[2021] UKFTT 0410 (TC)

TC 08320

INCOME TAX - HIGH INCOME CHILD BENEFIT CHARGE (HICBC) *— taxpayer with liability did not complete tax returns – invalid discovery assessments under s29(1)(a) TMA 1970 not contested – penalties standing separately from assessment – no reasonable excuse found exonerating taxpayer's delay – appeal against penalties dismissed*

Appeal number: TC/2019/04313 A/V

FIRST-TIER TRIBUNAL
TAX CHAMBER

Mr CHRIS PITTNER **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN MANUELL
MR IAN SHEARER

The hearing took place on 12 November 2021. The Appellant did not appear. All attempts to contact him were unsuccessful. So far as the Tribunal could tell, he had been duly notified of the arrangements for the hearing. The Tribunal decided that it was fair and in the interests of justice to proceed in his absence.

The Tribunal heard Ms Natalie Peet and Mr Connor Fallon, Litigators, of HM Revenue and Customs' Solicitor's Office for the Respondents.

The form of the hearing was by remote video link, using the CVP system. The issues for the Tribunal were narrow and so a remote hearing was appropriate. There had been no objection. 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.

The hearing was held in public.

DECISION

Introduction

1. The Appellant appealed four decisions by HMRC to impose Failure to Notify Penalties relating to HICBC, all dated 28 March 2019, as follows:

Tax year	Decision	Amount
2013/14	Failure to Notify Penalty @ 20% of £1,261.00	£252.20
2014/15	Failure to Notify Penalty @ 20% of £1,770.00	£354.00
2015/16	Failure to Notify Penalty @ 20% of £1,823.00	£364.60
2016/17	Failure to Notify Penalty @ 20% of £1,788.00	£357.60

2. In each of the relevant tax years, the Appellant's income exceeded £50,000 and his partner received Child Benefit. The Appellant was not registered for Self Assessment nor was he served notice to file income tax returns. On 17 August 2018 HMRC wrote to the Appellant concerning HICBC. 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 partner 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).

The Appellant's case

10. The Appellant stated in his Notice of Appeal dated 19 June 2019 that he was not disputing the HICBC charges which he was repaying, he disputed only the penalties. He had tried to resolve the matter with HMRC and had received conflicting advice. HMRC's records of the telephone conversations in question differed from his recollection. He had complained to HMRC about the treatment he had received. He sought removal of the penalties and an apology.

The Respondent's case

11. HMRC's position was that the Appellant's partner had been in receipt of child benefit since 30 November 2001. The Appellant was sent a letter about HICBC on 17 August 2013 as part of a mass mailing to taxpayers likely to have been affected. Prompting letters were sent to the Appellant on 17 August 2018 and again on 10 October 2018. There was no response so HMRC wrote to the Appellant again on 10 January 2019 outlining the assessments they intended to raise and indicating that penalties might be charged for failing to notify his HICBC liability in time. The letter was reissued on 21 January 2019 after an error was noticed. On 28 February 2019 the Appellant was notified by letter that assessments and penalties would be raised. On 5 March 2019 the Appellant telephoned HMRC and said he had not received the letters dated 10 January 2019 and 21 January 2019. On 22 March 2019 the Appellant again telephoned HMRC, accepting his HICBC liability. On 28 March 2019 HMRC wrote to the Appellant confirming the assessments and penalties which were to be raised. The Appellant subsequently appealed against the penalties. HMRC's view 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. Child benefit claim forms provided HICBC information.

12. 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 20%.

13. 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 exceeded £50,000. There were no grounds for a special reduction. The appeal should be dismissed.

Burden and standard of proof

14. The burden of proof lies on HMRC to show that the penalties imposed were valid. 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

15. A bundle of copy documents was served prior to the hearing by HMRC, incorporating the Appellant's documents, together with a separate bundle of generic authorities and materials relevant to HICBC cases. The Tribunal will be referring to few of the documents as the appeal turns largely if not entirely on points of law.

Discussion

16. 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 at that stage, which was left open. In *Wilkes* [2021] UKUT 150 (TC), the Upper Tribunal held that the s29 TMA 1970 Discovery Assessment procedure was not available to HMRC in HICBC cases. The discovery assessments in that appeal were held to be invalid as they did not relate to "income". HMRC had other options for HICBC recovery, such as requiring a taxpayer to submit a SA return or making a simple assessment of income as provided in section 28H of the Finance Act 2016.

