Neutral Citation: [2024] UKFTT 00102 (TC)

Case Number: TC09053

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2022/13173

HICBC – discovery assessments – penalties for failure to notify – carelessness – reasonable excuse

Heard on: 13 November 2023
Judgment date: 26 January 2024

Before

TRIBUNAL JUDGE ABIGAIL MCGREGOR
SHAMEEM AKHTAR

Between

MR PAUL BARON

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Paul Baron

For the Respondents: Sophie Taj, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. With the consent of the parties, the form of the hearing was V (video) using the Tribunal video hearing system. A face to face hearing was not held because a remote hearing was appropriate. The documents to which we were referred are a documents bundle of 152 pages and HMRC's generic authorities bundle of 831 pages.

2. 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.

INTRODUCTION

3. This appeal concerned discovery assessments made under Section 29 Taxes Management Act 1970 ("TMA 1970") amounting to £3,258.00, for the tax years 2015/16 to 2019/20 for liability to income tax in the form of the higher income child benefit charge ("HICBC") and penalties in the amount of £517.50 for failure to notify liability HICBC under Schedule 41 to Finance Act 2008 in respect of tax years 2015/16 through to 2019/20. This is an appeal against

RELEVANT BACKGROUND AND LAW

4. The HICBC came into effect on 7 January 2013 and arises under section 681B of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA 2003").

5. The HICBC imposes a charge to tax equal to the child benefit received for those individuals who have adjusted net income of over £60,000 in the tax year. The tax charge is reduced proportionally where adjusted net income ("ANI**"**) is between £50,000 and £60,000, but the way in which this applies is not in dispute in this case. ANI is defined in ITEPA 2003, s 681H.

6. The ability of HMRC to raise assessments under section 29 TMA is subject to time limits set out in sections 34 and 36 as follows:

> "34(1) Subject to the following provisions of this Act, and to any other provisions of the Taxes Acts allowing a longer period in any particular class of case, an assessment to income tax or capital gains tax may be made at any time not more than 4 years after the end of the year of assessment to which it relates.
>
> 34(2) An objection to the making of any assessment on the ground that the time limit for making it has expired shall only be made on an appeal against the assessment.
>
> …
>
> 36(1) An assessment on a person in a case involving a loss of income tax or capital gains tax brought about carelessly by the person may be made at any time not more than 6 years after the end of the year of assessment to which it relates (subject to subsection (1A) and any other provision of the Taxes Acts allowing a longer period).
>
> 36(1A) An assessment on a person in a case involving a loss of income tax or capital gains tax–
>
> …
>
> (b) attributable to a failure by the person to comply with an obligation under section 7,

…

> may be made at any time not more than 20 years after the end of the year of assessment to which it relates (subject to any provision of the Taxes Acts allowing a longer period)."

7. Section 118(2) TMA: "118(2) For the purposes of this Act, … where a person had a reasonable excuse for not doing anything required to be done he shall be deemed not to have failed to do it unless the excuse ceased and, after the excuse ceased, he shall be deemed not to have failed to do it if he did it without unreasonable delay after the excuse had ceased."

8. Section 118(5) TMA: "118(5) For the purposes of this Act a loss of tax or a situation is brought about carelessly by a person if the person fails to take reasonable care to avoid bringing about that loss or situation."

9. A person who has an income tax (or capital gains tax) liability (and has not received a notice to file a tax return from HMRC) is obliged, under section 7 of TMA 1970, to notify his liability to tax by the 31 October after the end of the tax year in question. This is subject to some exceptions, but the exceptions do not apply if the person is subject to the HICBC.

10. A person who fails to comply with the obligation to notify liability to tax in accordance with TMA 1970, s 7 is liable to a penalty under paragraph 1 of Schedule 41 to Finance Act 2008.

11. The penalty is determined as a percentage of the potential lost revenue under paragraph 6 of Schedule 41 to Finance Act 2008. Where the failure or act is not deliberate, the percentage rate is 30%.

12. Under paragraphs 12 and 13 of Schedule 41 to Finance Act 2008, the penalty percentage can be reduced as a result of the taxpayer's cooperation with and disclosure to HMRC. Where the disclosure is prompted, this can reduce the penalty to:

> (1) 10% if HMRC become aware of the failure less than 12 months after the time when tax first becomes unpaid; and
>
> (2) 20% in any other case.

13. Under paragraph 14 of Schedule 41 to Finance Act 2008, HMRC may reduce the penalty if there are special circumstances.

