



Neutral Citation: [2023] UKFTT 994 (TC)

Case Number: TC09005

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2022/13911

HIGH INCOME CHILD BENEFIT CHARGE – penalties under Schedule 41 of the Finance Act 2008 for failure to notify liability to the High-Income Child Benefit Charge – whether the Appellant was liable to the charge – yes – whether the Appellant received the nudge letter – yes – whether ignorance of the law amounted to a reasonable excuse in the circumstances of this appeal – no – Appeal dismissed

Heard on: 23 August 2023

Judgment date: 20 November 2023

Before

**JUDGE NATSAI MANYARARA
DEREK ROBERTSON JP**

Between

CHRISTOPHER LEGG

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Appellant in Person

For the Respondents: Ms Anika Aziz, litigator of HM Revenue and Customs’ Solicitor’s Office

DECISION

INTRODUCTION

1. The Appellant is appealing against penalties (“the Penalties”) that HMRC issued on 21 May 2021, under Schedule 41 of the Finance Act 2008 (“Schedule 41”), for failure to notify liability to the High-Income Child Benefit Charge (hereinafter referred to as ‘the HICBC’). The Penalties were charged as follows:

Tax Year	Liability to Tax	Category of penalty	Penalty range	Penalty %	Penalty charged
2018-19	£968	Non-deliberate and prompted	20% to 30%	27%	£261.36
2019-20	£1,076	Non-deliberate and prompted	20% to 30%	24%	£258.24
				Total	£519.60

2. HMRC also issued tax assessments for the years under appeal, in the sum of £2,044. The assessments are not under appeal. In any event, the appeal period for the assessments lapsed on 21 June 2021. This appeal relates, solely, to the Penalties under Schedule 41.

3. With the consent of the parties, the form of the hearing was V (video). The documents to which we were referred were (i) a Documents Bundle consisting of 183 pages; and (ii) the HICBC Generic Bundle consisting of 827 pages. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

BACKGROUND FACTS

4. On 28 November 2019, HMRC issued a letter to the Appellant asking him to check whether he was liable to the HICBC (“the nudge letter”). If so, the Appellant was required to contact HMRC to confirm the amounts. The letter was issued to the Appellant’s last known address at 23 Girdle Road.

5. On 11 March 2021, HMRC issued a further letter to the Appellant as the Appellant had not responded to the nudge letter.

6. On 24 March 2021, the Appellant telephoned HMRC and agreed that he may be liable to pay the HICBC, and added that he would provide further information.

7. On 21 May 2021, HMRC issued assessments in the sum of £2,044. HMRC also issued the Penalties on the same date.

8. The Appellant appealed against the Penalties on 18 August 2021. HMRC provided their view of the matter on 14 October 2022, upholding the decision to charge the Penalties and inviting the Appellant to request a statutory review.

9. On 13 January 2022, the Appellant lodged an appeal with the Tribunal.

THE ISSUES

10. The issues in the appeal are: (i) whether the Penalties have correctly been issued; and (ii) If so, whether or not the Appellant has established a reasonable excuse.

THE LEGISLATION

11. The relevant law, so far as is material to the issues in this appeal, is as follows:

12. Section 681B of the Income Tax (Earnings and Pensions) Act 2003 ('ITEPA') provides for the HICBC, and sets out the conditions that must be met before a taxpayer is liable for it, as follows:

“(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.

[...]

(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.”

13. Section 681C ITEPA sets out how the amount of the HICBC is determined, relevantly as follows:

“(1) The amount of the high income child benefit charge to which a person (“P”) is liable for a tax year is the appropriate percentage of the total of—

(a) any amounts in relation to which condition A is met, and

(b) any amounts in relation to which condition B is met. For conditions A and B, see section 681B.

(2) “The appropriate percentage” is—

(a) 100%, or

(b) if less, the percentage determined by the formula— $((ANI - L)/X)\%$

Where—

ANI is P's adjusted net income for the tax year; L is £50,000;

X is £100.”

14. The requirement to notify chargeability to income tax is set out at s. 7 of the Taxes Management Act 1970 ('TMA')

“Taxes Management Act 1970

Section 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.

(2) In the case of [persons who are] chargeable as mentioned in subsection (1) above as [the relevant trustees] of a settlement, that subsection shall have effect as if the reference to a notice under section 8 of this Act were a reference to a notice under section 8A of this Act.

15. Schedule 41 provides that:

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

<i>Tax to which obligation relates</i>	<i>Obligation</i>
Income tax and capital gains tax	Obligation under section 7 of TMA 1970 (obligation to give notice of liability to income tax or capital gains tax).

