



[2020] UKFTT 00144 (TC)

TC07637

Appeal number: TC/2019/00018

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 – appellant unaware of the obligation to notify – HMRC's policy relating to penalty refunds considered - whether reasonable excuse for failure to notify – yes – appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

SIMON CLARKE

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE MICHAEL CONNELL
SUSAN STOTT**

**Sitting in public at Lincoln County Court, High Street, Lincoln LN5 7PS on 4
December 2019**

The Appellant in person

Mr Connor Fallon, Officer of HMRC, for the Respondents

DECISION

The Appeal

1. This is an appeal by Mr Simon Clarke ('the appellant') against penalties totalling £309.20 charged under Schedule 41 to the Finance Act 2008 ('Schedule 41'), raised for the tax years 2013-14, 2014-15 and 2015-16, for failure to notify his liability to tax as a result of his being liable to Higher Income Child Benefit Charge ('HICBC').
2. The assessments to income tax raised by HMRC under s 29 of the Taxes Management Act 1970 ('TMA') are not under appeal.

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') exceeds £50,000 (within a tax year). For each £100 in excess of £50,000 a 1% tax liability arises calculated on the amount of Child Benefit received.
4. Consequently, where an individual's ANI reaches £60,000 the effect is that 100% of the Child Benefit received becomes liable to a tax charge - the HICBC.
5. Anyone liable to the HICBC who chooses to carry on receiving Child Benefit payments has a legal obligation to declare the amount of Child Benefit they or their spouse/partner receive, by registering for Self-Assessment (if they are not already registered) and filling in a tax return each year.
6. For the tax years 2013-14 to 2015-16 the appellant had an ANI exceeding £50,000, and his partner had received payments of Child Benefit since 22 November 2004 for their first child, and for two children since 2008 when their second child was born.
7. On 31 August 2018 HMRC wrote to the appellant alerting him to the fact that he had failed to notify his liability to the HICBC.
8. The appellant replied on 5 September 2018 and confirmed liability to the HICBC. He made full disclosure of all relevant figures, being his income and the amount of Child Benefit his partner received. These figures were then checked against HMRC's internal systems.
9. On 24 September 2018, HMRC advised the appellant of their intent to raise assessments and penalties.
10. On 29 October 2018 HMRC issued assessments based on the amounts shown in the table below. The appellant accepts the tax assessments.

Tax year	Adjusted net income	Child Benefit received	HICBC due
2013-14	£52901.52	£1752.00	£508.00
2014-15	£54432.54	£1770.00	£761.00
2015-16	£63224.54	£1823.00	£1823.00
2016-17	£55499.41	£1788.00	£965.00
		TOTAL	£4057.00

11. HMRC also issued a penalty notice to the appellant as a result of his failure to notify the above chargeability. The maximum reduction was given in all cases, due to the quality of the Appellant's disclosure. The penalties are in the amounts shown in the following table:

Tax Year	Tax liability	Penalty criteria	Penalty range	Percentage charged	Penalty
2013/14	£508.00	Non deliberate and unprompted	10% - 30%	10%	£50.80
2014/15	£761.00	Non deliberate unprompted	10% - 30%	10%	£76.10
2015/16	£1823.00	Non deliberate unprompted	10% - 30%	10%	£182.30
2016/17	£965	Non deliberate unprompted within 12 months	0%-30%	0%	£0.00
				Total	£309.20

12. An appeal against the penalties was received by HMRC on 13 November 2018. The appellant's grounds were that:

- (i) he had been totally unaware of the relevant legislation
- (ii) he could not afford the penalties.

13. On 15 November 2018, HMRC acknowledged the points raised in the appellant's appeal letter, but upheld the penalties.

14. On 2 January 2019, the appellant lodged an appeal with the Tribunal.

Matters in dispute

15. Whether HMRC have correctly calculated and applied the penalties resulting from the appellant's failure to notify chargeability.

16. Whether the appellant has a reasonable excuse for failing to notify his liability to the HICBC.

Matters not in dispute

17. The following facts are not disputed for each of the years under appeal:

- ANI received in the amounts detailed in the table at paragraph 10, as these were provided by the appellant himself.
- Child Benefit received in the amounts detailed in the table at paragraph 10, as these were provided by the appellant himself.
- The appellant was not issued with a notice to file a Self-Assessment return under s 8 TMA 1970.
- The appellant did not file a Self-Assessment return under s 7 TMA 1970, and therefore did not notify his liability to the HICBC.
- The appellant accepts the assessments and has made steps to make payment of them, stating "I accept that I have to pay the money back.... I will pay this by the deadline indicated" on his appeal to HMRC.