14. Under paragraph 20 of Schedule 41 to Finance Act 2008, liability to the penalty does not arise where the taxpayer has a reasonable excuse for the failure.

FACTS

15. We find the following facts based on the evidence given and bundle of documents before us.

16. Prior to 2015/16 Mr Baron was not required to notify his liability to tax to HMRC or to complete a self-assessment return ("SATR").

17. Mr Baron's partner received child benefit in each of the tax years in question, having first claimed child benefit in November 2009.

18. The children in respect of whom child benefit was claimed were not Mr Baron's children.

19. Mr Baron had been in the army until 2014 and did not have any children of his own. He met his partner approximately 6 months before he left the army and when he moved out of army accommodation, he moved in with her.

20. In respect of each of the tax years in question, Mr Baron:

(1) was not issued with a notice to file a tax return;

(2) did not notify his liability to HICBC to HMRC; and

(3) did not file a SATR.

21. On 8 January 2021, HMRC issued a letter to Mr Baron highlighting the HICBC and giving some explanation of when it applies.

22. On 14 June 2021, HMRC sent a letter to Mr Baron explaining that they considered that he was liable to HICBC in 2015/16 through to 2019/20. This letter included a calculation of the amount of the HICBC and the risk of penalties, including a failure to notify penalty. It gave a deadline of 14 July 2021 to respond to the letter.

23. On 22 June 2021, Mr Baron called HMRC about the HICBC letter.

24. HMRC issued discovery assessments on 23 June 2021 for £3,258.00 for the HICBC charges.

25. HMRC raised penalty assessments on 23 June 2021. The amount was set at £517.50, made up of 20% penalties for the first 4 tax years and 10% for 2019/20.

26. An appeal against the assessments and penalties was submitted to HMRC on 18 July 2021.

27. HMRC issued a view of the matter letter on 6 October 2022, which upheld the penalty. The letter offered a review or an appeal to the Tribunal if Mr Baron disagreed.

28. Mr Baron appealed to the Tribunal, which was received at the Tribunal on 22 October 2022, well within the 30 day window for the appeal.

29. The following facts have never been under dispute:

(1) Mr Baron's adjusted net income amounts on which the HICBC was calculated;

(2) The child benefit received by Mr Baron's partner by reference to which the HICBC was calculated.

(3) Mr Baron's ANI exceeded that of his partner for all years under appeal.

(4) Mr Baron did not submit self-assessment tax returns for the years under appeal.

PARTIES ARGUMENTS

Appellant's contentions

30. The appellant contended that the assessment and penalty should be waived for all periods before June 2021 because:

(1) he did not know that the HICBC existed until that time, nor that it might be relevant to him;

(2) he did not have any children of his own and when the advertising campaign was launched by HMRC in 2013-14, he was a single man in the army, often away on operations – if he had ever seen the adverts, he would have, correctly at that time, concluded they were completely irrelevant to him;

(3) he has never had any financial responsibility for his partner's children – they maintain separate financial positions and do not share financial information with each other. The children's father remains financially responsible for them;

(4) He asked his wife about the HICBC when he got the January 2021 letter, but she told him that it was not relevant to him and that she was not over the £50,000 threshold so it wasn't relevant to her either;

(5) HMRC should have made him aware of the problem well before 5 years of HICBC had arisen and have all the information available to them to do it;

(6) He has had to call HMRC regularly regarding other issues in his tax arrangements because his tax code has been repeatedly incorrect, but no one has ever mentioned the possibility of HICBC to him;

(7) He has always been in PAYE all the way through his working life and so had no reason to consider whether he had to submit self-assessment tax returns.

HMRC's contentions

31. HMRC submits that:

(1) the Appellant was liable to the HICBC and was required to give notice of his liability to HICBC within 6 months from the end of the year of the tax year in question;

(2) the Appellant did not make such a notification;

(3) the discovery assessments were validly issued because:

(a) Officer Akram made a discovery that there had been an insufficiency of tax on 11 June 2021 and notified that discovery to Mr Baron on 23 June 2021

(b) The officer's belief that there had been an insufficiency was adduced through the witness evidence given by an alternate officer due to the original officer being on maternity leave;

(c) The officer's belief was one that a reasonable officer could form;

(d) The assessments cannot be appealed on the basis of the decision in *Wilkes* because it does not meet the conditions under section 97 of the Finance Act 2022, most importantly that no appeal was made to HMRC before 30 June 2021;

