Neutral Citation: [2023] UKFTT 707 (TC)

Case Number: TC 08898

FIRST-TIER TRIBUNAL
TAX CHAMBER

In public by remote video hearing

Appeal reference: TC/2022/12086

INCOME TAX – High Income Child Benefit Charge – liability for the charge? – yes – appeal against charge dismissed - penalty for failure to notify – appeal against penalty allowed

Heard on: 25 July 2023
Judgment date: 10 August 2023

Before

TRIBUNAL JUDGE NIGEL POPPLEWELL
MISS PATRICIA GORDON

Between

DARREN DUNCKLEY

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

<u>Representation:</u>

For the Appellant: In person

For the Respondents: Miss Sawdah Mia litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. This appeal concerns the High Income Child Benefit Charge ("**HICBC**"). The appellant has been assessed to HICBC for the tax year 2018/2019, together with a penalty ("**the penalty**") for failing to notify chargeability under section 7 Taxes Management Act 1970 ("**TMA**"). The penalty has been assessed pursuant to Schedule 41 Finance Act 2008 ("**Schedule 41**"). The tax assessment is for £1,788. The penalty assessment is for £482.76.

THE LAW

2. There was no dispute between the parties as to the relevant legislation which we summarise below.

3. By section 681B Income Tax (Earnings and Pensions) Act 2003 (which was inserted by Finance Act 2012 with effect for child benefit payments made after 7 January 2013) a person is liable to a charge to income tax, the HICBC, for a tax year if:

(1) His adjusted net income for the year is greater than £50,000.

(2) His partner's ("partner" is defined in section 681G) adjusted net income is less than his.

(3) He or his partner are entitled to child benefit.

4. The assessment to HICBC has been raised pursuant to HMRC's discovery assessment powers as provided in s29 TMA. Accordingly, HMRC bear the burden of establishing that they have discovered that an amount of income which ought to have been assessed to income tax has not been so assessed. In the case of *HMRC v Jason Wilkes* [2020] UKUT 0150 (TCC) ("***Wilkes***") the UT determined that HMRC had no power to make a discovery assessment in respect of the HICBC on the basis that the child benefit was not an amount of income which should have been assessed to income tax. The HICBC is a free-standing charge to tax.

5. Following the decision in *Wilkes* the provisions of section 97 Finance Act 2022 ("**Section 97"**) were enacted such that section 29 TMA was amended providing for a discovery assessment to be issued where "an amount of income tax … ought to have been assessed but has not been assessed" thereby providing for HICBC to be assessed by way of discovery assessment. Whilst the provision is generally only prospective s97 also provides that where a discovery assessment has been made to collect HICBC prior to tax year 2021/22 the provision is retrospective unless 1) pursuant to section 97(5) a notice of appeal was given to HMRC in respect of the assessment prior to 30 June 2021 and the *Wilkes* basis of challenge was asserted in that appeal on a date prior to 30 June 2021; or 2) pursuant to section 97(6) a notice of appeal was given to HMRC in respect of the assessment prior to 30 June 2021, the appeal was the subject of a temporary pause which occurred prior to 27 October 2021 and "it is reasonable to conclude that the temporary pausing of the appeal occurred (wholly or partly) on the basis that [the *Wilkes* issue] is, or might be, relevant to the determination of the appeal". The appeals which are subject to the retrospective statutory amendment are defined as "protected appeals". In this regard the protection offered is to HMRC and not the taxpayer.

6. By virtue of section 34(1) TMA, HMRC may raise a HICBC discovery assessment at any time within 4 years of the end of the tax year to which it relates. They also have the power, in consequence of section 36(1A) TMA, to raise the assessment within a period of 20 years of

the year of assessment where the loss of tax arises because of a failure to notify liability to a charge to tax under section 7 TMA. That section provides that if a person is chargeable to income tax, they must notify HMRC of that fact within 6 months after the end of the tax year. But if their income consists of PAYE income and they have no chargeable gains they are not required to notify their chargeability to income tax unless they are liable to the HICBC. In consequence of the provisions of section 118(2) TMA, the 20-year assessment provisions do not apply where the taxpayer establishes a reasonable excuse for the failure to notify their liability under section 7. However, HMRC will always have a period of 4 years in which to make a discovery assessment for a protected assessment.

