



TC06835

Appeal number: TC/2017/05973

INCOME TAX – High income child benefit charge ('HICBC') – discovery assessment under s 29 of TMA – penalty for failure to notify liability – Schedule 41 to Finance Act 2008 – case A and case B definition for reduction for disclosure – whether reasonable excuse for being unaware of the change in legislation – whether special reductions – the matter of interest charge – appeal allowed in part

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

NEIL JOHNSTONE

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE HEIDI POON
NOEL BARRETT**

Sitting in public at Eagle Building, Bothwell Street, Glasgow on 26 March 2018

Mr Neil Johnstone in person, for the Appellant

Ms Claire Robertson, HMRC officer, for the Respondents

DECISION

Introduction

1. This is an appeal by Mr Neil Johnstone ('the appellant') against assessments to
5 income tax raised under section 29 of the Taxes Management Act 1970 ('TMA'), and
penalties charged under Schedule 41 to the Finance Act 2008 ('Sch 41') for failure to
notify the respondents ('HMRC') of his liability to Higher Income Child Benefit
Charge ('HICBC').

2. The s 29 assessments and Sch 41 penalties for the relevant years are as follows:

- 10 (1) 2012-13: tax charge of £438; penalty £87.60;
(2) 2013-14: tax charge of £1,337; penalty £267.40;
(3) 2014-15: tax charge of £1,066; penalty £213.20.

3. The issues for the Tribunal to determine in respect of this appeal are:

- 15 (1) Whether the discovery assessments under s 29 TMA are valid and
made in accordance with the legislation;
(2) Whether the HICBC for each of the relevant years is correctly
quantified;
(3) Whether the Sch 41 penalties as imposed are due.

4. At the hearing, Mr Johnstone confirmed that he no longer contends against the
20 income tax assessments. The first two issues in this appeal therefore fall away.

5. This decision is in relation to the Sch 41 penalties only. The Tribunal indicated
its intention to issue a summary decision to dispose of these proceedings. Ms
Robertson, however, requested that a full decision so that the respondents can have a
judicial ruling on the application of the Sch 41 penalty regime in relation to a failure
25 to notify a liability for HICBC.

The legislative framework

6. The statutory provisions referred to in this decision are set out in the Appendix
under the following headings:

30 (1) The High Income Child Benefit Charge arises under s 681B of the
Income Tax (Earnings and Pensions) Act 2003 ('ITEPA 2003'). The
HICBC came into effect **from 7 January 2013**, under para 7 of Sch 1
to Finance Act 2012.

35 (2) The meaning of 'Adjusted net income' for the purposes of HICBC
is defined by reference to sub-s58(1) of the Income Tax Act 2007
(*'ITA 2007'*).

(3) The obligation to notify a liability to HICBC is provided under s 7
of the Taxes Management Act 1970 (*'TMA 1970'*).

(4) The provision for interest charge on any outstanding tax liability after the due date of payment is under s 86 of TMA.

(5) The penalty regime for failure to notify a relevant obligation, including one as defined by s 7 of TMA 1970 is provided under Schedule 41 to the Finance Act 2008 ('Sch 41').

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The Facts

7. Mr Johnstone works in the Information Technology industry, and his gross employment income, and taxable income after the applicable annual personal allowance ('PA'), for the relevant years are as follows:

- 10
- (1) For 2012-13 – gross at £65,226, taxable at £57,121, (PA £8,105).
 - (2) For 2013-14 – gross £72,064, taxable £62,000 (PA £9,440).
 - (3) For 2014-15 – gross £70,938.11, taxable £60,938.11 (PA £10,000).

8. On 17 February 2017, HMRC issued a letter, addressed to a Mr N R Johnstone at an address in Daventry, Northants, to advise that recent changes to Child Benefit for people on higher income may apply to him for the tax years ended 5 April 2013, 2014, and 2015.

9. The body of the letter of 17 February 2017 is addressed to a Mr Colbourne, with an NI number beginning with 'JB', while the case reference is 'CFSS-2159228'.

10. Apart from the case reference, which remains the same in all subsequent correspondence between HMRC and Mr Johnstone, the 'JB' NI number would appear to belong to Mr Colbourne, as Mr Johnstone's NI number is altogether different.

11. The February 2017 letter includes a calculation of the amounts outstanding in consequence of the HICBC, based on the benefit received for one child. These amounts of HICBC for the relevant years are listed as follows:

- 25
- (1) For 2012-13, estimated income (including employer taxable benefits) at £65,222; HICBC at £263; penalty at £100.74.
 - (2) For 2013-14, estimated income at £72,064.69; HICBC at £1,055; penalty at £307.51.
 - (3) For 2014-15, estimated income at £70,938.11; HICBC at £1,066; penalty at £245.18.
- 30

12. On 27 March 2017, HMRC wrote to Mr Johnstone again, this time to a Glasgow address held on the system to confirm that s 29 assessments would be issued, together with a penalty under Sch 41. The amounts of HICBC and penalty were stated at:

- (1) 2012-13, HICBC increased to £438; but penalty unchanged at £100.74.
 - (2) 2013-14, HICBC increased to £1,337; but penalty unchanged at £307.51.
 - (3) 2014-15, HICBC unchanged at £1,066; penalty unchanged at £245.18.
- 35

13. On 5 April 2017, a duplicate copy of the letter dated 17 February 2017 was re-sent to the Glasgow address, and HMRC requested a reply by 5 May 2017.