...

Amount of penalty: standard amount

6 (1) The penalty payable under any of paragraphs 1, 2, 3(1) and 4 is-

...

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

Potential lost revenue

7(1) “The potential lost revenue” in respect of a failure to comply with a relevant obligation is as follows.

(2) In the case of a relevant obligation relating to income tax or capital gains tax and a tax year,

the potential lost revenue is so much of any income tax or capital gains tax to which P is liable

in respect of the tax year by reason of the failure is unpaid on 31 January following the tax year.

...

Reductions for disclosure

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,

(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.

...

(6) Where a person who would otherwise be liable to a 30% penalty has made a prompted 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 not below 10%, or

(b) In any other case, to a percentage not below 20%, which reflects the quality of the disclosure.

Special reduction

14(1) If HMRC think it right because of special circumstances, they may reduce a penalty under any of 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

...”

THE ARGUMENTS

16. HMRC’s case can be summarised as follows:

- (1) The Appellant was not within the self-assessment regime prior to the tax years under appeal. He was not, therefore, issued with a notice to file a tax return.
- (2) The Appellant had an Adjusted Net Income (‘ANI’) exceeding the £50,000 threshold for liability to the HICBC and his partner was in receipt of Child Benefit. The Appellant was liable to the HICBC and he was required to give notice of his liability within six months of the end of the tax years in question. The Appellant does not dispute that he failed to notify his liability to the HICBC.
- (3) The Appellant did not provide his income details to agree the HICBC figures and he did not respond to the initial letter sent to him.
- (4) The failure to notify penalties reflect the timing and quality of the Appellant’s disclosure, which was prompted. As the Appellant’s failure continued 12 months after the tax became due, the penalty range is 20% to 30% of the Potential Lost Revenue (‘PLR’). The Penalties have been correctly charged.
- (5) The Upper Tribunal in *HMRC v Robertson* [2019] UKUT 0202 (TCC) (‘*Robertson*’) confirmed that PLR for a failure to notify penalty concerning income tax is not contingent on HMRC making an assessment to bring the income tax unpaid on 31 January following the tax year into the charge.
- (6) Irrespective of the decision in *HMRC v Jason Wilkes* [2021] UKUT 150 (TCC) (‘*Wilkes*’), the Penalties in the present appeal are unaffected, as confirmed in *Robertson*.
- (7) The Appellant has failed to establish a reasonable excuse and he has not specified any circumstances which might be considered special, for the purposes of para. 19(3) of Schedule 41.

17. The Appellant’s Grounds of Appeal (as set out in the Notice of Appeal) can be summarised as follows:

- (1) His reasonable excuse for the failure to notify was not deliberate, but was as a result of ignorance of the law.
- (2) He was not sent any educational letters by HMRC. Sometimes post to his home is mixed up with another address. He is not, however, suggesting that HMRC have the wrong address on file for him.
- (3) He changed jobs and entered a higher income for the first time.
- (4) He was not aware of the introduction of the HICBC and the obligation to notify liability to the HICBC. As soon as he became aware, he attempted to make repayment.
- (5) He gave assistance to HMRC when he made disclosure. He helped HMRC by telephoning HMRC to respond to letters. He told HMRC everything that he could.
- (6) HICBC is both controversial, and complicated, as shown by case law.

FINDINGS OF FACT

18. We have derived considerable benefit from hearing the oral evidence. We shall refer to the evidence and submissions so far as relevant to our decision. We make the following findings of fact:

- (1) The Appellant's partner has been in receipt of Child Benefit since July 2001.
- (2) The Appellant's ANI exceeded the threshold for liability to the HICBC for the tax years in question. The Appellant's ANI also exceeded that of his partner for the years under appeal.
- (3) The Appellant was not under self-assessment during the relevant period and a notice to file a tax return under s 8 TMA was not issued to him. The Appellant further did not make a voluntary self-assessment return under s 12D TMA.
- (4) The Appellant did not notify his liability to the HICBC.
- (5) On 28 November 2019, HMRC issued a nudge to the Appellant at the address held on file for the Appellant by HMRC. This was followed by a letter dated 11 March 2021. The second letter was issued as the Appellant had not responded to the nudge letter. On receipt of the second letter, the Appellant telephoned HMRC and agreed that he was liable to the HICBC.
- (6) In his appeal to HMRC, the Appellant referred to the letter received from HMRC in 2019, indicating that he had received it.
- (7) Within his letter of appeal to HMRC, the Appellant indicated that he believed that the HICBC did not apply to him.