7. Section 7 TMA provides that if a person is chargeable to income tax he must notify HMRC of that fact within 6 months after the end of the tax year. But if his income consists of PAYE income and he has no chargeable gains he is not required to notify his chargeability to income tax unless he is liable to the HICBC.

8. Paragraph 1 Schedule 41 provides that a person who has not been sent a tax return is liable to a penalty if he fails to comply with section 7 TMA. Paragraph 6 Schedule 41 provides that in the case of a "domestic matter" (which this is) where the failure was neither deliberate or concealed (as HMRC accept), the penalty is 30% of the "potential lost revenue"; but paras 12 and 13 provide for a reduction in that percentage in the case of prompted disclosure where a taxpayer gives HMRC help in quantifying the unpaid tax, but subject to a minimum penalty rate of 10% if HMRC became aware of the failure less than 12 months after the tax "first becomes unpaid by reason of the failure" (paragraph 13(3)(a)) and 20% otherwise.

9. Paragraph 14 Schedule 41 provides that HMRC may reduce a penalty because of special circumstances (and by paragraph 19 the tribunal may do so where HMRC's decision in this regard is flawed). Paragraph 20 provides that liability to a penalty does not arise if the taxpayer satisfies HMRC or the tribunal on an appeal that he had a reasonable excuse for the failure.

THE EVIDENCE AND THE FACTS

10. We were provided with a bundle of documents which was specific to this appeal as well as a substantial generic bundle which contained much information about the "advertising campaign" conducted by HMRC in relation to the HICBC. Oral evidence on behalf of HMRC was given by Officer Steven Thomas and Officer Daniel Juniper. The appellant gave oral evidence on his own behalf. From this evidence we find as follows:

(1) The appellant's spouse claimed child benefit in 2001 and 2004. At that time, and up to and including the tax year 2018/2019, the appellant was an employee and was not required to, nor did he, complete a self-assessment tax return. He received no notices to do so.

(2) In 2012, prior to the introduction of the HICBC, HMRC issued several press releases which detailed the introduction of the charge and advised High Income Child Benefit parents to register for self-assessment. Similar press releases came out in 2014. In 2018 and 2019 HMRC, in response to misgivings raised in connection with reasonable excuse defences issued a further round of press releases dealing with that issue. There is considerable information about the charge on HMRC's website.

(3) The appellant's income for 2018/2019, recorded in the appellant's employers PAYE records was £61,231.68.

(4) On 27 November 2019, HMRC issued a "nudge" letter (the "**nudge letter**"). That letter was addressed to the appellant at his home address. The appellant's evidence is that he did not receive that letter. It was not, however, returned to HMRC as undelivered.

(5) The nudge letter explained that HMRC wanted to help the taxpayer to understand whether he needed to pay the HICBC. It explained the financial circumstances in which a taxpayer might be liable to pay the charge, what to do next, and that if a taxpayer is not sure if he or she needed to pay the charge, the taxpayer should phone HMRC for assistance.

(6) On 11 March 2021 Officer Juniper selected the appellant for an in-depth review as to whether he had failed to notify HMRC of his liability to HICBC. He interrogated data provided by the Child Benefit Office. He checked HMRC's PAYE records. He checked the self-assessment system. He calculated the appellant's adjusted net income for the tax year in question and confirmed that it exceeded £50,000. He authorised the issue of an opening letter. We find as a fact that on that date Officer Juniper discovered that there was a loss of tax in 2018/2019 caused by the appellant's failure to notify liability to HICBC.