Burden of proof

18. The onus is on HMRC to show that the penalties have been charged correctly. Once demonstrated, the onus reverts to the appellant to demonstrate that he has a reasonable excuse for his failure to notify chargeability as defined in paragraph 20 of Schedule 41 FA 2008. The standard of proof is the ordinary civil standard, on the balance of probabilities

Relevant legislation

19. Paragraph 1 of Schedule 41 specifies that a penalty is payable where a taxpayer does not comply with the obligation to notify under s 7 TMA 1970 as amended. The relevant sub-paragraphs of s 7 read:

“7. Notice of liability to income tax and capital gains tax

(1) Every person who-

(a) is chargeable to income tax or capital gains tax for any year of assessment, and

(b) has not received a notice under section 8 of this Act requiring a return for that year of his total income and chargeable gains, shall, subject to subsection (3) below, within six months from the end of that year, give notice to an officer of the Board that he is so chargeable.

(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 subsections (4) to (7) below,

(b) the person has no chargeable gains, and

(c) the person is not liable to a high income child benefit charge.”

20. Section 8 of the Finance Act 2012 introduced HICBC.

21. HICBC arises under s 681B of the Income Tax (Earnings and Pensions) Act 2003 ('ITEPA 2003').

22. Section 681B, inserted by the Finance Act 2012, s 8 and Schedule 1, para. 1, is given effect for the tax year 2012-13 and subsequent tax years but, in the case of 2012-13, only in respect of amounts of Child Benefit to which a person is entitled for weeks beginning on or after Monday, January 7 2013.

23. Schedule 41 determines the penalties for failure to notify liability.

Appellant's Case

24. The appellant's grounds of appeal as stated in his notice of appeal are that:

(i) He was not made aware of the existence of HICBC until 2018. The appellant says that he did not receive HMRC's letter of 17 August 2013. He says that he takes careful care of his finances and given that his wife was in receipt of Child Benefit, had he received the letter he most certainly would not have ignored it. Clearly the import of the letter was very serious for him.

(ii) He has always been a PAYE taxpayer so could not have anticipated the need to file a tax return.

(iii) He has never intended to avoid paying tax

25. At the hearing, the appellant referred to HMRC's guidance relating to HICBC penalty refunds. This guidance explained circumstances where HMRC have issued cancellations and refunds of "Failure to Notify" ('FTN') penalties for the HICBC. These refunds were issued for the tax years 2013-14, 2014-15 and 2015-16. Penalties have been cancelled and refunded where families made their claim for Child Benefit before HICBC was introduced (as in the appellant's case) and where one partner's income subsequently increased over £50,000 in or after the 2013-14 tax year (again as in the appellant's case). The appellant went on to argue that as his income had increased to over £50,000 since HICBC was introduced in 2013 and as he and his wife had not made a new claim to Child Benefit since then, they fell squarely within the guidance provided by HMRC in relation to refunds of tax assessments and cancellations of penalties.

HMRC's Case

26. Mr Fallon for HMRC said the HICBC came into force from 7 January 2013 as per s 8 of the Finance Act 2012. HMRC are not legally obliged to notify changes in legislation to each and every individual.

27. HMRC contend that leading up to the introduction of the HICBC, there was an extensive publicity campaign to raise awareness. Furthermore, the HICBC was considered by Parliament in several debates, and the measures announced by the Chancellor in the 2012 budget.

28. On its website HMRC provide full details of the Child Benefit Helpline and available to answer queries on whether the HICBC applied or not. There is no evidence of the appellant seeking advice from this, or any other HMRC, helpline.

29. On its website, HMRC also have available a calculator on which taxpayers can verify whether they have to pay some or all of the Child Benefit as a tax charge if their ANI was over £50,000 per year.

30. HMRC have a record of issuing a letter (SA252) to the appellant on 17 August 2013, advising him to:

- Check his tax code and report any changes required
- Declare any changes to his income which had not previously been declared
- Register for Self-Assessment if he met the criteria
- Check if he was liable to the HICBC.

31. The appellant has accepted the assessments. In the case of *Neil Johnstone v HMRC* [2018] UKFTT 0689, at paragraph 30 the tribunal states:

"In the absence of a challenge against the S29 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".

32. As such, the only issues that remain are:

- Whether the penalty percentage has been correctly set, and;
- Whether the Appellant has a reasonable excuse for his failure to notify.