DISCUSSION

19. The Appellant appeals against penalties, charged under Schedule 41, for the failure to notify his liability to the HICBC.

Preliminary issue

20. At the commencement of the appeal hearing, the Appellant submitted that he has protected characteristics which mean that he has difficulty understanding written communication. In this respect, he stated that he was dyslexic. Whilst the Appellant has never raised this before, Ms Aziz did not object to us considering this new claim and appeared to suggest that this information was not new. Ms Aziz did not draw our attention to any communication (written or oral) received from the Appellant by HMRC (or the Tribunal) evidencing, or raising, his health issues. Moreover, during her submissions, Ms Aziz referred to the ability of a taxpayer/customer to seek help from HMRC if they have any health (or other) issues affecting their ability to comply with their obligations in respect of tax.

21. During the preliminary discussions, the Appellant declined to provide any further information, or evidence, in respect of his health condition(s) on the basis that he was "*not legally obliged to do so*". Whilst this may be so, this position left the Tribunal with no information to assist in determining the level of the Appellant's understanding, as he had specifically referred to difficulties understanding. Moreover, there has been no evidence from a healthcare professional, such as a neurologist, setting out the nature and extent of the Appellant's limitations.

22. As that Appellant did not want to disclose the nature and extent of any limitations as a result of his health problems, the Tribunal was unable to consider the impact that such problems would have on his ability to comply with his legal obligations in respect of tax and understand his tax obligations. The Appellant did not seek an adjournment in order to obtain legal representation.

23. The evidence before us show that the Appellant called HMRC to discuss his liability to the HICBC after the letter(s) had been issued to him. The Appellant did not raise any difficulty understanding what was required by HMRC at that stage. We consider that it would

have been open to the Appellant to do so without disclosing his health conditions but by asking for any assistance he felt that he required. He has, further, been able to write a letter of appeal to HMRC, as well as Grounds of Appeal to the Tribunal. The Appellant's written appeals engage with the decision under appeal. We find that the Appellant has been able to draft comprehensive letters to HMRC in response to the decision under appeal. We find that this is highly suggestive of an ability to understand complex written information. This is because by his own evidence, the Appellant confirmed that he drafted the letters of appeal independently. He was not only able to clearly set out his written submissions, he was also able to make reference to recent case law on the issues surrounding the HICBC in support of his appeal.

24. During the appeal hearing, the Appellant was able to engage with the Tribunal and answer all questions. He does not have an Appointee and he confirmed that he was ready to proceed with the appeal hearing as a litigant in person, at the commencement of the hearing. There was, therefore, no evidence before us to support a finding that the Appellant potentially lacked understanding in relation to the correspondence that he received from HMRC, or indeed the Tribunal proceedings and the HICBC.

25. I now turn to the circumstances of this appeal.

Substantive issues

26. The substantive issues under appeal are firstly, whether HMRC were correct to issue the Penalties in accordance with legislation and, secondly, whether or not the Appellant has established a reasonable excuse for the defaults which have occurred. In this regard, HMRC bear the initial burden of demonstrating that the Penalties are due. Once this is discharged, the burden of proof is upon the Appellant to demonstrate that there is a reasonable excuse.

27. In *Perrin v R & C Comrs* [2018] BTC 513 (*'Perrin'*) (Judges Herrington and Poole), at [69], the Upper Tribunal held, *inter alia*, that:

“Before any question of reasonable excuse comes into play, it is important to remember that the initial burden lies on HMRC to establish that events have occurred as a result of which a penalty is, *prima facie*, due. A mere assertion of the occurrence of the relevant events in a statement of case is not sufficient. Evidence is required and unless sufficient evidence is provided to prove the relevant facts on a balance of probabilities, the penalty must be cancelled without any question of “reasonable excuse” becoming relevant.”

28. It is trite law, therefore, that no penalty can arise in any case where the taxpayer is not in default of an obligation imposed by statute.

Q. Is the Appellant in default of an obligation imposed by statute?

29. The HICBC was considered by Parliament in several debates and the measures were announced by the Chancellor in the 2012 budget. There was an extensive publicity campaign to raise awareness, leading up to the introduction of the HICBC. The HICBC came into effect by virtue of Schedule 1 of the Finance Act 2012 (*'FA 2012'*), which amended Chapter 8, Part 10, ITEPA. From 7 January 2013, if an individual had an ANI in excess of £50,000 a year and either that individual, or his/her partner, received any Child Benefit payments, then the partner with the higher income had to pay the HICBC. The HICBC arises under s 681B ITEPA and the obligation to notify liability to the HICBC is provided for under s 7 TMA (*supra*). The time-limit for notifying chargeability income is six months from the end of the tax year in which the liability arises. The six-month time-limit ensures that a taxpayer can be sent a tax return in sufficient time to complete the tax return within the normal cycle for the year.

