disabled children) are not within the Tribunal's jurisdiction and must be debated elsewhere.

36. We therefore turn to whether there was a reasonable excuse for the failure to notify the HICBC liability by filing what in the Appellant's case be voluntary SA returns. We are bound to say that we have considerable sympathy with the Appellant's predicament. He presented his appeal in a modest and restrained manner and has pursued it with determination. As noted above, the essential facts are not in dispute. There was no suggestion at any stage of dishonesty or carelessness on the Appellant's part. It is not for the Tribunal to speculate how or why the public and controversial debate over HICBC passed the Appellant and his wife by. Not everyone is interested in current affairs. We are satisfied that the Appellant was genuinely unaware of his liability to HICBC and would have taken steps to stop receiving Child Benefit had he known that HICBC would have reduced it.

37. It is undoubtedly the case that HMRC have no obligation to inform individual taxpayers about the consequences of changes in legislation: see, e.g., *Lau v HMRC* [2018] UKFTT 0230 (TC). In practice HMRC see value in attempting to do so and there is obviously public benefit in that approach. That however does not change the essential position.

38. On the facts as accepted, the Appellant and his wife did not receive the bounty pack following the birth of their third child. That bounty pack had information about HICBC. The only documents they actually received made no mention of HICBC, as Mr Fallon candidly recognised on HMRC's behalf. There was thus no reason for the Appellant to give HICBC any thought. He retained the Child Benefit leaflet as he was advised to do and treated it as an official source, reasonably in our view.

39. Although the United Kingdom is not a police state, HMRC had access to Child Benefits payment information and that is how the Appellant's (and no doubt many others) failure to file a SA tax return declaring receipt of Child Benefit came to light. As Mr Fallon stated, the relevant records were indeed available to HMRC but it required manual checking. Thus it was several years before the liability of the Appellant came to light.

40. As is well established, there is no statutory definition of reasonable excuse because there are so many possibilities according to the circumstances affecting individual taxpayers: see *Perrin* (above). On the facts of the present appeal, we find that the Appellant had been in effect lulled into a false sense of security. The official information he had received meant that he gave no thought to HICBC. There was no concealment on his part, nor carelessness. It is true that the duty fell on him to disclose the liability, but the information about his household's receipt of Child Benefit was available to HMRC and HMRC were slow to act. That is not to be read as a criticism of HMRC because it was likely to be a question of what resources were made available by the government and there are no doubt many competing priorities.

41. There was some modest delay on the Appellant's part in his communication with HMRC but that included the end of year period. Few people hurry to deal with unwelcome matters. The delay was in our view insignificant and the Appellant remained in contact with HMRC. Perhaps this question may be finely balanced, but the Tribunal is required to act justly. We find that the combination of inadequate information from official sources and the long delay in notifying the Appellant of the HICBC liability, despite HMRC's ability to verify the position directly without any need to contact the Appellant, amounts when seen as a whole to a reasonable excuse. It was not simply a situation of ignorance of the law as such on the Appellant's part.

42. It is not necessary for us to consider whether there were any special circumstances. None was put forward and none was obvious.

43. The appeal against the three Discovery Assessments dated 1 March 2019 is dismissed. The appeal against the three Penalty Notices dated 1 March 2019 is allowed. The Penalty Notices are accordingly discharged in their entirety.

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.

TRIBUNAL JUDGE MANUELL

RELEASE DATE: 10 AUGUST 2020