14. On 13 April 2017, Mr Johnstone called HMRC to advise that he was not aware of the HICBC and the tax implications on receiving child benefit and earning over £50,000. HMRC advised that a penalty of 20% would be charged.

15. On 19 April 2017, HMRC issued assessments under s 29 TMA for 2013, 2014, and 2015, together with penalty assessments under Sch 41. A copy of the Self-Assessment statement of account, and a notice to file a tax return for 2015-16 were also enclosed. It was this set of correspondence that finally brought the amounts of HICBC for the relevant years in line with the penalty charges as follows:

(1) 2012-13, HICBC at £438; penalty revised from £100.74 to £87.60.

(2) 2013-14, HICBC at £1,337; penalty revised from £307.51 to £267.40.

(3) 2014-15, HICBC at £1,066; penalty revised from £245.18 to £213.20.

16. By letter dated 29 April 2017, Mr Johnstone appealed to HMRC against the s 29 and penalty assessments.

17. By letter dated 11 May 2017, HMRC rejected the appeal and offered Mr Johnstone an independent Statutory Review.

18. By letter dated 21 May 2017, Mr Johnstone wrote to contend against the reasons given by HMRC for rejecting his appeal. He also requested an independent review. The contentions, in summary, are as follows:

(1) That it is unreasonable for a government department such as HMRC to expect taxpayers 'to watch, read and listen to every news cycle, just in case there is a new tax liability on us'; this amounts to 'abdication of responsibility of information'.

(2) In response to HMRC's claim that 'Awareness letters were issued from November 2012', Mr Johnstone stated: 'I can confirm that neither my Wife or myself received any such letter.' Mr Johnstone further contended that the letter of 17 February did not arrive at his home address; the fact 'suggests this information distribution issue continues to this day'.

(3) That the Child Benefit Office indicated that it was only necessary to contact the office if there were changes in the circumstances of the recipient's 'family life'. There was no change in Mr Johnstone's 'family life' to make it necessary to contact any department.

(4) The penalty is based on the taxpayer knowing that he should have told HMRC, but Mr Johnstone maintained that he 'was unaware he needed to'.

(5) The annual communications from HRC and the Child Benefit Office did not include any indication of his liability to HICBC.

19. In a five-page letter dated 9 June 2017, HMRC wrote to Mr Johnstone to address his contentions point by point, and confirmed that his case would be referred to an independent officer not previously involved in his case for review.

5 (1) That the public is made aware of forthcoming changes in tax legislation in the Spring and Autumn Budget statements, and information is available on HMRC's website and from the Tax Enquiry Helpline.

(2) The Awareness letters issued from November 2012 were curtesy letters, and it remains the responsibility of the taxpayer and the recipient of benefits to be aware of the condition of a valid claim.

10 (3) The government website www.gov.uk gives clear advice on HICBC and of the income profile that renders the charge applicable; the requirement to notify is not restricted to changes in 'family life'.

(4) Penalty is chargeable where there is a failure to notify. It remains the taxpayer's responsibility to make sure that the correct benefit is claimed.

15 (5) Child Benefit is not means-tested, which means the Benefit Office does not hold details of Mr Johnstone's income. HMRC are not aware of a claimant's circumstances in terms of the number of children receiving Child Benefit or who in the household is the higher income earner. The collation of data to identify HICBC cases involved a lengthy process and
20 robust trial on HMRC's part before a letter, such as the one in February 2017, could be sent out to the relevant taxpayers affected by HICBC.

20. On 16 June 2017, Mr Johnstone wrote to confirm his request for a review, stating that in his opinion, the response from HMRC of 9 June 2017 'backs up entirely my reasoning for challenging the payment requests'.

25 21. On 5 July 2017, the review conclusion letter was issued, which upheld the assessments to income tax and penalty.

The appellant's case

22. On 2 August 2017, Mr Johnstone notified his appeal to the Tribunal, stating as his grounds the following:

30 (1) Whilst HMRC and Child Benefit Agency stated that they relied on media to ensure all taxpayers were aware of the change in law, he and his spouse were unaware of the change until April 2017.

(2) HMRC subsequently confirmed that they sent over 1 million letters to taxpayers on this matter, but Mr Johnstone never received any.

35 (3) One of HMRC's letters had been sent to an address that he had never been resident at, and that other letters might have been delivered to the wrong address.

40 (4) He was told by HMRC that 'tens of thousands' of outstanding cases had been passed to them by the Child Benefit Agency. This confirms his belief that HMRC's reliance on the media was flawed.

(5) He understood that the law considers that a failure in a third party can warrant a relief against penalties. He would contend that the Child Benefit Agency is the third party, and have completely failed to communicate.

5 (6) Leaflets are still being supplied by the Agency to remind people of changes in circumstances that affect their benefit entitlement, but none of them list one spouse earning over £50,000 per annum as a disqualifying factor.