30. Sub-sections (1A) and (1B) of s 7 TMA ensure that the requirement to notify only applies to persons who are not already required to submit a return pursuant to the provisions of s 8 TMA. Moreover, the provisions of sub-section (3) and (4) of s 7 mean that a person whose income is dealt with under the Pay-As-You-Earn ('PAYE') regime will not be required to notify under s 7 TMA. However, s 7(3) TMA was amended by para. 2 of Schedule 1 to FA 2012 to provide that a taxpayer is required to notify their liability to the HICBC under s 7 TMA in the same way as they were required to notify any other liability to income tax. The impact of this amendment is that even if a taxpayer's income is dealt with under the PAYE regime, if they are liable to the HICBC, they will always be required to notify under s 7 TMA, unless they are required by HMRC to make and deliver a return under s 8 TMA.

31. For each £100 in excess of £50,000, a 1% tax liability arises, calculated on the amount of Child Benefit received. Where a taxpayer's ANI reaches £60,000, the result is that 100% of the Child Benefit received becomes liable to a tax charge. The change in the law meant that taxpayers had a statutory obligation to notify chargeability to tax. The charge is calculated on a sliding scale. The effect is to impose a tax charge equal to 100% of the amount of the Child Benefit if the higher-earning partner has an ANI of £60,000 or more per annum. If the higher-earning partner earns between £50,000 and £60,000 per annum, the tax charge is equal to 1% of the amount of the Child Benefit for each £100 of income over £50,000. In effect, the HICBC claws back Child Benefit by imposing a tax charge on the higher-earning partner, and does so in full if the level of income is at least £60,000, or on a sliding scale if it is between £50,000 and £60,000.

32. Section 681G ITEPA defines "partner" for the purposes of s 681B(4) ITEPA. In essence, a couple must be either married or in a civil partnership (unless separated), or they must be living together as if they were a married couple or civil partners. Section 681H provides that ANI is determined under s 58 of the Income Tax Act 2007 ('ITA').

33. The Appellant informed HMRC that he has never personally made a claim for Child Benefit. By his own evidence, however, his partner was in receipt of Child Benefit. The Appellant further accepts that his ANI exceeded the threshold for liability to the HICBC, and that he did not notify chargeability to the HICBC. We shall return to this in our consideration of the issue of reasonable excuse later.

34. We are satisfied that the Appellant was in default of an obligation imposed by statute. Subject to considerations of 'reasonable excuse' and 'special circumstances' set out below, the penalties imposed are due and have been calculated correctly.

Q. Has the Appellant established a reasonable excuse for the defaults which have occurred?

35. Paragraph 20 of Schedule 41 provides for the discharge of a penalty where a taxpayer has a reasonable excuse for their failure to notify. There is no statutory definition of 'reasonable excuse'. Whether or not a person had a reasonable excuse is an objective test and is a matter to be considered in the light of all of the circumstances of the particular case: *Rowland v R & C Comrs* (2006) Sp C 548 ('*Rowland*'), at [18]. The test we adopt in determining whether the Appellant has a reasonable excuse is that set out in *The Clean Car Co. Ltd. v C&E Commissioners* [1991] VATTR 234 ('*Clean Car*'), in which Judge Medd QC said this:

"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?"

36. Although *Clean Car* was a VAT case, it is generally accepted that the same principles apply to a claim of reasonable excuse in direct tax cases.

37. In *Perrin*, the Upper Tribunal explained that the experience and knowledge of the particular taxpayer should be taken into account in considering whether a reasonable excuse has been established. The Upper Tribunal concluded that for an honestly held belief to constitute a reasonable excuse, it must also be objectively reasonable for that belief to be held. The word '*reasonable*' imports the concept of objectivity, whilst the words '*the taxpayer*' recognise that the objective test should be applied to the circumstances of the actual (rather than the hypothetical) taxpayer. The standard by which this falls to be judged is that of a prudent and reasonable taxpayer, exercising reasonable foresight and due diligence, in the position of the taxpayer in question, and having proper regard for their responsibilities under the Taxes Acts: *Collis v HMRC* [2011] UKFTT 588 (TC) ('*Collis*').