(4) The assessments were correctly calculated based on undisputed adjusted net income figures;

(5) The discovery assessments for the first two years under appeal were raised based on extended time limits on the basis that Mr Baron had not taken reasonable care; whereas the later periods were within the normal 4-year limit;

(6) If the Tribunal finds that Mr Baron had a reasonable excuse (or had taken reasonable care), then the discovery assessments for the first two years will automatically fall away as having been out of time, in accordance with the decision in Hextall v HMRC [2023] UKFTT 00390 (TC)

(7) the penalties were validly assessed in accordance with paragraph 16(1) of Schedule 41 to Finance Act 2008;

(8) the potential lost revenue on which the penalties must be assessed is the amount of the HICBC to which Mr Baron was liable in respect of the tax years in question by reason of his failure to notify, in accordance with the decisions in Robertson v HMRC [2019] UKUT 0202 and Lau v HMRC [2018] UKFTT 230;

(9) the behaviour of the Appellant is determined as 'non-deliberate' and 'prompted', allowing for a penalty up to 30% of the PLR. The failure to notify penalty has been

charged at a rate of 20% for the first four tax years and 10% for the 2019/20 year on the basis that this came to HMRC's attention within 12 months of the tax becoming due. This represents full mitigation for the Appellant's quality of disclosure, when prompted;

(10) the disclosure was prompted by the letter of 14 June 2021;

(11) the reasons set out by the Appellant do not constitute a reasonable excuse for this failure to notify in accordance with the four-step test set out in *Perrin*; and in particular:

(a) the Appellant has not adduced any evidence that shows that the lack of knowledge of the HICBC charge was objectively reasonable by reference to specific factors that acted on him specifically and contributed to his lack of awareness;

(b) if there was a reasonable excuse, it was not remedied without unreasonable delay because there was no response to the January 2021 nudge letter;

(12) as per *Lau*, *Johnstone [2018] UKFTT 689*, and *Nonyane [2017] UKFTT 11*, the Appellant's failure to notify cannot be attributed to a failure by HMRC to inform the Appellant that the liability was due;

(13) only the Appellant held information about many of the variables that determine liability to the HICBC: non-PAYE sources of income; tax reliefs deductible in calculating ANI; the identity of a person's partner (if applicable); and which partner has the higher ANI;

(14) the Tribunal does not have jurisdiction to make comment or decisions on the conduct or administrative practices of HMRC; and

(15) the Appellant has not provided any special circumstances that could be considered by HMRC to reduce the penalty under paragraph 19(3) of Schedule 41 to FA 2008.

DISCUSSION

32. As noted above, there is no dispute about the calculations involved in this appeal, nor on the fundamental facts that no notification was made to HMRC and no returns were submitted.

33. The discovery assessments made in relation to 2017/18 to 2019/20 were made within the standard 4-year time limit in section 34(1) of TMA 1970. Since Mr Baron did not challenge the evidence from HMRC that there had been a discovery of an insufficiency of tax and accepted that, given what he now knows, he was liable for HICBC in those years, those discovery assessments must stand good and the appeal against them must be dismissed.

34. The discovery assessments made in relation to 2015/16 and 2016/17, however, rely on the extended 6 year time limit in section 36(1) of TMA 1970. These require that Mr Baron did not take reasonable care to avoid the insufficiency of tax.

35. We must follow the principles set out by the Upper Tribunal in *HMRC v Hicks* [2020] UKUT 12 (TCC), which held at [120] that:

> "Whether acts or omissions are careless involves a factual assessment having regard to all the relevant circumstances of the case. There are many decided cases as to what amounts to carelessness in relation to the completion of a self assessment tax return. The cases indicate that the conduct of the individual taxpayer is to be assessed by reference to a prudent and reasonable taxpayer in his position: see, for example, Atherton v HMRC [2019] STC 575 (Fancourt J and Judge Scott) at [37]."

36. Reasonable care and reasonable excuse are often considered to have the same material effect, with the exception of the last limb which requires, in the context of considering

reasonable excuse only, use to consider whether the excuse was remedied without unreasonable delay. Therefore the first three limbs of the test, set out by the Upper Tribunal, in *Christine Perrin v HMRC [2018] UKUT 0156*, are equally useful for establishing whether Mr Baron took reasonable care. Those first three steps are:

(1) first, establish what facts the taxpayer asserts give rise to a reasonable excuse;

(2) second, decide which of those facts are proven;

(3) third, decide whether, viewed objectively, those proven facts do amount to an objectively reasonable excuse for the default, e.g. by asking the question "was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?";

37. Mr Baron asserts that he was not aware of the existence of HICBC until the first letter in January 2021 and was not aware that it was relevant to him until the second letter in June 2021.