10 (7) The Child Benefit Agency should have passed the information onto HMRC back in 2014, and none of this would have been an issue. The third party therefore had failed in carrying out due diligence.

23. At the hearing, Mr Johnstone elaborated on his grounds of appeal which we summarise as follows:

15 (1) He emphasised that neither he nor his wife was aware of the higher income households being at risk of HICBC; that they had ‘no reason to either stop the child benefit or to self-assess’; that he did not have to fill in a self-assessment return.

(2) While ignorance of the law is no defence, if ‘300,000 people are still at risk of historical child benefit charge’, it is indicative of the government departments’ failure to raise awareness.

20 (3) It is not fair to impose both interest and penalty; it is unfair that HMRC will not remove interest charge after their failure to notify him of the change in benefit entitlement.

25 (4) It was HMRC and the ‘third-party’, namely the Child Benefit Agency, that should have the responsibility of taking additional steps in alerting the individual taxpayers who were in receipt of the benefit.

(5) That HMRC have a part to play in the length of time taken to bring the matter to his attention; the delay of four years in his case was due to HMRC’s internal backlog.

HMRC’s case

30 24. The only reason put forward by Mr Johnstone for his failure to notify was not being aware of the change in legislation relating to HICBC. HMRC contend that ignorance of the law cannot be a reasonable excuse (*Qualaphram Ltd v HMRC* [2016] UKFTT 100 (TC) at [121]).

35 25. HMRC agree that there is no evidence to indicate deliberate action. Furthermore, HMRC accept that a taxpayer does not have to agree with HMRC’s position in order to co-operate. HMRC have reduced the penalty to the lowest amount permitted by law in recognition of Mr Johnstone’s co-operation:

(1) By responding to HMRC as soon as he became aware of the requirement;

40 (2) By confirming his income as requested by HMRC;

(3) By providing explanations to HMRC.

26. HMRC have considered whether special reductions are due, but can find no special circumstances to merit special reductions.

Discussion

5 *Burden of proof*

27. In respect of the income tax assessments, HMRC have the burden to prove that the conditions for there to be a discovery as provided under s 29 TMA are met, and that the assessments are raised within the relevant time limits.

10 28. On the face of it, HMRC have met the burden in establishing that the discovery assessments were valid and in time. Mr Johnstone no longer appeals against the assessments, which therefore stand good as provided under s 50(6) TMA.

29. In respect of the penalties for failure to notify under Sch 41, the onus is on HMRC to demonstrate that the condition for the imposition of the penalties is met as provided by para 1, and that the assessment is valid in terms of para 16.

15 30. In the absence of a challenge against the s 29 assessments, there is a *prima facie* case that the requirement under para 1 for the imposition of a Sch 41 penalty has also been met. As regards para 16 requirements, the penalty assessments for all relevant years are validly issued under the terms of sub-para 16(1), and are within the relevant time limits stipulated under sub-para 16(4).

20 *Issues for determination*

31. Having considered the representations from the parties, and in view of HMRC's request for a decision with full reasoning and facts, we have addressed all the relevant issues in turn, which are:

- (1) Whether the penalty percentage has been correctly set;
- 25 (2) Whether Mr Johnstone had a reasonable excuse for the failure;
- (3) Whether special reductions apply.

Issue 1: Whether penalty percentage correctly set

(a) First step – standard percentage according to the category of failure

30 32. The penalty percentage is set by reference to the 'Degrees of culpability' as defined under para 5 of Sch 41. It is accepted that the category of failure in this case is not 'deliberate' and the standard percentage for non-deliberate failure is statutorily determined at 30%.

(b) Second step – reduction for disclosure

33. Paragraph 13 of Sch 41 provides for reduction in relation to the quality of disclosure. There was much discussion at the hearing on the setting of the percentage for reduction, in part due to the fact that the table under para 13 in the version of legislation being supplied was out of alignment. Substantively, the question being
5 discussed concerns the definition of ‘case A’ and ‘case B’ in para 13.

34. The current version of para 13 is enacted by FA 2010 s 35, Sch 10 paras 7, 9, with effect from 6 April 2011, whereby the original version of para 13 was substantially re-drafted, along with the insertion of the table of reduction percentages.
10 The old version of para 13 did not contain any table, nor the designations of ‘case A’ and ‘case B’, and there were fewer categories of ‘standard percentages’.

35. The current version of para 13 attempts to simplify the presentation of percentages for reduction in relation to disclosure by tabulating the parameters and the maximum reduction applicable to each category of failure. The table dispenses with the repetition of otherwise substantially similar text in order to provide for each
15 category. The re-drafting is a matter of presentation. The substance of the provisions relevant to the setting of the percentage for reduction in relation to disclosure is not changed from the original version.

36. For this reason, the wording of para 13 in the original enactment assists with the interpretation of ‘case A’ and ‘case B’ in the current version with the tabulation of percentages. Sub-paragraphs 13(5) and (6) in the original enactment read as follows:
20

‘(5) Where a person who would otherwise be liable to a 30% penalty has made an unprompted disclosure, HMRC shall reduce the 30% –

(a) if the penalty is under paragraph 1 and HMRC become aware of the failure less than 12 months after the time when tax first becomes unpaid by reason of the failure, to a percentage (which may be 0%),
25 or

(b) in any other case, to a percentage not below 10%,

which reflects the quality of the disclosure.