38. The decision depends upon the particular circumstances in which the failure occurred. Where the person had a reasonable excuse for the failure but the excuse ceased, the person is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased. We proceed by determining whether facts exist which, when judged objectively, amount to a reasonable excuse for the defaults which have occurred and, accordingly, give rise to a valid defence. In this regard, we have assessed whether the facts put forward and any belief held by the Appellant are sufficient to amount to a reasonable excuse.

39. In his Grounds of Appeal, the Appellant submits, *inter alia*, that (i) he did not receive the letters from HMRC; and (ii) he had no knowledge of the HICBC, or of the requirement to notify liability to the HICBC. Having considered all of the information before us, cumulatively, we find that the Appellant has not established a reasonable excuse. We give our reasons for so finding:

40. In respect of the first of the Appellant's submissions, we find that the Appellant has been unable to maintain a consistent account about whether he received the nudge letter. Whilst the Appellant submitted (in his Grounds of Appeal) that he did not receive the nudge letter, that argument is remarkably at odds with the letter of appeal that the Appellant sent to HMRC after the Penalties were issued. In his letter of appeal to HMRC, the Appellant says this:

"HMRC wrote to me in November..., informing me that I might be liable to pay the HICBC – followed by the discovery assessment

...

In December 2019 I read about HISB [sic] from letter received.

...

First became aware on 11 March 2021 of HICBC that I might owe something"

[Emphasis added both above and below]

41. We find that this letter does not sit well with the claim made in the Appellant's Grounds of Appeal. Furthermore, the timeline within this letter sits well with HMRC's case about when the nudge letter was issued to the Appellant (i.e., 28 November 2019), despite the suggestion that the letter was returned to HMRC on 19 August 2021. We find that the Appellant could not have read about the HICBC in December 2019 if the letter dated 28

November 2019 had not been seen by him as the only other letter was issued on 11 March 2021; a date which is also referred to in the Appellant's letter to HMRC.

42. During the appeal hearing, the Appellant confirmed that when he received the letter, he did not think that the HICBC applied to him because he believed that he was under the threshold. This supports a finding that what the Appellant did when he received the nudge letter was to assume that the HICBC did not apply to him. This much is apparent from his letter of appeal to HMRC:

"I believed I was below the threshold due to my car allowance and other allowances so thought nothing of it further"

43. The provisions of s 118 TMA and s 7 of the Interpretation Act 1978 ('IA') are relevant to establishing whether the nudge letter was received by the Appellant. In this respect, we are satisfied that the nudge letter was received by the Appellant. This is because the letter was sent to the address that HMRC had on file for the Appellant and there is no suggestion that it was returned undelivered. There is no suggestion, on the evidence before us, that there were any difficulties with the postal service at around the time of that delivery. Section 7 IA (which relates to service by post), provides that:

"Where an Act authorises or requires any document to be served by post (whether the expression 'serve' or the expression 'give' or 'send' or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post".

44. The nudge letter is, therefore, deemed to have been delivered, unless the contrary is proved. By his own evidence, the Appellant confirmed that the address held by HMRC was his correct address. Furthermore, the letter was issued to the same address that the Appellant gave to the Tribunal during his appeal.

45. The letters issued to customers affected by the changes to Child Benefit, such as the Appellant, explained how the HICBC took effect from 7 January 2013; and that the new charge would apply when a taxpayer's (or their partner's) income exceeds £50,000. Those affected would then have needed to decide whether to keep receiving Child Benefit and pay the tax due through self-assessment, or to stop receiving Child Benefit and not pay the new charge. The letter issued to the Appellant would be set out in the following terms:

"Dear X

High Income Child Benefit Charge

Our records indicate the recent changes to Child Benefit for people on higher incomes may apply to you and you did not register to receive a Self Assessment tax return...

Changes to Child Benefit

The new High Income Child Benefit Charge came into effect on 7 January 2013. You have to pay the tax charge if all of the following statements applied to you in the tax year ended 5 April 2013.

- You have an individual income of over £50,000 a year.*
- Either you or your partner received any Child Benefit payments after 7 January 2013.*
- Your income for the tax year is higher than your partner's. The partner with the higher income has to pay the charge if both partners have income over £50,000."*

46. As stated earlier, a further letter was issued to the Appellant on 11 March 2021. By a telephone call shortly thereafter, the Appellant accepted that the HICBC applied to him, having failed to respond to the nudge letter. We hold that the Appellant did, in fact, receive the nudge letter and the letter issued on 11 March 2021.