(7) That opening letter was dated 12 March 2021, and addressed to the same address as the nudge letter, HMRC explained that their records showed that the appellant was liable to the HICBC and that they considered that he was liable to a charge of £1,788 for the tax year in question. It also explained why late payment penalties and interest might be due.

(8) On 26 April 2021, HMRC sent a follow-up letter to that opening letter. That was sent to the same address as the two previous letters. The appellant denies receiving that letter, but it was not returned to HMRC as undelivered.

(9) On 11 May 2021, HMRC sent a further letter to the appellant at his home address as well as notices of assessment to the HICBC and to the penalty.

(10) Following receipt of those notices, the appellant contacted HMRC by telephone. He did so several times. On one occasion he managed to speak to somebody at HMRC. The HMRC officer was from the PAYE department. He tried to put the appellant through to the correct individual at HMRC who dealt with HICBC. The appellant waited for 40 minutes to be put through, but then gave up in despair.

(11) On 1 July 2021 HMRC received the appellant's appeal against the HICBC and penalty assessments.

(12) On 16 May 2022 HMRC responded to the appeal and provided their view of the matter. Their view was that the charge and the penalty were both properly imposed. The appellant sought an independent review of that decision. On 8 July 2022 HMRC issued their review conclusion letter upholding both assessments. On 29 July 2022 the appellant lodged an in-time appeal with the tribunal.

DISCUSSION

11. As we explained to the appellant at the hearing, this is a game of two halves. The first is whether the HICBC is properly chargeable. The second is whether, if it is so chargeable, the appellant is liable to the penalty. Different considerations apply to these issues.

12. As regards the first, we have found that the discovery assessment for the HICBC is a valid in time assessment. We also find, and the appellant does not dispute this, that his income

for the tax year in question was greater than £50,000. Since the appeal to HMRC was not made before 30 June 2021 (it was not received by HMRC until 1 July 2021) and did not include anything which suggests that the appellant was challenging the assessment on "*Wilkes* like" grounds, it is subject to the retrospective legislation in Section 97.

13. Accordingly, we have no alternative other than to uphold that assessment and dismiss the appellant's appeal against the assessment to the HICBC. The fact that the appellant may have had no idea about the liability to the charge is irrelevant when considering his liability to the charge. It is only relevant when we come to the issue of the penalty to which we now turn.

14. If the appellant can establish that he had a reasonable excuse for not notifying his liability to the HICBC, then he can be excused from his liability to the penalty.

15. The onus is on the appellant to show that, on the balance of probabilities, the facts show that he had a reasonable excuse.

16. The legal principles which we must consider when an appellant submits that he has a reasonable excuse are set out in the the Upper Tribunal decision in *Christine Perrin v HMRC* [2018] UKUT 156 ("***Perrin***"). The relevant extract is set out below:

> "81. When considering a "reasonable excuse" defence, therefore, in our view the FTT can usefully approach matters in the following way:
>
> (1) First, establish what facts the taxpayer asserts give rise to a reasonable excuse (this may include the belief, acts or omissions of the taxpayer or any other person, the taxpayer's own experience or relevant attributes, the situation of the taxpayer at any relevant time and any other relevant external facts).
>
> (2) Second, decide which of those facts are proven.
>
> (3) Third, decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default and the time when that objectively reasonable excuse ceased. In doing so, it should take into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times. It might assist the FTT, in this context, to ask itself the question "was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?"
>
> (4) Fourth, having decided when any reasonable excuse ceased, decide whether the taxpayer remedied the failure without unreasonable delay after that time (unless, exceptionally, the failure was remedied before the reasonable excuse ceased). In doing so, the FTT should again decide the matter objectively, but taking into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times.
>
> 82. One situation that can sometimes cause difficulties is when the taxpayer's asserted reasonable excuse is purely that he/she did not know of the particular requirement that has been shown to have been breached. It is a much-cited aphorism that "ignorance of the law is no excuse", and on occasion this has been given as a reason why the defence of reasonable excuse cannot be available in such circumstances. We see no basis for this argument. Some requirements of the law are well-known, simple and straightforward but others are much less so. It will be a matter of judgment for the FTT in each case whether

> it was objectively reasonable for the particular taxpayer, in the circumstances of the case, to have been ignorant of the requirement in question, and for how long. The Clean Car Co itself provides an example of such a situation".