(6) Where a person who would otherwise be liable to a 30% penalty has made a prompted disclosure, HMRC shall reduce the 30% –
30

(a) if the penalty is under paragraph 1 and HMRC become aware of the failure less than 12 months after the time when tax first becomes unpaid by reason of the failure, to a percentage not below 10%, or

(b) in any other case, to a percentage not below 20%,
35

which reflects the quality of the disclosure.

(c) Whether case A or case B

37. The original enactment of para 13 was clear about the parameters applicable in determining the reduction percentage for disclosure:

(1) *Nature of disclosure* – sub-para 5 concerns ‘unprompted’ disclosure while sub-para 6 concerns ‘prompted’ disclosure;

5 (2) *The timing of HMRC become aware of the failure* – the distinction is drawn at the first 12 months when the tax first becomes unpaid, corresponding to case A (if within the first 12 months), and case B (after the first 12 months).

38. As a matter of statutory construction in the context of HICBC, the timing of HMRC becoming aware of the failure is to be construed by reference to the timing of HMRC making a ‘discovery’ as defined by s 29 TMA.

10 39. It is common ground that the disclosure in this case was prompted. We consider whether the timing of HMRC becoming aware of the failure falls into case A or case B. We consider the last of the three years of assessment 2014-15 as an example:

(1) The HICBC for 2014-15 first became due the latest by 31 January of the year following the end of the tax year; that is, on 31 January of 2016.

15 (2) If HMRC became aware of the failure before 31 January 2017, then the failure falls into case A.

(3) HMRC’s first letter to Mr Johnstone indicating their awareness of the failure was sent on 17 February 2017, just after the anniversary date for the failure to fall under case A.

20 (4) The failure for 2014-15 therefore falls into case B. (Consequently, the earlier years of 2012-13 and 2013-14 are also case B for para 13 purposes.)

(5) The fact that the letter was addressed to a wrong address makes no difference to the determination of the timing of HMRC becoming aware of the failure.

25 40. For a *non-deliberate* failure, with *prompted* disclosure under *case B*, the standard penalty percentage of 30% can be reduced, but not further than the minimum of 20%. In other words, the maximum percentage of reduction for prompted disclosure for case B is 10%.

30 41. HMRC have given the maximum reduction for disclosure in recognition of Mr Johnstone’s co-operation by setting the overall penalty percentage at 20%. We confirm 20% as the correct penalty percentage in the instant case, and is in accordance with the relevant provisions under Sch 41.

Issue 2: Whether reasonable excuse for failure to notify

35 42. There is no statutory definition of reasonable excuse. Whether there was a reasonable excuse is ‘a matter to be considered in the light of all the circumstances of the particular case’ (*Rowland v HMRC* [2006] STC (SCD) 536 at [18]), and by reference to case law authorities.

43. The central tenor of Mr Johnstone’s pleading for having a reasonable excuse is that neither he nor his wife was aware of HICBC; that he had no reason to become

aware of the change in legislation; that it was the responsibility of HMRC as a government department to make him aware that the change in legislation may apply to him; that HMRC's failure to make him aware of the change in legislation was tantamount to 'abdicating their responsibility'.

5 44. It is necessary to cast Mr Johnstone's main ground of appeal in the light of the
penalty regime to assess its merit. As specific to the penalty regime, Mr Johnstone's
main argument can be put as follows: a penalty for a failure to notify a liability cannot
be impossible if HMRC had *not* notified him of the change in legislation that would
affect him. In other words, a penalty for a failure to notify a liability is impossible if
10 (and only if) HMRC have notified him of the need to notify the liability.

45. This ground of appeal is premised on the assumption that it was HMRC's
responsibility to make sure all taxpayers who might potentially be affected by the
change of legislation were *individually* contacted with an alert letter. By not having
done so, HMRC had 'abdicated their responsibility' in this respect.

15 46. In the alternative, Mr Johnstone submitted that if some 300,000 people
remained unaware of HICBC, then HMRC's awareness campaign had failed; that the
one million letters sent out by HMRC were not enough to achieve the purpose.

47. Furthermore, Mr Johnstone referred to the Child Benefit Agency as the 'third
party' which should have taken additional steps to ensure that the affected taxpayers
20 were notified. In this regard, Mr Johnstone seems to be relying on para 21 of Sch 41,
which provides a defence against a penalty if reliance has been placed on an agent.

48. There are two aspects to Mr Johnstone's argument, and we address them in turn:

(1) Was it HMRC's responsibility to notify all affected taxpayers of
HICBC before a Sch 41 penalty can be imposed?

25 (2) Did Mr Johnstone's ignorance of the change in legislation amount to a
reasonable excuse?

49. The first proposition is simply not arguable for the following reasons:

(1) HMRC do not have a statutory duty to notify all taxpayers potentially
affected by HICBC. By statutory duty, we mean a duty that is provided by
30 Parliament and laid down by statute. For example, HMRC have a statutory
duty to issue a notice of assessment for any tax liability to be enforceable.

