Neutral Citation: [2023] UKFTT 00716 (TC)

Case Number: TC 08906

FIRST-TIER TRIBUNAL
TAX CHAMBER

In public by remote video hearing

Appeal reference: TC/2022/12673

INCOME TAX – penalties for failing to notify liability to the HICBC – appellant husband ignorant of the law –appellant's wife ignorant of husband's ANI - reasonable excuse? – yes - appeal allowed

Heard on: 24 July 2023
Judgment date: 18 August 2023

Before

TRIBUNAL JUDGE NIGEL POPPLEWELL
MR JAMES ROBERTSON

Between

WASEEM SHAHID

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: In person

For the Respondents: Miss Anika Aziz 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 four tax years (2014/2015 to 2017/2018), together with penalties ("**the penalties**") for failing to notify chargeability for each of those tax years under section 7 Taxes Management Act 1970 ("**TMA**"). The penalties have been assessed pursuant to Schedule 41 Finance Act 2008 ("**Schedule 41**").

2. The appellant has accepted the tax assessments and is paying them. This appeal is therefore only against the penalties which amount, in total, to £1,729.

THE LAW

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

4. 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.

5. 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.

6. 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 paragraphs 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.

7. 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.

EVIDENCE AND FACTS

8. 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. The appellant gave oral evidence. On the basis of the documentary and oral evidence we find as follows:

(1) Prior to the years under appeal, the appellant was not within the self-assessment regime. He did not receive notices to file tax returns and did not file tax returns in any of those years.
(2) HMRC's records indicate that the appellant was sent a letter SA 252 on 17 August 2013. This was sent to the address which HMRC had for the appellant at that time. It is the appellant's evidence that he cannot recall receipt of this letter. He is absolutely certain, however, that even if he did receive it, neither he nor his wife read it.

(3) SA 252 was sent to a number of higher rate taxpayers. It tells those taxpayers that the HICBC came into effect on 7 January 2013 and a taxpayer is liable to pay the charge if; in the 2012/2013 tax year taxpayer had individual income over £50,000 a year; the taxpayer or his/her partner received any child benefit payments after 7 January 2013; the taxpayer's income for the tax year is higher than his/her partner's.
(4) HMRC's records show, and the appellant does not dispute this, that his adjusted net income for each of the years under appeal exceeded £50,000.
(5) The appellant's spouse has been in receipt of Child Benefit with effect from July 2014 (for their first child) August 2018 (for their second child) and December 2019 (for their third child).
(6) We find as a fact that the Child Benefit claim form which the appellant's spouse would have completed when applying for Child Benefit payments states that: "This information **only** applies if you or your partner have an individual income of more than £50,000 a year" and: "From 7 January 2013, if either you or your partner have an individual income of more than £50,000 a year then you (or your partner) will have to pay a **High Income Child Benefit Charge** on some or all of the Child Benefit you receive".
(7) We also find as a fact that the appellant had not seen the Child Benefit claim forms during the tax years in question.
(8) On 14 November 2019 HMRC issued a nudge letter ("**the nudge letter**") to the appellant which was sent to his home address. On 20 November 2019, the appellant contacted HMRC by telephone seeking further information about the HICBC. On 13 December 2019, HMRC issued a reminder letter to the appellant reminding him to check whether he was liable to the HICBC.
(9) On 7 January 2020 the appellant contacted HMRC by telephone telling them that he would contact them again regarding any liability to HICBC, and on 14 May 2021, the appellant confirmed to HMRC, in a telephone conversation, that he accepted liability to the HICBC for the tax years under appeal.
(10) This telephone conversation was followed up in a letter dated 17 May 2021 from HMRC to the appellant confirming HMRC's view that the appellant was liable to HICBC for the tax years in question in an amount of £8,645, and explaining to the appellant what he needed to do if he wanted to either accept, or challenge, that liability.
(11) On 24 June 2021, HMRC issued assessments for the HICBC as well as notices of penalty assessments for failing to notify chargeability. The penalty percentage was 20% for each of the tax years based on non deliberate behaviour and prompted disclosure. The penalties amount in total to £1,729.
(12) The appellant submitted in time appeals against the penalty assessments in July 2021. HMRC issued their view of the matter letter in July 2022 following which the appellant accepted HMRC's offer of review. On 12 September 2022 the appellant notified an out of time appeal with the tribunal (to which HMRC do not object) and on 2 November 2022 HMRC sent their review conclusion letter to the appellant confirming their original decision to impose the penalties.
(13) The appellant's evidence was that: His wife is a full-time housewife; she did not understand the rules which apply to Child Benefit payments; he had told her that his basic income was £42,000 per year; he works offshore, and the overtime that he receives when working offshore took his income, during the tax years under appeal, considerably over the £50,000 threshold; he received his income under deduction of tax under PAYE; he received a P60 each year recording his total income and which reflected both his basic and additional overtime income; he did not tell his wife that he was earning this additional income, nor the amount of it; he did not share any of the paperwork relating to his income with his spouse; his wife did not enquire, at any stage, whether he had received more than his basic income of £42,000 per year, so that she did not know that he was earning this extra money from his