17. Obviously the Tribunal is bound by *Wilkes,* which means that the four discovery assessments in the present appeal are invalid. Nevertheless, the Appellant has not appealed against those assessments and has accepted, rightly on the undisputed facts, that he is liable to pay HICBC and that the calculation of HICBC as levied is accurate. Indeed, the Tribunal infers that the Appellant has already paid at least some of the HICBC due from him. As *Wilkes* (above) shows, there are at least two other straightforward routes available to HMRC for HICBC recovery, so contesting the discovery assessments in the present appeal would ultimately almost certainly lead to a pyrrhic victory for the Appellant. In all probability he would simply be assessed by another route and would still have to pay.

18. The validity of the penalties which are under appeal requires consideration. The Tribunal has no jurisdiction over administrative errors by HMRC, for which an apology has already been given. If the Appellant remains dissatisfied about those aspects, he should invoke HMRC's complaints procedure, which is described on HMRC's website and is readily accessible.

19. It was submitted on HMRC's behalf that the penalties stood independently of any issue surrounding validity of the discovery assessments. Reliance was placed on *Lau* [2018] UKFTT 230 (TC), where Judge Anne Scott held that Paragraph 1 of Schedule 41 of the Finance Act 2008 specified that a penalty was payable where a taxpayer does not comply with the obligation to notify HMRC of his liability to income and capital gains tax within six months from the end of the tax year in question, pursuant to section 7(1) TMA 1970. By section 7(3) of TMA 1970, HICBC was expressly included in the statutory duty to notify.

20. But at [25] of her decision, Judge Scott said that if there were no valid section 29 TMA discovery assessment (which the judge did not accept), there would be no potential lost revenue and accordingly no penalty.

21. Since *Lau* (above) was decided, as already noted, the Upper Tribunal has ruled in *Wilkes* that the section 29 discovery assessment procedure is not available for HICBC cases. The Appellant in this appeal is unrepresented. It is clear from

HMRC's Statement of Case that a challenge to the assessments was at least a possibility. The Appellant was plainly unaware of *Wilkes*, otherwise he might have sought to amend his Notice of Appeal, an application which it would have been difficult to resist, notwithstanding our observations about the likely eventual outcome. We will therefore consider the point further.

22. HMRC also relied on *Robertson* (above). There the Upper Tribunal ruled that the distinction between liability and assessment was well established. Potential lost revenue ("PLR") was not limited to and determined by the tax shown in an assessment.

23. As to Schedule 41, paragraph 16(4)(b), FA 2008, if there is no valid assessment (as in the present appeal), then any penalty would have to be assessed "before the end of the period of 12 months beginning with… the date on which the amount of tax unpaid by reason of the relevant act or failure is ascertained". The evidence before us indicates the material date as 10 January 2019, which is the first letter in which HMRC quantify the amount of HICBC due. Since the penalty assessments were then raised on 28 March 2019, the 12 month period following the ascertainment is met.

24. The Tribunal accordingly finds that the penalties are valid and stand independently of the invalid discovery assessments. Even if the Appellant had sought to challenge the discovery assessments, and had succeeded because of *Wilkes*, there was PLR and the penalties accordingly stand.

25. The Tribunal therefore turns to consider whether there was a reasonable excuse for the failure to notify the HICBC liability by filing what in the Appellant's case would have been voluntary SA returns. 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* (above). 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.

26. HMRC has 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. The relevant records were available to HMRC but (the Tribunal understands) this required manual checking. Thus it was several years before the liability of the Appellant came to light.

27. 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). The difficulty in the present appeal is that the Appellant has accepted he had some awareness of HICBC. As the evidence in HMRC's HICBC bundle shows, there was an extensive publicity campaign as well as saturation levels of media coverage, so escaping awareness would not be easy. A further difficulty is the Appellant's failure to respond promptly to HMRC's initial enquiries in 2018, accepting that some of the later correspondence was not received and had to be sent again.

28. The Appellant has not challenged his liability to pay HICBC. He seeks merely to escape the penalties. The Tribunal emphasises that bad faith or dishonesty on the Appellant's part have not been alleged. Whatever the Appellant may have understood in his calls to HMRC, it is in the Tribunal's view improbable that he was in fact informed that there would be no penalties. HMRC's records do not support the Appellant's contentions and he has produced no records of his own. Moreover and in any event, any such conversation(s) has/have no bearing on the underlying question of why the Appellant delayed in declaring his HICBC liability. The Tribunal finds that no reasonable excuse has been shown by the Appellant.

29. It is not necessary for The Tribunal to consider whether there were any special circumstances. None was put forward and none was obvious from the evidence before us.

30. The appeal against the Penalty Notices is dismissed.

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.

JOHN MANUELL
TRIBUNAL JUDGE

Release date: 16 NOVEMBER 2021