Neutral Citation: [2023] UKFTT 00997 (TC)

Case Number: TC09008

FIRST-TIER TRIBUNAL
TAX CHAMBER

In public by remote video hearing

Appeal reference: TC/2023/07686

INCOME TAX – penalties for failing to notify liability to the HICBC – reasonable excuse? – no - appeal dismissed

Heard on: 9 November 2023
Judgment date: 24 November 2023

Before

TRIBUNAL JUDGE NIGEL POPPLEWELL
MISS PATRICIA GORDON

Between

SCOTT MACARTHUR

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 to HICBC for the tax year 2017/2018, together with a penalty ("**the penalty**") for failing to notify chargeability for that tax year under section 7 Taxes Management Act 1970 ("**TMA**"). The penalty has been assessed pursuant to Schedule 41 Finance Act 2008 ("**Schedule 41**").

2. The appellant has accepted the tax assessment and has paid it. This appeal is therefore only against the penalty of £217.08.

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.

8. Under paragraph 20, where a taxpayer had a reasonable excuse for the relevant act or failure but the excuse has ceased, the taxpayer is to be treated as having continued to have that excuse if the relevant act, or failure is remedied without unreasonable delay after the excuse has ceased.

EVIDENCE AND FACTS

9. 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) From June 2005 the appellant had submitted self-assessment tax returns. However, these were only submitted in order to recover travel expenses and working from home allowances. He was employed throughout this time.

(2) However, he was taken out of the self-assessment regime in July 2017. For the 2017/2018 tax year, the appellant received no notice to file a return.

(3) HMRC suggest that following his removal from the self-assessment regime, the appellant would have been sent an SA 832 letter telling him about the HICBC criteria and what he should do if there was a change in his circumstances. No evidence of the sending of this letter was provided, and the appellant denied receipt. We therefore reject HMRC's assertion that such a letter had been sent to the appellant.

(4) The appellant's evidence was that it was his spouse who, generally speaking, was the higher earner of the two of them. She had been in receipt of child benefit with effect from November 2013 for their first child and February 2016 for their second.

(5) 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".

(6) On 14 November 2019 HMRC issued a nudge letter ("**the nudge letter**") to the appellant which was sent to his home address at M30 9NP. The nudge letter explains that the appellant should check whether he is liable to pay HICBC, which may be the case if he has "taxable income and benefits over £50,000 in the tax year".

(7) On 13 December 2019, HMRC issued a "final reminder" letter to the appellant, reminding him to check whether he was liable to the charge. This was sent to the same address as the nudge letter.

(8) On 18 May 2021 and again on 25 June 2021, HMRC sent letters to the appellant telling him that he had not notified his liability to the charge. These letters were sent to an address at M6 7EW. We find as a fact that the appellant has never lived at an address with that postcode and thus received neither letter.

(9) On 24 November 2022, HMRC wrote to the appellant telling him that as he had not responded to their earlier letters, they had assumed that he had agreed that he was liable to pay the charge, and that HMRC would be issuing an assessment. On 13 December 2022, HMRC issued a discovery assessment on the basis that the appellant had adjusted net income for 2017/2018 of more than £50,000, and that he had a liability to HICBC of £804. It is our understanding that the appellant has paid this.

(10) Also on 13 December 2022, HMRC issued a notice of penalty assessment for failure to notify in an amount of £217.08, on the basis of non-deliberate and unprompted disclosure.

(11) On 20 December 2022, the appellant contacted HMRC by telephone, telling them that it was his spouse who was the higher earner for the tax year 2017/2018. He also appealed against the tax assessment and the penalty. On 13 January 2023, HMRC provided their view of the matter letter upholding the original decisions. Following an independent review, on 17 March 2023, HMRC issued their review conclusion letter again upholding the original decisions. On 17 April 2023, the appellant lodged an out of time appeal with the tribunal to which HMRC have not objected.

(12) The appellant's evidence was that he has known that his spouse was claiming child benefit since she started claiming it. The only time that he had exceeded the £50,000 adjusted net income figure was when his wife was on maternity leave. He cannot remember whether he had received the nudge letter or the letter of 13 December 2019 but if he had done, he would not have thought either was relevant since, as far as he was concerned, he was not earning more than £50,000. So, he would have ignored them. Furthermore, he was unaware that benefits in kind were included when calculating his adjusted net income and was unaware of the introduction of the HICBC and thus his obligation to notify.

DISCUSSION

10. The burden is on HMRC to show that the penalty assessment is a valid in time assessment and (arithmetically) assesses the appellant to the correct amount.

11. The appellant does not seriously challenge the validity of the assessment, and we find, as a fact, that it is a valid in time assessment which is numerically correct.

12. 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

13. 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".

14. 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?".

15. 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"***).

16. 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.

17. 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 Popplewell' 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 Popplewell 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".

18. 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.

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

20. In this case, the appellant's spouse was on notice about details of the HICBC, since it was clearly set out in the claim form that she would have completed in respect of the claim for their first child in November 2013. We can understand how she might have thought that it was irrelevant if neither she nor the appellant was earning more than £50,000 (taking into account both income and benefits) at the time. And that had she had a conversation with the appellant at that time, telling him that this was one of the criteria for the charge, we have no doubt that the appellant would have told her that the charge did not apply because he was earning less than that.

21. But the appellant is equivocal about whether he received the nudge letter on 14 November 2019, or the reminder letter on 13 December 2019. His evidence was that he might have received either or both of them, but disregard as being irrelevant since, in his view, his adjusted net income is less than £50,000.

22. We find as a fact, however, both letters were sent to the correct address and that they were received by the appellant. It would have been objectively reasonable for him to open them and to have reviewed their contents. The nudge letter makes clear that it is not just income which is taken into account when computing the £50,000, but also benefits, and there is a link to a gov.uk website which we have no doubt would have also confirmed the way in which adjusted net income is calculated i.e. benefits have to be taken into account. The letter of 13 December 2019, too, provides the same website to assist the appellant.

23. Given that the appellant told us that he used HMRC website information to assist in completing his SA returns, we think it reasonable that he should have gone to the gov.uk websites to which he was directed by the relevant letters.

24. It is our view that the appellant was ignorant of his liability to pay the HICBC dint purely of the information which HMRC have published, and put into general circulation, at the time that the HICBC was introduced.

25. But he was on notice that he might have a liability to the HICBC with effect from 14 November 2019 and/or 13 December 2019. So, his reasonable excuse finished on one or other of those days, and although he then had a reasonable time to engage with HMRC to correct the position, we find that he did not do so until after the discovery assessment had been issued to him on 13 December 2022.

26. We therefore take the view that the appellant has no reasonable excuse for failing to notify HMRC of his chargeability to HICBC.

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

DECISION

28. We dismiss the appeal and uphold the penalty.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

29. 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: 24th NOVEMBER 2023