33. Paragraph 1 Schedule 41 FA 2008 sets out when a penalty may be charged.
34. Paragraph 5 Schedule 41 FA 2008 sets out the degrees of culpability and accordingly, the amounts that may be charged as a penalty based on the culpability identified.
35. The behaviour of the appellant was categorised as ‘non-deliberate’ and ‘unprompted’, allowing for a penalty of between 10-30% of the PLR.
36. The failure to notify penalties for tax years 2013-14 to 2015-16 have been charged at a rate of 10%. This percentage has been calculated as a result of the appellant’s quality of disclosure, and represents the full mitigation allowable.
37. The penalty for 2016-17 has been charged at 0% as the disclosure was made within 12 months of the failure arising.
38. HMRC submit that the penalties have been correctly charged, in line with the legislation and that they have acted with utmost reasonableness in allowing the maximum mitigation provided for in the legislation.
39. Paragraph 20 FA 2008 provides for a penalty to be discharged where a taxpayer has a reasonable excuse for their failure to notify.
40. The Upper Tribunal (‘UT’) case of *Christine Perrin v HMRC* [2018] UKUT 0156 (TCC) gives helpful insight into what constitutes a reasonable excuse for failing to meet one’s responsibilities under tax law. The UT judges stated that ignorance of the law can in some limited circumstances be a reasonable excuse based on the objective reasonableness of the particular customer and sets out a four stage approach at paragraph 81:

“When considering a “reasonable excuse” defence, therefore, in our view the FTT can usefully approach matters in the following way:

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).

Second, decide which of those facts are proven.

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?”

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.”

41. The appellant states that he did not know about the HICBC and therefore could not have been expected to notify HMRC of his liability. He suggests that he expected to be told if a change in the law affected him.

42. In the case of *Lau v HMRC* [2018] UKFTT 230 (TC) – TC06463, the First-tier Tribunal considered the HICBC where the grounds of appeal were that the appellant was unaware of the new legislation. Judge Scott at paragraph 33 stated:

“...HMRC are under no obligation to notify individual taxpayers.”

And, at paragraph 37 and 38 stated:

“Parliament cannot have intended ignorance of the law to be a reasonable excuse because Parliament must have enacted the law with the intention that it would be obeyed. In all these circumstances, ignorance of the law simply cannot amount to a reasonable excuse.”

43. In the case of *Nicholson v Morris* (HM Inspector of Taxes) (1) (1973-1978) 51 TC 95, at paragraph 109 the Judge states:

“..It is idle for any taxpayer to say to the Revenue, ‘Hidden somewhere in your vaults are the right answers: go thou and dig them out of the vaults’. That is not a duty on the Revenue.”

44. HMRC contend that it is an individual taxpayer’s responsibility to ensure that their tax affairs are correct and that they are aware of legislative changes.

45. In the case of *Hesketh & Anor v HMRC* [2017] UKFTT 871 (TC), at paragraph 93 the Judge states:

“...for anything to be a reasonable excuse for a failure, it must cause the failure. Yet HMRC's failure to tell the appellants about the change in the law did not cause their ignorance: it merely failed to change it. Mr and Mrs Hesketh were ignorant of the new filing requirement: HMRC did not write to tell them about it so they remained ignorant of it long after the due dates had passed. The failure to write to them did not cause their ignorance and so it could not in law be an excuse for it.”

46. Furthermore, in *Nonyane v HMRC*, [2017]UKFTT11(TC)-TC05577 which is a decision solely concerning discovery assessments raised due to a failure to notify liability to HICBC, at paragraph 28 Judge McGregor states:

“I agree with HMRC’s submissions that it is not obliged to notify all customers of changes in the law.”

Concluding at paragraph 31:

“I therefore find that the discovery assessment was valid and that the appeal must be dismissed.”

47. As per *Lau* and *Hesketh*, the appellant’s failure to notify liability cannot be attributed to a failure by HMRC to inform the appellant that the liability was due.

48. Judge Scott summaries the judicial position on this matter comprehensively in *Johnstone v HMRC*, at paragraph 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 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.

(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) 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.

(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 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 supervisory jurisdiction by way of judicial review. (See the Upper Tribunal decision in *HMRC v Noor* [2013] UKUT 071 at [25].)”

49. Whilst it is clear that there is no legal obligation to do so, HMRC submit that steps were taken to raise awareness. HMRC records show that on 17 August 2013, a ‘SA252’ letter was issued to the appellant. These letters were intended to encourage taxpayers to check whether they were liable to the HICBC, either through contacting HMRC or using the online resources.