(2) What initiatives or measures HMRC had taken to raise awareness of
HICBC were matters of internal policy decisions, over which this Tribunal
has no jurisdiction.

35 (3) The cohort of taxpayers likely to be affected by HICBC is not readily
identifiable from the information held by HMRC, especially when the
recipient of the child benefit and the taxpayer liable to HICBC are not the
same person, as is the case here.

(4) The ‘Child Benefit’ is not a means-tested benefit, and as such, the Child Benefit Agency does not hold data to enable any identification of the recipients that may be affected by HICBC.

5 (5) The proposition that the Child Benefit Agency makes para 21 provisions relevant is completely misguided. Paragraph 21 of Sch 41 addresses situations wherein the taxpayer has relied on an agent, such as an accountant, to notify HMRC of a liability to tax. Mr Johnstone did not have an agent acting for him, and para 21 is not relevant.

10 (6) It also seems that Mr Johnstone has confused the term ‘agency’ under para 21 with the Child Benefit Agency. Under para 21, the reliance on an agent to notify a liability to HMRC gives rise to a defence for the taxpayer because there is a contractual relationship between the taxpayer and the agent for such a responsibility to be discharged. The CBA has no contractual relationship with Mr Johnstone to undertake to notify HMRC
15 of his liability to HICBC.

(7) Mr Johnstone has also suggested that the process whereby taxpayers get sent the awareness letter by HMRC was unfair, as it clearly had left some affected taxpayers out. Such a challenge can only be done by way of judicial review at the High Court, as this tribunal has no general
20 supervisory jurisdiction by way of judicial review. (See the Upper Tribunal decision in *HMRC v Noor* [2013] UKUT 071 at [25].)

50. We now turn to consider the second proposition as to whether Mr Johnstone’s ignorance and continuous ignorance of the change in legislation gave rise to a reasonable excuse. Even though Mr Johnstone had tried to distinguish his argument
25 from a pleading of ignorance of the law, we are of the view that there is no genuine distinction between ‘being ignorant’, and ‘not being aware of’ as Mr Johnstone sought to emphasise.

51. In *Spring Capital Ltd v HMRC* [2015] UKFTT 8 (TC), Judge Mosedale stated at [48] what we consider to be the starting point in considering a pleading for reasonable
30 excuse based on ignorance of the law:

‘Ignorance of the law cannot, as a matter of policy, ever amount to a reasonable excuse for failing to observe the law. This is because otherwise the law would favour those who choose to remain in
35 ignorance of it above those persons who choose to acquaint themselves with the law in order to abide by it.’

52. In the case of *Jo-Ann Neal v C&E Comrs* [1988] STC 131 (‘Neal’), a 19-year-old model pleaded ignorance of the law due to her age, against a penalty imposed in consequence of her failure to register for VAT. On appeal from the decision of the then VAT Tribunal, Simon Brown J rejected the argument that ‘the taxpayer could
40 invoke her ignorance of basic value added tax law as reasonably excusing her default’. He continued (at p 136) as follows:

‘This case was simply not concerned with the taxpayer’s ignorance other than of basic value added tax law let alone ignorance of mixed law and fact. ... I am reassured to learn that the commissioners have

5 in fact been treating as a reasonable excuse circumstances falling far short of physical inability to comply with the statutory requirements. These circumstances ... include cases where there is doubt whether the trader is employed or self-employed or whether the supplies being made are indeed taxable, doubts which generally would arise out of difficult questions of law.’

53. When considering whether ignorance of the law can give rise to a reasonable excuse, the substance of the particular legal requirement of which the taxpayer is ignorant is a factor to be taken into account. Simon Brown J’s comment in *Neal* (at 10 page 137) is pertinent for this reason:

15 ‘In this case, however, there could be no doubt. The default was entirely the product of basic ignorance of value added tax law. That cannot be construed as a reasonable excuse. I add only this. Value added tax is surely now well enough established in our daily commerce that anyone, however inexperienced, ought to recognise the need to become acquainted with its basic requirements when embarking upon a career.’

54. Similarly, in *Keith Edward Jenkinson v C & E Comrs* [1988] VATTR 45, the VAT tribunal considered the extent whereby ignorance of the law can amount to a 20 reasonable excuse. The tribunal concluded that while it is not a case that ‘the eyes of the court are to be bandaged by the application of the maxim as to *igornatia legis*’¹, there can be no doubt where a failure is the result of basic ignorance of the law, that cannot be a reasonable excuse.

55. It is not that there is a formulaic rejection that ignorance of the law can, never 25 ever, give rise to a reasonable excuse. It is conceivable that a taxpayer may be caught unawares by some highly complex tax provisions, and whether ignorance of law can give rise to a reasonable excuse depends on at least two factors: (1) the particular piece of legislation in question, and (2) the circumstances of the taxpayer.

56. As a piece of legislation in question, the HICBC is not difficult to understand. 30 The charge applies where the taxable income of the higher earner in the household exceeds the annual threshold of £50,000. It was a change that was widely covered by the media after the relevant Budget announcement, and a change that HMRC had produced leaflets and made public on their official website.

