Neutral Citation: [2024] UKFTT 00047 (TC)

Case Number: TC09028

FIRST-TIER TRIBUNAL
TAX CHAMBER

In public by remote video hearing

Appeal reference: TC/2022/11423

INCOME TAX – High Income Child Benefit Charge – liability for the charge – yes - appeal against charge dismissed - penalties for failure to notify –no reasonable excuse no special circumstances - appeal against penalties dismissed

Heard on: 30 November 2023
Judgment date: 11 December 2023

Before

TRIBUNAL JUDGE NIGEL POPPLEWELL
MR CHRISTOPHER JENKINS

Between

ANDREW NEWALL

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: In person

For the Respondents: Ms Maria Serdari 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 ("**the assessments**") to HICBC for the tax years 2017/2018 to 2019/2020, together with penalties ("**the penalties**") for failing to notify chargeability under section 7 Taxes Management Act 1970 ("**TMA**"). The penalties have been assessed ("**the penalty assessments**") pursuant to Schedule 41 Finance Act 2008 ("**Schedule 41**"). The assessments amount in total to £2,248. The penalty assessments are for £604.08.

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 assessments have been raised pursuant to HMRC's discovery assessment powers as provided in section 29 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 Section 97 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 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.

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. The appellant gave oral evidence on his behalf. From this evidence we find as follows:

(1) The appellant's wife has claimed child benefit since December 2001. On making her claim, the claim form made no mention of the HICBC. At that time, and up to and including the tax year 2019/2020, 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) HMRC's records show that on 17 August 2013 the appellant was sent an SA 252 to an address at 9 Morefield Close Preston. SA252 is a generic letter sent to over a million higher

earners in 2013 warning them of the changes to the child benefit regime, and the introduction of the HICBC which would apply if an individual or an individual's spouse, claiming child benefit, earned more than £50,000 a year. And warning the recipient to check whether the charge applied and if so the requirement to register for self-assessment.

(4) That letter was returned to HMRC undelivered. The appellant has never lived at that address. We find as a fact that he never received the SA 252.

(5) The appellant's adjusted net income for the years under assessment, as evidenced by his PAYE records, exceeded £50,000 in each of those years.

(6) On 15 November 2019, HMRC issued a "nudge" letter ("**the nudge letter**"). That letter was addressed to the appellant at his correct home address. The appellant's evidence is that whilst he cannot definitely remember receiving it, he thinks that he must have done. In fact, it was his evidence that prior to receiving the nudge letter, (it might have been the subsequent letter of 13 December 2019 (see below) the appellant wasn't sure) he asked his wife whether she was still receiving child benefit payments to which she responded yes. And that was when he discovered that she was still receiving them, having previously thought that child benefits were paid in respect of young children, and he wasn't aware that his wife was still receiving them up until that time.

(7) His evidence was also that he must have received one or the other and probably both of those letters, but he thought he was earning less than the £50,000 and so he wasn't liable to the charge.

(8) 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.

(9) On 13 December 2019, HMRC issued a "final reminder" letter to the appellant, at his correct address, reminding him to check whether he was liable to the charge.

(10) The assessing officer, Officer Alex Stevens had left the employment of HMRC at the time of the hearing but had tendered a witness statement which was the subject of Officer Thomas' oral testimony. It was Officer Thomas' evidence that the information set out in Officer Stevens witness statement was exactly the sort of process which was typical of assessing officers when considering the possibility of taxpayers being liable to the HICBC.

(11) This evidence was not challenged by the appellant, and we find it as fact that on 28 April 2021 Officer Stevens 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 years 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 Stevens discovered that there was a loss of tax in tax years 2017/2018 to 2019/2020.

(12) That opening letter was dated 29 April 2021, and was 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 £2,248 for the tax years in question. It also explained why late payment penalties and interest might be due.

(13) On 15 June 2021 HMRC issued a reminder letter to the appellant alerting him to the fact that he had not notified his liability to the charge.

(14) On 30 June 2021 HMRC issued the assessments.