47. Section 7 TMA requires an individual who is liable to income tax, or capital gains tax, for a year of assessment to notify HMRC of that fact within six months of the end of the tax year when the liability arises. Therefore, if a taxpayer is chargeable to income tax and has not received a notice to file a return, there is an obligation upon the taxpayer to notify chargeability, unless there is no liability to the HICBC. The Appellant was not under self-assessment and he was not issued with a notice to file for the relevant tax years. We have found that the Appellant does not deny that his partner had been in receipt of Child Benefit for the relevant period, or that his income exceeded the threshold for liability to tax, or indeed that his income exceeded that of his partner. We find that any question as to whether the Appellant was liable for the HICBC for the tax years in question is answered in the affirmative and the letters should have prompted further action on the part of the Appellant.

48. In relation to the Appellant's general awareness of the HICBC, we have borne in mind the comments of the tribunal in *Hesketh & Anor v HMRC* [2018] TC 06266 ('*Hesketh*'), where Judge Mosedale held that Parliament intended all of its laws to be complied with, and that ignorance of the law was not an excuse. The onus is upon an appellant to ensure that they properly understand their obligations under the law. In *Spring Capital v HMRC* [2015] UKFTT 8 (TC), at [48], Judge Mosedale said this:

"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 chose to remain in ignorance of it above those persons who chose to acquaint themselves with the law in order to abide by it."

49. Similarly, in *Lau v HMRC* [2018] UKFTT 230 (TC) ('*Lau*'), Judge Anne Scott held, at [37] to [38], that:

"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."

50. In *Gilbert v HMRC* [2018] UKFTT 437 (TC), at [38] and [40], Judge Helier said this:

"38. ... It seems to me that in construing what was intended by Parliament as being capable of being a reasonable excuse the question is what conduct Parliament intended to penalise in relation to a transgression of the law. The answer to that is that it did not intend to penalise behaviour in which the conduct of the taxpayer was reasonable in the circumstances even if that resulted in a breach of the law. But what is reasonable must be judged against the actions of a hypothetical person who had in mind the need to comply with whatever statutory obligations might apply to him from time to time"

...

40. In relation to a breach of the law the answer to the question: "what caused the taxpayer's ignorance of the change in the law?" will affect whether he or she acted reasonably. In some cases that cause may well afford a reasonable excuse: for example if the taxpayer had been in a coma, or was advised by HMRC or another reputable source that the law would not or was unlikely to change in a relevant period, or if the taxpayer did not have the mental capacity to understand the possibility of a change in the law; in other circumstances the cause of that ignorance may be unlikely to found a reasonable excuse: for example a simple assumption that there would be no change or a decision to do nothing unless asked to do something by HMRC. In the first set of examples it might be said that the taxpayer acted reasonably having regard to his circumstances and the need for compliance, in the second the reverse."

51. As held by Clouston J in *Holland v German Property Administrator* [1936] 3 All ER 6, at p 12:

“the eyes of the court are to be bandaged by the application of the maxim as to ignoratia legis.”

52. Even if the Appellant’s initial belief that the HICBC did not apply to him were to be considered, in *Garnmoss Ltd. T/A Parham Builders v HMRC* [2012] UKFTT 315 (TC), the tribunal held (in the context of a VAT appeal and the question of reasonable excuse) that:

“12. What is clear is that there was a muddle and a bona fide mistake was made. We all make mistakes. This was not a blameworthy one. But the Act does not provide shelter for mistakes, only for reasonable excuses. We cannot say that this confusion was a reasonable excuse.”

53. We find that a mistake does not provide shelter for the default which has occurred in this appeal. Furthermore, in *Katib v HMRC* [2019] UKUT 189 (TCC) (*‘Katib’*), the Upper Tribunal concluded that the lack of experience of the appellant and the hardship that is likely to be suffered was not sufficient to displace the responsibility on the appellant to adhere to time limits. The differences in fact in *Katib* and the appeal before us do not negate the principle established in relation to the need for statutory time limits to be adhered to, and the duty placed upon taxpayers to adhere to statutory duties.

54. The issue of whether HMRC are under a legal obligation to notify all customers of a change in the law has been the subject of much adjudication. Whilst not binding on us, we find that following decisions of the First-tier Tribunal (*‘FtT’*) to be persuasive:

55. In *Johnstone v HMRC* [2018] UKFTT 0689 (TC) (*‘Johnstone’*), Judge Poon summarised the judicial position in respect of whether HMRC have a duty to notify all taxpayers potentially affected by the HICBC, at [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...”