57. A prudent and reasonable taxpayer would have acquainted himself with the 35 fundamental change to the basis of child benefit entitlement when the announcement in the Budget was made. The income threshold relevant to HICBC at any time is information readily available on the internet or HMRC’s official website. A taxpayer affected by HICBC can opt to stop receiving the child benefit, or to pay the HICBC.

¹ Citing Clauson J in the High Court decision of *Holland v German Property Administrator* [1936] 3 All ER 6 at page 12.

58. While there are, as Mr Johnstone suggested, still some 300,000 cases of historical HICBC, there have been far more cases of HICBC where the taxpayers had been diligent, and ‘chosen to acquaint themselves with the law in order to abide by it’.

59. As to the second factor, whether it is reasonable for Mr Johnstone to remain
5 unaware of the change in legislation, the test of reasonableness as set out by Judge Medd in *The Clean Car Company Ltd v C&E Comrs* [1991] VATTR 234 is applied:

‘... can the fact that the taxpayer honestly and genuinely believed that what he did was in accordance with his duty in relation to claiming input tax, by itself provide him with a reasonable excuse. In my view,
10 it cannot. ... 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
15 found himself at the relevant time, a reasonable thing to do?’

60. The test of reasonableness is primarily objective, by asking whether what the taxpayer did was a reasonable thing a responsible taxpayer would have done, taking into account the subject attributes of the taxpayer in question. In other words, as stated
20 in *Collis v HMRC* [2011] UKFTT 588 (TC) at [29], ‘the standard by which this falls to be judged is that of a prudent and reasonable taxpayer in the position of the taxpayer in question’. The standard of care is therefore objective, and the question for the Tribunal to address is what a prudent and reasonable taxpayer, with the experience and attributes of Mr Johnstone, would have done in his situation.

61. Applying the test to the facts in question, we find the following:

25 (1) Mr Johnstone is an IT specialist who is adept at using the internet as a source for information.

(2) He was aware of his wife being in receipt of child benefit.

(3) His income profile for the relevant year was not just marginal to the threshold, but well above the threshold to bring him into HICBC.

30 (4) It was not just the initial period of being unaware of the change in legislation, but a continuous period of over two years until his youngest child turned 18 before the end of the tax year 2014-15 when he claimed he remained unaware of the change.

35 (5) Mr Johnstone is in a professional position that requires him to take initiative and be pro-active.

62. In these circumstances, we do not find that Mr Johnstone’s ignorance of his liability under HICBC gives rise to a reasonable excuse under Sch 41 for the penalties to be vacated. A taxpayer with the attributes of Mr Johnstone is a person taking his place in society holding down a responsible job, who would have the inclination and
40 the ability to find out what the law requires of him in order to abide by it.

Whether special reductions

63. Paragraph 14 of Sch 41 allows HMRC to reduce a penalty if they think it right to do so because of special circumstances. HMRC's review conclusion letter of 9 June 2017 stated that based on the details provided, there were no special circumstances to merit special reductions.

64. HMRC's decision in relation to whether special reduction applies is taken as being distinct from their decision to assess a penalty in the first place. This is in line with the legislative analysis in *Bluu Solutions Ltd v HMRC* [2015] UKFTT 0095 (TC).

65. The legislation does not define 'special circumstances'. From case law, it is accepted that for circumstances to be special they must be 'exceptional, abnormal or unusual' (*Crabtree v Hinchcliffe* [1971] 3 All ER 967), or 'something out of the ordinary run of events' (*Clarks of Hove Ltd v Bakers' Union* [1979] 1 All ER 152).

66. Pursuant to para 19 of Sch 41, the Tribunal must therefore consider whether there were special circumstances which would justify it substituting its decision for that of HMRC's. In this respect, we have regard to the fact that there is sufficient uncertainty or confusion surrounding the records held by HMRC for correspondence purposes in relation to Mr Johnstone.

67. From the documentary evidence, it is clear that there was a letter dated 17 February 2017 addressed to a Mr N R Johnstone at an address in Daventry, Northants. The body of the letter bears yet another addressee, by the name of Mr Colbourne, and the NI number to identify the taxpayer is not Mr Johnstone's either.

68. It was suggested by Mr Johnstone that there could have been letters, such as the awareness letter, from HMRC for his attention that had been misdirected to a wrong address. Mr Johnstone's inference based on the primary fact of the misdirected letter of February 2017 is not without some evidential basis. The possibility that there could have been letters from HMRC not reaching Mr Johnstone gave rise to circumstances which we consider to be 'exceptional, abnormal or unusual', and 'something out of the ordinary run of events'.

69. Pursuant to the provisions under para 19 of Sch 41, the Tribunal substitutes its decision for HMRC's by allowing a 50% reduction of the total penalties imposed.

70. In allowing special reduction in this case, it should not be taken to mean that the taxpayer's responsibility to notify a liability to HICBC is mitigated to any extent by being reliant on HMRC's initiative in alerting the taxpayer in the first place. What we are allowing is the peculiar set of circumstances in Mr Johnstone's case which might have caused relevant correspondence from HMRC to fail to reach him more timeously, and arguably, might have brought the penalty assessment(s) under 'case A'.