(15) On 30 June 2021, HMRC issued a notice of penalty assessment to the appellant (which was subsequently amended by a notice dated 23 March 2022).

(16) On 22 July 2021, the appellant appealed against both the assessments and the original penalty assessment to HMRC.

(17) HMRC issued their view of the matter letter in respect of the appeals against both the assessments and the original penalty assessment on 17 September 2021. They explained why they considered that the assessments and that penalty assessment was justified. They offered the appellant a statutory review.

(18) On 31 January 2022, HMRC issued their review conclusion letter upholding the assessments and the penalty assessment.

(19) On 25 February 2022 the appellant lodged an in-time appeal with the tribunal.

DISCUSSION

11. There are two matters which we have to decide. 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. The appellant submitted that he was not aware of the HICBC nor the fact that his wife was still receiving child benefit payments. Throughout his working life he had been an employee and thus had the benefit of a payroll department who took care of his tax and national insurance. The reason that he had earned more than the £50,000 threshold in two of the three years under appeal was because he worked for a chemical manufacturing organisation which was commissioning a new manufacturing plant, and thus he had earned more due to working more hours than he would normally have worked. He also submitted that it was, in his view, unfair to collect backdated amounts along with interest and penalties. He has never knowingly avoided tax which he owed.

13. Regrettably for the appellant, we have no jurisdiction to consider the fairness, or otherwise, of primary legislation. Our role is to interpret the legislation as applied to the facts of this case. Nor, too, does HMRC have any jurisdiction to consider the fairness or otherwise of primary legislation. Their role is to collect tax in accordance with the law as enacted.

14. We have found that Officer Stevens made a discovery of an insufficiency of tax on 28 April 2017 and issued the assessments on 30 June 2021 We also find, and the appellant does not dispute this, that his adjusted net income for the tax years in question was greater than £50,000. Since the appeal to HMRC was not made before 30 June 2021 it is subject to the retrospective legislation in Section 97. It is a protected appeal.

15. We also find that the assessments were made within the four year limitation period, irrespective of whether the appellant might have a reasonable excuse for having failed to notify.

16. And so, we have no alternative other than to dismiss the appellant's appeal against the assessments. He falls slap bang within the statutory provisions which impose the charge.

17. We now turn to whether the appellant has a reasonable excuse in the context of the penalty.

18. 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.

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

20. 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.
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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".

21. 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?"

22. 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"***).

23. 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.

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.
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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);
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> (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
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> (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.
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> 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. In this case it is HMRC's position that the appellant was on notice that he might be liable to the charge when he received the nudge letter in November 2019 and the final reminder letter in December 2019. HMRC accept that he was not on notice as long ago as 2013, when the SA 252 purportedly sent to him because he had never received that letter.

27. On the evidence, we find that the appellant was on notice that he might be liable to pay the HICBC when he received the nudge letter in November or at the latest on 13 December 2019 when he received the reminder letter. We find as a fact that he received one or other of these letters, and base that finding on his evidence that he discussed the contents of those letters with his wife and it was only then that he discovered that she was still claiming child benefit for one or more of their children.

28. So, although the appellant had a reasonable excuse for failing to notify his chargeability to the HICBC up to and including, say, 13 December 2019, he had no reasonable excuse for failing to notify, thereafter. He would have had a reasonable excuse had he engaged with HMRC within a reasonable period after receiving that letter but did not so engage with HMRC until he received the assessments and the original penalty assessment on 30 June 2021. Any reasonable excuse defence, therefore, based on ignorance of the law, cannot be sustained in light of that delayed engagement. He would have needed to have engaged within, at the latest, six months of 13 December 2019, and he did not do this.

29. We conclude, therefore, that the appellant had no reasonable excuse for failing to notify and is thus liable to the penalties.

30. Nor are there special circumstances which would justify a special reduction.

DECISION

31. We dismiss the appeals against the assessments to HICBC and against the penalty assessments.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

32. 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: 11th DECEMBER 2023