Neutral Citation: [2024] UKFTT 00123 (TC)

Case Number: TC09065

FIRST-TIER TRIBUNAL
TAX CHAMBER

[By remote video hearing]

Appeal reference: TC/2022/13993

INCOME TAX – High Income Child Benefit Charge – Child Benefit paid to children's mother – Appellant divorced from children's mother – Appellant assessed to HICBC – whether Section 681B ITEPA 2003 Condition A is satisfied –whether Appellant entitled to Child Benefit – whether responsible for the children –Section 141 SSCBA 1992 – yes to both questions – assessments upheld – appeal dismissed

Heard on: 28 November 2023
Judgment date: 6 February 2024

Before

TRIBUNAL JUDGE ANNE SCOTT
MEMBER JOHN ROBINSON

Between

IAN HOLLAND

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: The appellant in person

For the Respondents: Ms Sofia Taj, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. This is an appeal against discovery assessments made under section 29 Taxes Management Act 1970 ("TMA") amounting to £3,576 for the tax years 2018/19 and 2019/20.

2. With the consent of the parties, the hearing was conducted by video link using the Tribunal's video hearing system. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

3. The documents to which we were referred comprised a Bundle consisting of 228 pages and a HICBC generic bundle extending to 831 pages.

Preliminary issues

4. It transpired in the course of the hearing that the appellant had understood that penalty assessments issued on 17 November 2022 and totalling £624 imposed under Schedule 41 Finance Act 2008 had been appealed to the Tribunal. The parties were agreed that formal written submissions would be lodged and the question of whether a late appeal should be permitted in relation to the penalty assessments should be decided by the Tribunal on the basis of the oral evidence heard and the written submissions.

5. On 13 December 2023, Ms Taj lodged written submissions and on 3 January 2024, the appellant lodged written submissions in response. Ms Taj confirmed that:

> "Having the benefit of hearing the oral submissions put forward by Mr Holland, the Respondents accept that he does have a reasonable excuse for his failure to notify and will accordingly cancel the penalties issued on 17 November 2022 in the sum of £624".

6. Accordingly, that is no longer a live issue. For the avoidance of doubt, had the penalties not been cancelled the Tribunal would have allowed a late appeal in that regard and would have found that there was a reasonable excuse for the failure to notify.

The facts

7. Mr Holland had claimed for, and been in receipt of, Child Benefit since 5 January 2004 in respect of his first child and 12 March 2007 for the second child. The Child Benefit claims were in his name. The Child Benefit was paid into a joint account with his then wife.

8. In September 2012, the appellant and his wife separated and the bank account came under the sole control of the appellant's soon to be ex-wife. Therefore she received the Child Benefit. The account was in her sole name from December 2015. The Decree Absolute was dated 30 March 2015. The appellant had left the family home in August 2012. The award of Child Benefit terminated on 7 September 2020.

9. At all relevant times the appellant has made monthly Child Maintenance payments to his ex-wife and into that bank account. The amount of those payments always exceeds the amount of Child Benefit.

10. On 4 December 2019, HMRC wrote to the appellant asking him to confirm if he was liable to pay the HICBC and, if so, to register for self-assessment. As he had not received any Child Benefit since 2012, he thought that that could not apply to him and so he did not respond.

11. On 19 April 2021, HMRC, having researched the position, wrote to the appellant indicating that it was thought that a total of £4,014 in HICBC would be payable for the years 2012/13, 2018/19 and 2019/20.

12. On 29 June 2022, HMRC again wrote to the appellant stating that following the decision of the Upper Tribunal in *HMRC v Jason Wilkes* [2021] UKUT 0150 (TCC) the Finance Act 2022 had amended the legislation. They enclosed a decision that they intended to issue in relation to assessments and confirmed that they intended charging penalties of £1,030.14.

13. The appellant responded on 6 July 2022 explaining that in August 2012 he had separated from his wife and he had never received any Child Benefit payments. He said that since the separation in August 2012 and the divorce in March 2014, he had received no payments. He asked if HMRC would confirm that the HICBC was not due.

14. HMRC responded on 3 August 2022 pointing out that the appellant had at all times been the named claimant of Child Benefit and that the payments had been made to the nominated bank account.

15. On 13 August 2022, the appellant wrote stating that he was formally appealing the discovery assessment and pointing out that he had never completed a self-assessment tax return as he was in employment and he paid tax via PAYE. He pointed out that he had never received any notifications or statements from Child Benefit Service to allude to any payments. He followed that letter with an email from his ex-wife dated 19 August 2022 confirming that she had always received the Child Benefit payments.

16. On 1 September 2022, HMRC wrote to the appellant asking for proof of the divorce, confirmation from the Child Benefit office that there had not been payment to him, proof of Child Maintenance as the non-resident parent since 2013 and copy bank statements for the corresponding years. The appellant responded on 13 September 2022 with all of that information.