The matter of interest

71. Mr Johnstone has raised the matter of interest as a charge in addition to penalties. Interest is statutory as provided by s 86 of TMA. Parliament has decreed

that a tax liability is to be settled by its statutory due date, and any late payment will give rise to interest. The levy of interest is a measure to compensate the Exchequer for not receiving a tax payment on time, and an effective means to incentivise timely settlement of a liability.

- 5 72. The interest element on the HICBC liability is in consequence of the tax remaining outstanding by its statutory due date. There is no right of appeal against the interest charge. It follows therefore that the Tribunal has no jurisdiction to consider the matter of interest.

Decision

- 10 73. For the reasons stated above, the appeal is allowed in part.

74. The penalties are reduced by 50% to £284.10.

- 15 75. 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.

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**DR HEIDI POON
TRIBUNAL JUDGE**

RELEASE DATE: 23 November 2018

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Appendix

Applicable Legislation

Section 681B of ITEPA 2003

1. The provisions for HICBC is under s 681B of (ITEPA 2003) are as follows:

- 5 (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—
- 10 (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.
- 15 (4) Condition B is that—
- (a) a person ('Q') other than P is entitled to an amount in respect of child benefit for a week in the tax year,
 - (b) Q is a partner of P throughout the week, and
 - (c) P has an adjusted net income for the year which exceeds that of Q.

20 Subsection 58(1) of ITA 2007

2. 'Adjusted net income' is defined under s 681H of ITEPA 2003, by reference to sub-s 58(1) of the Income Tax Act 2007 (ITA 2007), which provides, *inter alia*, that:

For the purposes of Chapters 2 and 3, an individual's adjusted net income for a tax year is calculated as follows.

- 25 *Step 1* Take the amount of the individual's net income for the tax year.
- Step 2* If in the tax year the individual makes, or is treated under section 426 as making, a gift that is a qualifying donation for the purposes of Chapter 2 of Part 8 (gift aid) deduct the grossed up amount of the gift.
- 30 *Step 3* If the individual is given relief in accordance with section 192 of FA 2004 (relief at source) in respect of any contribution paid in the tax year under a pension scheme, deduct the gross amount of the contribution.
- 35 *Step 4* Add back any relief under section 457 or 458 (payments to trade unions or police organisations) that was deducted in calculating the individual's net income for the tax year.

The result is the individual's adjusted net income for the tax year.

Section 7 of TMA 1970

3. If the adjusted net income of an individual in a tax year gives rise to HICBC, then under s 7 of TMA 1970, it is provided:

- 5 (1) Every person who –
- (a) is chargeable to income tax or capital gains tax for any year of assessment, and
 - (b) falls within subsection (1A) or (1B),
- 10 shall, subject to subsection (3) below, within the notification period, give notice to an officer of the Board that he is so chargeable.
- (1A) A person falls within this subsection if the person has not received a notice under section 8 requiring a return for the year of assessment of the person's total income and chargeable gains.
- (1B) A person falls within this subsection if the person –
- 15 (a) has received a notice under section 8 requiring a return for the year of assessment of the person's total income and chargeable gains, and
- (b) has received a notice under section 8B withdrawing the notice under section 8.
- 20 [...]
- (3) A person shall not be required to give notice under subsection (1) above in respect of a year of assessment if for that year –
- (a) the person's total income consists of income from sources falling within subsection (4) to (7) below,
 - 25 (b) the person has no chargeable gains, and
 - (c) the person is not liable to higher income child benefit charge.

Section 86 to TMA 1970

4. Section 86 of TMA provides for the charge of interest on any outstanding tax liability after its due date. Sub-section 1(b) provides as follows:

- 30 ... any income tax or capital gains tax which becomes due and payable in accordance with section 55 or 59B of this Act, shall carry interest at the rate applicable under section 178 of the Finance Act 1989 from the relevant date until payment.

Schedule 41 to FA 2008

- 35 5. Paragraph 1 sets out the condition for the imposition of the penalty as referential to a 'Failure to notify':

(1) A penalty is payable by a person (P) where P fails to comply with an obligation specified in the Table below (a 'relevant obligation').

Income tax ... : Obligation under section 7 of TMA 1970 ...

6. The penalty percentage is set with reference to the 'Degrees of culpability' caterogised under para 5 as follows:

5 (1) A failure by P to comply with a relevant obligation is –

(a) 'deliberate but concealed' if the failure is deliberate and P makes arrangements to conceal the situation giving rise to the obligation, and

10 (b) 'deliberate but not concealed' if the failure is deliberate and P does not make arrangements to conceal the situation giving rise to the obligation.

7. The standard amount of penalty is provided under para 6 in accordance with the degree of culpability giving rise to the failure.

15 **6** (1) This paragraph sets out the penalty payable under paragraph 1.

(2) If the failure is in category 1, the penalty is –

(a) for a deliberate but concealed failure, 100% of the potential lost revenue,

20 (b) for a deliberate but not concealed failure, 70% of the potential lost revenue, and

(c) for any other cases, 30% of the potential lost revenue.

(3) If the failure is in category 2, the penalty is –

[150%, 105% or 45% depending on the degrees of culpability].