offshore activities; the appellant pays all domestic bills and expenses; he puts money into a separate account for his wife who pays the housekeeping out of that; there is no joint account; as soon as he received the nudge letter in 2019, he contacted HMRC; he is currently paying the HICBC to HMRC by instalments; paying the penalties on top of these instalments will cause him considerable financial hardship.

DISCUSSION

9. The burden is on HMRC to show that the penalty assessments are valid in time assessments and (arithmetically) assess the appellant to the correct amount.

10. The appellant does not seriously challenge the validity of the assessments, and we find, as a fact, that they are valid in time assessments which are numerically correct.

11. The burden of establishing that the appellant has a reasonable excuse, or that there are special circumstances, rests with the appellant. He must establish these on the balance of probabilities.

Reasonable excuse

12. 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.
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> (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.
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> 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".

13. 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?".

14. 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"***).

15. 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.

16. In her decision in *Naila Hussain* [2023] UKFTT 00545 ("*Hussain*") Judge Brown reviewed a number of HICBC cases dealing with "ignorance of the law defences" 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.
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> 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;
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> (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".

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

18. However, as in most cases, the difficulty arises in applying these principles to the particular facts in a specific appeal.

19. We have found as a fact that HMRC did indeed send letter SA 252 to the appellant on 17 August 2013 and that that letter was deemed to have been received by him since it was sent to his correct address. But we have also found as a fact that the appellant did not read its contents, and thus was not aware of the fact that if his adjusted net income was greater than £50,000 he would be liable to the HICBC if his wife claimed child benefit.

20. We say this because we believe the appellant who gave evidence in a coherent and convincing and, to our view, reliable manner. He appears to be a man who is conscious of the UK tax system and intends to comply with his obligations towards it. This is evidenced by the fact that when he received the nudge letter on 14 November 2019, he contacted HMRC within six days and entered into a dialogue about them concerning his liability to the charge. Further telephone conversations ensued together with an exchange of correspondence, resulting in an acceptance, by the appellant, that he was liable to the HICBC, in May 2021. We infer from the appellant's behaviour, therefore, that had he received SA 252 (and so was on notice that his spouse was not entitled to claim Child Benefit if his adjusted net income was more than £50,000) he would have told his spouse that she should not do so.

21. However, at the time that she was claiming, and whilst he knew that she was so claiming, he was ignorant of the financial criteria which prohibited her from validly claiming. He had not seen SA 252, and he fulfilled each of criteria (1) - (3) set out in the extract from *Hussain* above.

22. We have also found as a fact that the appellant's spouse was on notice of the financial criteria for making a legitimate claim for Child Benefit (even if, in the appellant's view she did not understand them) as this information was clearly set out on the claim forms which she had completed when making the claims in respect of her three children. So she knew that if her husband's adjusted net income was more than £50,000, she should not be claiming. However, we have also found as a fact that the appellant told her that his income was £42,000 per year. He did not tell her of his additional income derived from his overtime from his offshore work. She had no sight of his payslips or P60. She was ignorant of his adjusted net income for the tax years in question. We find this as a fact.