50. HMRC therefore submit that substantial measures were taken to raise the appellant’s awareness of the HICBC, but that ultimately it is for taxpayers affected by the change to notify their liability to HMRC.

51. HMRC do not accept that they failed to notify the appellant, but even if it were the case, it cannot constitute a reasonable excuse as, irrespective of the perceived failure, there is no statutory requirement for HMRC to notify taxpayers of changes to the law.

52. In the case of *HMRC v Hok Ltd* [2012] UKUT 363 (TCC) the UT considered whether the jurisdiction of the First-tier Tribunal (‘FTT’) includes the ability to discharge a penalty on the grounds of unfairness, and concluded that the Tribunal has the power to:

“... set aside a penalty which has not in fact been incurred, or to correct a penalty which has been incurred but has been imposed in an incorrect amount, but it goes no further. ... it is plain that the First-tier Tribunal has no statutory power to discharge, or adjust a penalty because of a perception that it is unfair.”

53. It is clear then that the FTT can only discharge the penalty if it has been incorrectly charged, but HMRC submit that that is not the case in this appeal and the penalties should therefore be upheld.

54. Turning to part 4 of the test from *Perrin*, HMRC do not believe the appellant has a reasonable excuse for their failure, so there is no reason to consider whether they have remedied the failure without unreasonable delay, but if the Tribunal disagrees, then HMRC make the following submissions.

55. Liability to the HICBC has been established going back to the 2013-14 tax year. There is no indication within HMRC’s records that the appellant took steps, prior to HMRC’s compliance action, to notify liability, or establish whether the HICBC applied.

56. The appellant has not demonstrated he had a reasonable excuse in accordance with paragraph 20 of Schedule 41 for his failure to notify as defined by s 7(1) TMA 1970. In any event, HMRC submit that the appellant cannot be considered to have remedied his failure without unreasonable delay.

57. With regard to the appellant’s argument that HMRC adopted a policy of issuing cancellations of assessments and refunds of penalties in certain circumstances, as outlined in their guidance, this would only apply if a tax payer had not received HMRC’s letter alerting them to the changes in legislation.

58. Special reduction, in accordance with paragraph 14 of Schedule 41, has not been considered by HMRC. However, there is nothing unusual or exceptional in the appellant's grounds of appeal to render the penalties unfair or contrary to what Parliament intended when enacting the legislation and therefore special reduction cannot be applied.

59. The assessments were correctly made and the penalties were also issued in the correct amounts.

Conclusion

60. HMRC say that they had written to the appellant to alert him to the HICBC in early 2013. We were provided with a generic copy of the letter which HMRC sent to tax payers. HMRC were not able to supply the Tribunal with a copy of the actual letter to the appellant. The letter states quite clearly that the new HICBC had come into effect on 7 January 2013 and that the tax payer would be liable to the tax charge if in the 2012-13 tax year they had individual income of over £50,000 a year and either the tax payer or their partner received Child Benefit payments after 7 January 2013. If these conditions were satisfied the tax payer had to register for Self-Assessment for the 2012-13 tax year by 5 October 2013 so that they could declare the Child Benefit received, pay the tax charged on time and avoid a late payment penalty.

61. In the year 2012-13 the appellant's income was less than £50,000 and therefore he would not have had to take any action. The appellant says that so far as he can recall he did not receive that letter and was therefore unaware of the change in legislation. He asserts that in any event, had he received the letter, although it did not apply to him at the time, he would not have ignored it.

62. HMRC's guidance relating to HICBC penalty refunds contains a flow chart which states that customers will have their penalty refunded or cancelled for the years 2013-14, 2014-15 and 2015-16 if their income increased to over £50,000 since HICBC was introduced in 2013 and they have not made a new claim to Child Benefit since. This clearly applies to the appellant. The flow chart also explains circumstances where customers will not have their penalty refunded or cancelled, which includes situations where they were already liable to HICBC in 2012-13 "during the high profile media campaign" and when HMRC sent targeted letters. Mr Fallon for HMRC argued that HMRC's policy on penalty refunds did not include situations where customers had been sent targeted letters. However that is not what the guidance says. The guidance clearly states that customers have to be already liable to HICBC in 2012-13 and in receipt of HMRC's targeted letter. The appellant was not liable to HICBC in 2012-13 and it is debatable whether he ever received an HMRC targeted letter.

63. We conclude that the appellant's circumstances fall within HMRC's own penalty refund guidance and therefore the appeal is allowed and the penalties of £309.20 are discharged.

64. 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.

MICHAEL CONNELL

TRIBUNAL JUDGE

RELEASE DATE: 13 MARCH 2020