(4) If the failure is in category 3, the penalty is –

25 *[200%, 140% or 60% depending on the degrees of culpability].*

(italics being paraphrasing)

6A [defines category 1, 2, and 3 failures]

8. The standard amount of penalty can be reduced by taking into account the quality of disclosure. Paragraphs 12 and 13 provide for 'Reductions for disclosure' as follows:

12 (1) Paragraph 13 provides for reductions in penalties under paragraphs 1 to 4 where P discloses a relevant act or failure

(2) P discloses a relevant act or failure by –

(a) telling HMRC about it,

35 (b) giving HMRC reasonable help in quantifying the tax unpaid by reason of it, and

(c) allowing HMRC access to records for the purpose of checking how much tax is so unpaid.

(3) Disclosure of a relevant act or failure –

(a) is “unprompted” if made at a time when the person making it has no reason to believe that HMRC have discovered or are about to discover the relevant act or failure, and

(b) otherwise, is “prompted”.

5 (4) In relation to disclosure “quality” includes timing, nature and extent.

10 **13** (1) If a person who would otherwise be liable to a penalty of a percentage shown in column 1 of the Table (a ‘standard percentage’) has made disclosure, HMRC must reduce the standard percentage to one that reflects the quality of the disclosure.

(2) But the standard percentage may not be reduced to a percentage that is below the minimum shown for it –

(a) for a prompted disclosure, in column 2 of the Table, and

(b) for an unprompted disclosure, in column 3 of the Table.

15 (3) Where the Table shows a different minimum of case A and case B–

(a) the case A minimum applies if –

(i) the penalty is one under paragraph 1, and

(ii) HMRC become aware of the failure less than 12 months after the time when the tax first becomes unpaid by reason of the failure, and

20

(b) otherwise, the case B minimum applies.

Standard %	Minimum % for prompted disclosure	Minimum % for unprompted disclosure
30%	case A: 10% case B: 20%	case A: 0% case B: 10%
45%	case A: 15% case B: 30%	case A: 0% case B: 15%
60%	case A: 20% case B: 40%	case A: 0% case B: 20%
70%	35%	20%
100%	50%	30%
105%	52.5%	30%
140%	70%	40%
150%	75%	45%
200%	100%	60%

9. After applying any reduction for disclosure, further reduction to the penalty percentage may be made if there are special circumstances:

5 **14** (1) If HMRC think it right because of special circumstances, they may reduce a penalty under any of the paragraphs 1 to 4.

(2) In sub-paragraph (1) ‘special circumstances’ does not include –
(a) ability to pay, or
(b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

10 (3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to –
(a) staying a penalty, and
(b) agreeing a compromise in relation to proceedings for a penalty.

15 10. Paragraph 16 provides that HMRC shall ‘assess’, ‘notify’ and ‘state in the notice in respect of which the penalty is assessed’ (sub-para 16(1)). The time limit for raising a penalty assessment is under sub-para 16(4), whereby:

16 (4) An assessment of a penalty ... must be made before the end of the period of 12 months beginning with –

20 (a) the end of the appeal period for the assessment of tax unpaid by reason of the relevant act or failure in respect of which the penalty is imposed, or
(b) if there is no such assessment, the date on which the amount of tax unpaid by reason of the relevant act or failure is ascertained.

11. Paragraph 17 provides a right to appeal against a penalty assessment:

25 **17** (1) P may appeal against a decision of HMRC that a penalty is payable by P.

(2) P may appeal against a decision of HMRC as to the amount of a penalty payable by P.

30 12. The Tribunal’ jurisdiction in relation to an appeal against a penalty assessment is provided under para 19 as follows:

19 (1) On an appeal under paragraph 17(1) the tribunal may affirm or cancel HMRC’s decision.

(2) On an appeal under paragraph 17(2) the tribunal may –

35 (a) affirm HMRC’s decision, or
(b) substitute for HMRC’s decision another decision that HMRC had power to make.

(3) If the First-tier tribunal substitutes its decision for HMRC’s, the tribunal may rely on paragraph 14 –

40 (a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point),
or

(b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 14 was flawed.

(4) In sub-paragraph (3)(b) 'flawed' means flawed when considered in the light of the principles applicable in proceedings for judicial review.

5 13. Paragraph 20 provides for the defence of 'Reasonable excuse':

20 (1) Liability to a penalty under any of the paragraphs 1, 2, 3(1) and 4 does not arise in relation to an act or failure which is not deliberate if P satisfies HMRC or (on appeal notified to the tribunal) the tribunal that there is a reasonable excuse for the act or failure.

10 (2) For the purposes of sub-paragraph (1) –

(a) an insufficiency of funds is not a reasonable excuse unless attributable to events outside P's control,

15 (b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the relevant act or failure, and

(c) where P had a reasonable excuse for the relevant act or failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the relevant act or failure is remedied without unreasonable delay after the excuse ceased.

20 14. Paragraph 21 has as its title '**Agency**', and where agency is involved, sub-paragraph 21(1) provides that:

25 In paragraph 1 the reference to a failure by P includes a failure by a person who acts on P's behalf; but P is not liable to a penalty in respect of any failure by P's agent where P satisfies HMRC or (on an appeal notified to the tribunal) the tribunal that P took reasonable care to avoid the failure.