23. So in this case we have a somewhat unusual set of circumstances. It is clear that whilst the appellant and his spouse, collectively, knew that he was earning more than £50,000 and that this rendered him liable to the HICBC, individually each was missing actual knowledge of a crucial part of the legislative jigsaw. The appellant did not know (until he received the nudge letter) of the detailed criteria which would render him liable to the charge. His spouse did not know that the appellant's adjusted net income was more than £50,000.

24. It is important to focus on the appellant's situation given that it is he who is being impugned for the penalty. It is he who has to establish a reasonable excuse. It is not for his wife to establish a reasonable excuse nor that collectively they had a reasonable excuse. The penalties are assessed on him, not on the two of them. Thus, his ignorance of the law can be a reasonable excuse for him.

25. HMRC's view is that a taxpayer with a reasonable regard to the law and their responsibilities would be aware of the need to consider their partner's income. And thus the objectively reasonable taxpayer would ask their partner one or both of the following questions (or an alternative to the same effect); are you claiming Child Benefit? And do you have an adjusted net income of over £50,000?

26. They go on to say that if the partner exercises the right to decline to give this information, HMRC have a mechanism to allow them to obtain it. It seems that in these circumstances HMRC are prepared to waive the cloak of confidentiality about one spouses tax position and provide details of it to the other spouse. Whether this is a proper way of behaving is not for us to determine.

27. Nor are we required to comment on whether this is a reasonable course of behaviour by one spouse towards another.

28. But in this case we are faced with a situation where the appellant knew that his spouse was claiming Child Benefit and knew that he was earning more than £50,000 but did not know that this rendered him liable to the HICBC. His spouse had been told by the appellant that he was earning £42,000 a year. So why should she question that? As far as she was concerned (even if she had read and understood the criteria for bringing a proper claim for Child benefit) she was able to sign off the claim forms in the knowledge that she was eligible to make a claim.

29. If she was faced with the penalty for having failed to take reasonable care in making this claim, then we can see that it might be relevant to her position that she might have asked the appellant to check that his adjusted net income for the years in question was indeed £42,000. But she is not in the dock in this appeal. The issue is one for her husband.

30. We can also see HMRC's point that if there were indicia which might have put the appellant's spouse on notice that her husband was earning more than £42,000, there might be circumstances in which she might have gently tested her husband's assertion that he was only earning that amount. But again, this goes to the appellant's spouse's position rather than to the appellant's. In any event, the appellant's unchallenged evidence, which we accept, was that he paid most of the household bills, his wages went into an account in his name out of which he transferred money into a separate account which his wife could use for housekeeping, and that as far as she was concerned, he earned only the £42,000 that he had told her he earned. So there seems to us no reason why in these circumstances the appellant's wife should have queried the information given to her by her husband.

31. When considering the appellant's position, we have found that he was ignorant of the legislative provision that if he had adjusted net income of more than £50,000, his spouse should not be claiming child benefit. And he was so ignorant right up until he received the nudge letter on 14 November 2019. In our view this comprises a reasonable excuse for having failed to notify chargeability until then. The question therefore is whether he remedied that failure without unreasonable delay. HMRC suggest that he did not. We disagree.

32. Having received the nudge letter, the appellant contacted HMRC within a week. He sought further information from them over the phone regarding HICBC. It is clear that he was a busy man and needed to digest this information. He was chased by HMRC shortly before Christmas 2019 and responded shortly thereafter on 7 January 2020, keeping them informed that he was considering his position. Whilst it was not until four months later that he confirmed that he accepted liability to HICBC, we do not think this is an unreasonable period of time. He did not keep his head down once he knew that there was a potential liability. He sought to clarify the situation. He accepted liability once the facts were clear to him and has been paying the charge by instalments ever since. It is our view that the appellant had a reasonable excuse for failure to notify chargeability which he remedied, once he received the nudge letter, without unreasonable delay.

DECISION

33. We allow the appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

34. 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: 18 August 2023