17. On 6 October 2022, HMRC wrote to him stating amongst other matters that it did not matter "where the money is sent" but the fact was that he had claimed the Child Benefit and he was therefore liable for the HICBC. They asked him to confirm whether the information about the HICBC was correct.

18. On 20 October 2022, HMRC spoke with the appellant by telephone and, following that, on 28 October 2022, they wrote confirming the amounts of the assessments and penalties. The penalties amounted in total to £624. That letter pointed out that the penalties had to be paid separately from any tax and interest.

19. On 28 October 2022, the assessments were issued. The appellant has paid the assessment for 2012/13 in the sum of £438 since he was still residing with his wife for part of that time.

20. On 8 November 2022, the appellant formally appealed the two other assessments. He pointed out that over the last three months he had been "regularly speaking" with HMRC and re-iterating the fact that HMRC had repeatedly told him that if he had not received the Child Benefit then he would not be liable for the HICBC. He stated that, genuinely, he had not been aware that his name was still "aligned" with the payments.

21. On 25 November 2022, the View of the Matter letter was issued. It concluded that Condition A in the HICBC legislation was satisfied because the appellant was entitled to, and had been claiming, Child Benefit and he was therefore liable to the HICBC. It explained the process for appeal to the Tribunal.

22. On 5 December 2022 the appellant appealed to the Tribunal.

23. He reiterated the arguments that he had advanced previously and pointed out that notwithstanding what the letters from HMRC had stated, nevertheless he had repeatedly been told in telephone conversations with HMRC that if he provided evidence that he had not received the Child Benefit, he would not be liable for the HICBC.

Discussion

24. We have no hesitation in accepting that the appellant is a straightforward and honest witness. He did not receive the Child Benefit in the two years in question. However, the matter is not as straightforward as that and the information communicated to him verbally by HMRC was incorrect.

25. Ms Taj relies on *Meades v HMRC* [2023] UKFTT 544 (TC) ("Meades") on the basis that the facts are similar to those in this appeal, which they are. As the Tribunal made clear at paragraph 61 in *Meades*, the fact that HMRC had misunderstood the position does not affect the requirement for the Tribunal to look at the law.

26. What is the legal position? The legislation about the HICBC is contained in the Income Tax Earnings and Pension Act 1992 ("ITEPA") and the Income Tax Act 2007 ("ITA"). The relevant Child Benefit legislation is in the Social Security Contributions and Benefits Act 1992 ("SSCBA") and the Child Benefit (General) Regulations 2006 ("the Regulations").

27. The HICBC was imposed by Finance Act 2012, section 8 and Schedule 1, which inserted Chapter 8 into ITEPA, Part 10. The HICBC provisions are set out at ITEPA sections 681B to 681H.

28. Insofar as relevant, section 681B provides as follows:

> "(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."

29. It is not in dispute that the appellant's income exceeded £50,000 and that he had no partner with a greater income than that in both of the tax years in question.

30. The issue is whether he was entitled to Child Benefit, albeit he never received it.

31. Section 141 SSCBA provides that a person is entitled to Child Benefit if that person is "responsible" for a child in any week.

32. Section 143(1) SSCBA reads:

> "For the purposes of this Part of this Act a person shall be treated as responsible for a child…in any week if—
>
> (a) he has the child…living with him in that week; or
>
> (b) he is contributing to the cost of providing for the child…at a weekly rate which is not less than the weekly rate of child benefit payable in respect of the child…for that week."

33. It is not in dispute that the children lived with their mother and not the appellant. However, it is also not in dispute that he was making Child Maintenance payments at a rate that was greater than the amount of Child Benefit.

34. The children's mother would also have had an entitlement to Child Benefit but Schedule 10 SSCBA and the Regulations make provision for priority as between those entitled to Child Benefit. We agree with Judge Redston and Ms Gable in *Meades* where they explained at paragraphs 67 and 68 that the effect of those provisions is that where the father has been awarded Child Benefit, as the appellant in this case had been, then even where the Child Benefit was paid to the mother the father retained priority as to entitlement.

35. Sadly for the appellant, because he did not terminate his claim to Child Benefit when he separated from the children's mother, the award remained in place until the claim was closed in 2020. Although the children did not live with him he paid sufficient Child Maintenance to remain entitled to Child Benefit.

36. Accordingly the appellant had an entitlement to Child Benefit in the relevant years albeit he did not receive it. Therefore he satisfies the provisions of Condition A in section 681B ITEPA and is liable to the HICBC.

37. Lastly, we can certainly understand that the appellant might consider that this is an unfair outcome. However, the Tribunal is a creature of statute and has only the powers given to it by statute. As the Upper Tribunal made clear in *HMRC v Hok* [2012] UKUT 363 (TCC) at paragraph 58 this Tribunal has no jurisdiction to consider whether or not the law is fair.

Conclusion

38. For all these reasons the appeal is dismissed and the assessments are confirmed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

39. 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.

ANNE SCOTT
TRIBUNAL JUDGE

Release date: **06th FEBRUARY 2024**