17. The test we adopt in determining whether the appellant has an objectively reasonable excuse is that set out in *The Clean Car Co Ltd v C&E Commissioners* [1991] VATTR 234, in which Judge Medd QC said:

> "The test of whether or not there is a reasonable excuse is an objective one. In my judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?"

18. That this is the correct approach has also recently been confirmed by the Court of Appeal in *William Archer v HMRC* [2023] EWCA Civ 626 (***"Archer"***).

19. It is clear from the foregoing extract from *Perrin* that ignorance of the law can, in certain circumstances, comprise a reasonable excuse. It is a matter of judgment for us as to whether it is objectively reasonable for the appellant in the circumstances of this case to have been ignorant of the requirement to complete a self-assessment tax return in light of his liability to the HICBC.

20. It is equally clear from the evidence in the generic bundle that prior to the introduction of the HICBC, HMRC launched an extensive information campaign to make the general public aware of the introduction of the charge.

21. What is not so clear from the evidence adduced in this case, but of which we are aware because of other HICBC cases which we have read and on which we have sat, is that in November 2012 HMRC issued a briefing to over a million higher rate taxpayers about the charge. And in September 2013 self-assessment letters known as "SA 252" letters were sent to a number of higher rate taxpayers. A pro forma SA 252 letter is in the generic bundle which HMRC have provided for this appeal.

22. HMRC have not submitted that an SA 252 letter was sent to this appellant nor indeed that he was one of the million or so higher rate taxpayers notified about the introduction of the charge in 2012. The reason for this is clear from HMRC's records. It is because for each of the tax years starting with 2012/2013, the appellant earned less than £50,000.

23. So no specific communication regarding the HICBC was sent to this appellant until the nudge letter in November 2019.

24. In her decision in *Naila Hussain* [2023] UKFTT 00545 Judge Brown reviewed a number of HICBC cases and said this:

> "37. There are a great many HICBC cases being considered by the Tribunal at present. Many are determined against the taxpayer and a handful have been determined in the taxpayer's favour. Judge Popplewell in particular appears to have determined a number of cases favorably to the taxpayer and it is on these judgments that the Appellant relies (the most recent is *Mark Goodall v HMRC* [2023] UKFTT 18 (TC)) (***"Goodall"***). In that judgment Judge Poppelwell references his prior decision in *Leigh Jacques v HMRC* [2020] UKFTT 331

(TC) in which he reviewed the extensive case list on which HMRC rely in HICBC cases.

38. In each of the judgments Judge Poppelwell has concluded that a taxpayer is likely to have a reasonable excuse where they were:

(1) not under an obligation to complete a tax return up to the tax years prior to that in which the HICBC applied because, primarily, they were paid through PAYE and had no other income justifying a need to notify;

(2) in receipt of child benefit payments prior to the introduction of HICBC with the consequence that the application itself made no reference to HICBC (the child benefit claim form post the introduction of HICBC clearly sets out when the charge applies);

(3) had not received notification from HMRC directly at any point prior to the contact which led to the issues of the tax assessment; but

(4) acted promptly in ceasing to claim child benefit and engaged actively with resolving the historic tax liabilities as soon as HMRC did make contact.

39. However, in *Goodall* Judge Popplewell also noted that where a taxpayer had received a nudge letter then the taxpayer would have no reasonable excuse but went on to decide that in that case, by reference to the evidence, to determine that no nudge letter had been received. As such, and on the facts the first point at which Mr Goodall became aware of the risk of a HICBC liability he acted without unreasonable delay".

25. We confirm that the foregoing is an accurate reflection of Judge Popplewell's view of when a taxpayer might have a reasonable excuse in HICBC penalty cases.