56. Similarly, in *Nonyane v HMRC* [2017] UKFTT 0011 (TC) (*‘Nonyane’*), Judge McGregor concluded, at [28], that:

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

57. In *Lau*, at [33], Judge Anne Scott reached the same conclusion.

58. Furthermore, we are satisfied that HMRC’s website provided full details of the HICBC. HMRC’s website also has 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 is over £50,000 per annum. A bounty pack was also given to all parents of a new born after 2012-13, containing a flyer about Child Benefit, where the HICBC was explained. To claim Child Benefit, a person

would have to fill out the Child Benefit claim form and send it to the Child Benefit office for processing. The forms include multiple warnings about the HICBC (at p. 2 of the notes accompanying the claim form). It was not until April 2018 that Child Benefit could be claimed by telephone (in certain circumstances). If a taxpayer chose to claim Child Benefit, they would have to notify liability to the HICBC.

59. We are satisfied that if the Appellant was in any doubt about whether the HICBC applied to him, he could have sought further information from HMRC, especially in light of the correspondence received from HMRC by the Appellant.

60. In any event, we find that case law has established that the HICBC was a widely publicised initiative. In *Robertson*, the Upper Tribunal (Judge Poole and Judge Thomas Scott) considered an argument by the appellant (in that appeal) to the effect that the awareness letters had not been received. Judge Scott held, at [98], that:

“[98] As to whether the appellant had a reasonable excuse, while we accept his evidence that neither he nor his wife received any awareness letters or SA 252s in 2012 or 2013, we do not think this is enough to establish a reasonable excuse. Unlike some tax changes this one was very high profile and was widely discussed in all sorts of media....”

61. In *McDonagh v HMRC* [2020] UKFTT 0421, Judge Connell said this, at [54]:

“54. Whilst it is clear that there is no legal obligation to do so, HMRC took considerable steps to raise awareness of the HICBC. Between October and December 2012, HMRC issued numerous high profile press releases. HMRC say that around 1 million letters were sent in November 2012 to recipients of child benefit, explaining that the HICBC was due to take effect on 7 January 2013. The releases specifically drew attention to recipients of child benefit that the HICBC would impact those earning more than £50,000 per annum. A further reminder was issued through another nationwide press release in March 2013. Another advertising campaign ran from 10 - 17 March 2013. By September 2013, 400,000 people with income above £50,000pa had opted out of receiving child benefit payments. Further press releases were issued in December 2013 and January 2014.”

62. *Lau, Robertson, Johnstone, Nonyane and Hesketh* are all cited by HMRC as authority for the proposition that there is no obligation on HMRC to notify, specifically, a taxpayer of new legislation. We completely agree with that proposition. We find that HMRC would not have had any way of knowing that the HICBC applied to the Appellant, given that he had failed to notify his liability. This was the reason why HMRC wrote to the Appellant in November 2019 and March 2021. Having considered all of the evidence, cumulatively, we hold that the Appellant has not established a reasonable excuse.

Q. Are the failure to notify penalties correctly charged?

63. In *Robertson*, the Upper Tribunal held that as is clear from Schedule 41, para 7, Potential Lost Revenue (‘PLR’) was any income tax to which the appellant in that appeal was liable in respect of the tax years, by reason of the failure to notify, which was unpaid on 31 January following the tax year. The Upper Tribunal further held that the correct approach to calculating PLR for the purposes of failure to notify was set out by the FtT in *Lau*.

64. Schedule 41 determines the penalties for failure to notify liability to income. tax. Paragraph 1 of Schedule 41 sets out when a penalty may be charged. The onus is on HMRC to demonstrate that the condition for the imposition of a penalty has been met, as provided for by para. 1 of Schedule 41. Paragraph 5 of Schedule 41 then sets out the degrees of culpability and the amounts that may be charged as a penalty, based on the culpability identified. Paragraph 16 of Schedule 41 makes it clear that PLR does not depend upon an assessment. The incontrovertible fact in the appeal before us is that the Appellant should have, but did

not, notify liability under the terms of s 7 TMA, as amended. A penalty therefore arises under para. 1 of Schedule 41.