38. At the hearing, HMRC accepted that the media campaign undertaken around the introduction of HICBC was not relevant to Mr Baron and that there was not an expectation that awareness of HICBC would have developed at that time.

39. We accept Mr Baron's evidence that he was not aware of the existence of HICBC until the first letter came to him.

40. As the Upper Tribunal pointed out in [82] of *Perrin*, it is a matter of judgment in each case whether it was objectively reasonable for the particular taxpayer, in the circumstances of the case, to have been ignorant of the requirement in question, and for how long.

41. HMRC consider that Mr Baron has not put forward specific factors that acted on him specifically and contributed to his lack of awareness. We do not agree. We consider that he has adduced facts that are specific to him and are not of general application to the wider taxpayer body. HMRC did not challenge Mr Baron's evidence on these matters.

42. These are Mr Baron's absence from the country on military operations; the fact that the children in question were not his and he had no financial involvement in their upbringing; the fact that he did not know that his partner had ever claimed child benefit; the fact that the original claim for child benefit made by his partner was made a time before any warnings were included regarding the earnings limits.

43. On the basis of these specific factors, we find that ignorance of the HICBC was objectively reasonable for Mr Baron and that he had therefore taken reasonable care in the two tax years 2015/16 and 2016/17 to avoid the insufficiency of tax.

44. Therefore, HMRC are not entitled to rely on the extended time limits for the assessments for those two years. As a result, the assessments of £309 in respect of 2015/16 and £500 in respect of 2016/17 are out of time and should be cancelled.

45. Turning to the penalties for failure to notify. We find that the penalties were correctly calculated and were assessed and notified to Mr Baron in accordance with the law and were therefore validly issued. The percentage applied by HMRC in calculating the penalties is the lowest percentage available for a prompted disclosure and Mr Baron did not challenge that fact that his disclosure was prompted.

46. We must however, consider whether or not Mr Baron had a reasonable excuse for his failure to notify liability to HICBC. As we have found above, he has met the first three stages of this test in establishing that he took reasonable care.

47. In the context of reasonable excuse, we must consider when that excuse ended and whether the failure was then remedied without unreasonable delay.

48. We consider that the excuse ended in January 2021 when he received the letter. This letter contained the following paragraph:

> "You have to pay the charge if you have taxable income and taxable benefits over £50,000 in a tax year and in the same tax year:
>
> - you, or your spouse or partner, received any Child Benefit payments
> - your income is higher than your spouse or partner's income

49. Mr Baron's evidence was that he received this letter and discussed it with his partner, who told him that it was only to do with her income and that she wasn't near the threshold.

50. We consider that, on receipt of that letter, Mr Baron became aware of the potential for HICBC to apply to him. The terms of the paragraph set out above are very clear. In our view, it was not objectively reasonable for Mr Baron to take no further action other than speaking to his partner at this stage. His first action to remedy the issue was not taken until after the June letter.

51. As a result, we find that Mr Baron did not take action to remedy the failure without unreasonable delay and therefore we cannot find that he had a reasonable excuse for the failure to notify.

52. We also find that there was no flaw in HMRC's decision that no special circumstances had been established.

53. As a result, the penalties for failure to notify stand good.

DECISION AND DISPOSITION

54. Mr Baron's appeal against the discovery assessments for the years 2015/16 and 2016/17 is allowed.

55. Mr Baron's appeal against the discovery assessments for the years 2017/18 – 2019/2020 and against the failure to notify penalties for the years 2015/16 – 2019/20 are dismissed. The following assessments therefore stand good:

(1) Discovery assessment for 2017/18: £500

(2) Discovery assessment for 2018/19: £608

(3) Discovery assessment for 2019/20: £1341

(4) Failure to notify penalty for 2015/16: £61.80

(5) Failure to notify penalty for 2016/17: £100

(6) Failure to notify penalty for 2017/18: £100

(7) Failure to notify penalty for 2018/19: £121.60

(8) Failure to notify penalty for 2019/20: £134.10

RIGHT TO APPLY FOR PERMISSION TO APPEAL

56. 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.

ABIGAIL MCGREGOR
TRIBUNAL JUDGE

Release date: 26th JANUARY 2024