26. When tested against the foregoing criteria, we are of the view that the appellant in this case satisfied (1)-(3). This is clear from the facts. The appellant was under no obligation to complete a self-assessment tax return for the tax year in question in this appeal. His spouse was in receipt of child benefit well before the introduction of HICBC. Neither he nor his spouse had received any specific notification prior to the sending of the nudge letter. So, we are in the same position as Judge Popplewell in *Goodall.* There, as in this case, the appellant had a reasonable excuse as he had received no specific notification of his potential liability to HICBC. But the question was whether, if he had received a nudge letter, that reasonable excuse ceased as he did not act without unreasonable delay.

27. It is our view that if the appellant in this appeal had received the nudge letter, then he has no reasonable excuse for failure to notify chargeability to HICBC. The million-dollar question, therefore, is whether he received the nudge letter.

28. Under section 7 of the Interpretation Act 1978, which applies to service of documents authorised or required by legislation, "service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post".

29. Clearly the nudge letter is not a document authorised or required by legislation. But we intend to adopt the same approach towards service set out above. It seems to us common sense. If HMRC are alleging that the nudge letter was sent to the appellant and thus he was on notice that someone earning more than £50,000 was liable to the HICBC, they need to show that they

had sent it to him. If the appellant then alleges reasonable excuse on the basis that he did not receive it, he needs to establish non-receipt.

30. We are satisfied that HMRC did send the nudge letter to the correct address and that it was actually sent to the appellant. Indeed, this was not seriously challenged by the appellant. We do not believe that the copy letter in the documents bundle was some form of "ghost" letter, created by HMRC for the purposes of this appeal. We find that it was a copy of the actual letter which was sent to the appellant at the correct address. We find the same is true, too, of the letter notifying the appellant of his liability to the charge, dated 12 March 2021, and the subsequent chasing letter of 26 April 2021. These letters were not returned to HMRC, undelivered.

31. The appellant says that he received neither the nudge letter nor the two subsequent letters.

32. We accept the appellant's evidence. It is our view from the appellant's evidence, his actions, and his demeanour, that he is telling the truth.

33. Firstly, the appellant's evidence that he had not received the letters was not seriously or forensically challenged by HMRC. Secondly, the way in which the appellant gave evidence suggested to us that he was a truthful person and indeed once he found out that he was liable to the HICBC, following receipt on 11 May 2021 of the assessments, he acted as a conscientious taxpayer, conscious of and intending to comply with his obligations regarding tax.

34. It was the appellant's evidence, which was not seriously challenged by HMRC, that had he received the nudge letter and the subsequent chasing letters, he would have acted in the same way that he acted once he had received the assessments. We believe him.

35. His evidence was that having read the letter and the assessments (and he was confused by the fact that he had received letters and assessments dated 10 and 11 May 2021 which he found contradictory) he took time to consider their contents. He did not really understand them. He noted that he had an extended time to appeal (from 30 days to 3 months and 30 days). He then tried to understand what was going on by telephoning HMRC on several occasions. On one occasion he was successful but left hanging on the telephone for some 40 minutes, after which he terminated the call.

36. He appealed against the assessments and that appeal was received by HMRC on 1 July 2021.

37. The appellant was aware of his liability to HICBC and the penalty on 11 May 2021. He took immediate steps to find out what was going on by telephoning HMRC. He appealed against the assessments some six or seven weeks later. We do not think this is an unreasonable delay.

38. It is our conclusion that the appellant had a reasonable excuse for failing to notify chargeability to the HICBC, and when that excuse ceased, on notification of that liability by service of the assessments, the appellant remedied his failure without unreasonable delay.

39. Accordingly, we allow his appeal against the penalty.

DECISION

40. We dismiss the appeal against the HICBC of £1,788 but allow the appeal against the penalty of £482.76.

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.

NIGEL POPPLEWELL
TRIBUNAL JUDGE

Release date: 10 August 2023