65. The first step is therefore to set out the degree of culpability. The Appellant's behaviour has been classified as non-deliberate. The standard percentage of a penalty in these circumstances is, therefore, statutorily determined at 30% (supra). The next step involves reduction for the quality of disclosure (namely whether it is 'prompted' or 'unprompted'). As the Appellant had failed to notify after he was required to check whether he was liable to the HICBC, resulting in an assessment, HMRC have classified the disclosure as being 'prompted'. The Appellant only contacted HMRC after the letters had been issued to him. Where there is a non-deliberate failure with prompted disclosure, the standard percentage of 30% can be reduced, but not further than the minimum of 20%.

66. The Penalties for the tax years in question have been charged at a rate of 27% (2019) and 24% (2018) These percentages were based on the quality of disclosure and represent the full mitigation allowed. The Appellant did not provide his income details to agree the HICBC figures and did not make disclosure, or respond to the nudge letter issued on 28 November 2019. If HMRC became aware of the failure less than 12 months after the time when the tax first became unpaid, a minimum penalty of 24% can be charged, otherwise the minimum penalty is 27%. HMRC first became aware of the failure to notify more than 12 months after the tax in respect of the 2018-19 tax year.

67. To work out the percentage rate, HMRC worked out the difference between the minimum and maximum penalty percentages and then multiplied that figure by the reduction for quality of disclosure to arrive at the percentage reduction. HMRC then took off the percentage reduction from the maximum penalty percentage. This gave a penalty percentage of 27% for the 2018-19 tax year.

68. In respect of the 2019-20 tax year, HMRC became aware of the failure on 21 April 2021, which is less than 12 months after the tax became unpaid. The penalty range is between 10% to 30% of the PLR. HMRC worked out the difference between the minimum and maximum penalty percentages and then multiplied that figure by the reduction for the quality of disclosure, to arrive at a percentage reduction. HMRC then took off the percentage reduction from the maximum penalty percentage. This gave a penalty percentage of 24% for the 2019-20 tax year.

69. We are satisfied that the Penalties for failure to notify have been correctly calculated, and in accordance with the legislation.

Q. Do any special circumstances apply?

70. Paragraph 14 of Schedule 41 allows for the reduction of a penalty if HMRC think it right to do so because of special circumstances. There have been a number of cases on special circumstances, from which we derive the following principles:

(1) While "special circumstances" are not defined, the courts accept 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).

(2) HMRC's failure to consider special circumstances (or to have reached a flawed decision that special circumstances do not apply to a taxpayer) does not mean the decision to impose the penalty, in the first place, is flawed.

(3) Special circumstances do not have to be considered before the imposition of the penalty. HMRC can consider whether special circumstances apply at any time up to, and during, the hearing of the appeal before the tribunal.

(4) The tribunal may assess whether a special circumstances decision (if any) is flawed if it is considering an appeal against the amount of a penalty assessed on a taxpayer.

71. The special circumstances must apply to the individual and not be general circumstances that apply to many taxpayers: see *Collis*, at [40] and *Bluu Solutions Ltd v Commissioners for Her Majesty's Revenue & Customs* [2015] UKFTT 95. The Tribunal may rely on special reduction if HMRC's decision was 'flawed' when considered in the light of the principles applicable in proceedings for judicial review'. That is a high test. HMRC considered the Appellant's case and found that no special circumstances apply. Pursuant to para. 19 of Sch 41, the Tribunal must consider whether there were special circumstances which would justify it substituting its decision for that of HMRC. We have considered the Grounds of Appeal and the arguments presented by the Appellant therein (and before us during the hearing). In light of the facts as found, we find that no special circumstances apply.

72. In relation to the fairness or otherwise of the Penalties, we have considered the case of *R & C Comrs v Hok Ltd* [2012] UKUT 363 (TCC); [2013] STC 255. There, the Upper Tribunal held that the FtT did not have the power to discharge penalties on the ground that their imposition was unfair. Furthermore, in *Rotberg v R & C Comrs* [2014] UKFTT 657 (TC), it was accepted that the FtT's jurisdiction went only to determining how much tax was lawfully due, and not the question of whether HMRC should, by reason of some act or omission on their part, be prevented from collecting tax otherwise lawfully due. The Upper Tribunal held, at [109], that the FtT has no general supervisory jurisdiction.

73. Applying *Aspin v Estill* [1987] STC 723, the Upper Tribunal further found, at [116], that the jurisdiction of the FtT in cases of that nature was limited to considering the application of the tax provisions themselves.

74. For all of the foregoing reasons, the appeal is dismissed. In reaching these findings, the Tribunal has applied the test set out in *Clean Car*.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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.

**NATSAI MANYARARA
TRIBUNAL JUDGE**

Release date: 20th NOVEMBER 2023