



TC07794

INCOME TAX – High Income Benefit Charge – penalty assessment – reasonable excuse based on ignorance of the law - observations on HMRC's extracts from Perrin and Nicholson v Morris - appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2018/03073

BETWEEN

BACHIR MOHAMED BELLOUL

Appellant

-and-

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

Respondents

TRIBUNAL: JUDGE NIGEL POPPLEWELL

The Tribunal determined the appeal on 26 July 2020 without a hearing with the consent of both parties under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 8 May 2018, HMRC's skeleton argument dated 29 January 2020, and a case specific bundle and a generic bundle of documents provided by HMRC.

DECISION

INTRODUCTION

1. This appeal concerns the High Income Child Benefit Charge (“**HICBC**”). The appellant has been assessed to HICBC for three tax years (2013-2014, 2014-2015 and 2015-2016), together with penalties (the “**penalties**”) for failing to notify chargeability under section 7 Taxes Management Act 1970 (“**TMA**”). The penalties have been assessed pursuant to Schedule 41 Finance Act 2008 (“**Schedule 41**”). The tax assessments for the three years amount to £4,780. The penalties amount to £829.40.
2. The appellant has accepted the tax assessments and paid them. However he has appealed against the penalties.

THE LAW

3. There was no dispute between the parties as to the relevant legislation which I summarise below.
4. By section 681B Income Tax (Earnings and Pensions) Act 2003 (which was inserted by Finance Act 2012 with effect for child benefit payments made after 7 January 2013) a person is liable to a charge to income tax, the HICBC, for a tax year if:
 - (1) His adjusted net income for the year is greater than £50,000;
 - (2) His partner’s (“partner” is defined in section 681G) adjusted net income is less than his, and
 - (3) He or his partner are entitled to child benefit.
5. Section 7 TMA provides that if a person is chargeable to income tax he must notify HMRC of that fact within 6 months after the end of the tax year. But if his income consists of PAYE income and he has no chargeable gains he is not required to notify his chargeability to income tax unless he is liable to the HICBC.
6. Paragraph 1 Schedule 41 provides that a person who has not been sent a tax return is liable to a penalty if he fails to comply with section 7 TMA. Para 6 Sch 41 provides that in the case of a “domestic matter” (which this is) where the failure was neither deliberate or concealed (as HMRC accept), the penalty is 30% of the “potential lost revenue” ; but paras 12 and 13 provide for a reduction in that percentage in the case of prompted disclosure where a taxpayer gives HMRC help in quantifying the unpaid tax, but subject to a minimum penalty rate of 10% if HMRC became aware of the failure less than 12 months after the tax “first becomes unpaid by reason of the failure” (paragraph 13(3)(a)) and 20% otherwise.
7. Paragraph 14 Schedule 41 provides that HMRC may reduce a penalty because of special circumstances (and by paragraph 19 the tribunal may do so where HMRC’s decision in this regard is flawed). Paragraph 20 provides that liability to a penalty does not arise if the taxpayer satisfies HMRC or the tribunal on an appeal that he had a reasonable excuse for the failure.
8. Under Section 115 TMA:

“Any notice or other document to be given, sent, served or delivered under the Taxes Acts may be served by post, and, if to be given, sent, served or delivered to or on any person

by HMRC may be so served addressed to that person..... at his usual or last known place of residence, or his place of business or employment.....”

9. Under Section 7 of the Interpretation Act 1978 (“IA”):

“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 to be 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”

EVIDENCE AND FACTS

10. I was provided with a court bundle, which included the appellant’s notice of appeal. The respondents’ skeleton argument contains useful background to the appeal. I was also provided with a substantial generic bundle which contained much information about the “advertising campaign” conducted by HMRC in relation to the HICBC. On the basis of this information I make the following findings of fact:

(1) The appellant had been in receipt of Child Benefit for the three tax years under appeal. HMRC’s records show this. HMRC were also aware that the appellant was claiming Child Benefit prior to the introduction of the changes to the tax regime in January 2013.

(2) In 2012, prior to the introduction of the HICBC, HMRC issued a number of press releases which detailed the introduction of the charge and advised high income Child Benefit parents to register for self-assessment. Similar press releases came out in 2014. In 2018 and 2019 HMRC, in response to misgivings raised in connection with reasonable excuse defences issued a further round of press releases dealing with that issue. There is considerable information about the charge on HMRC’s website.

(3) The appellant was aware of none of these press releases, nor of this information. He received no letter advising him that he might be liable to the HICBC until October 2017.

(4) For all of the tax years under appeal the appellant was an employee and all of his taxes had been paid through his employer’s PAYE payroll.

(5) For the tax year 2013-2014 his adjusted net income was £62,269. For 2014-2015 it was £68,967 and for 2015-2016 it was £58,000.

(6) There is no evidence that the appellant had been required to submit a self-assessment tax return for either the years in question or for any previous tax year. HMRC had told him that for the tax years 2012 and 2013 there was no need for the appellant to file a self-assessment tax return.

(7) On 18 October 2017 HMRC issued a letter to the appellant advising him that their records indicated that he might be liable to the HICBC and had not registered for self-assessment for the tax years under appeal. HMRC calculated the amount of the charge as being £4,794.

(8) The appellant telephoned HMRC on 1 November 2017 and agreed to call back to confirm the amounts assessed.

(9) In a letter dated 30 November 2017 to HMRC, the appellant recalculated the charge, and also pointed out to HMRC that neither he nor his spouse have been aware of the change in law imposing the charge; it was not until he received HMRC's letter of October 2017 that he was liable for it; he and his wife who is a teacher had looked at all correspondence from the Child Benefit office in 2013-2014 and could find no letter that warned them or advise them of any change in the law. And he and his spouse did the same as regards correspondence from HMRC. He also asked if HMRC would waive the charge.

(10) HMRC replied in a letter dated 4 December 2017 telling the appellant that they were unable to waive the charge and explained the assessment calculations. The appellant responded to that letter on 13 December 2017 reiterating the fact that neither he nor his wife had received any correspondence from HMRC informing them of the changes to Child Benefit, and informing HMRC that had they received any such letter, they would have immediately acted upon it. He also makes the point that while HMRC have said in their letter that he had a duty to inform the Child Benefit Office of any changes to his family circumstances, he could not see how the changes to the way in which Child Benefit is paid was such a change in circumstance. The legislation might have changed but he was not aware of those changes.

(11) On 22 December 2017 HMRC issued the assessments for the HICBC. They did so on the basis that in 2015-2016 the appellant had received Child Benefit of £1,590. They have subsequently discovered that the amount should have been £1,576.

(12) On 2 January 2018 HMRC issued penalty notice to the appellant. The penalty was calculated at 20% of the tax liability for the years 2013-2014 and 2014-2015, and 10% for the tax year 2015-2016. Those penalty notices assessed penalties of £831.60, but this was based on the erroneous Child Benefit figure of £1,590. The penalties based on the correct amount are £829.40. In other words the amount in dispute in this appeal.

(13) On 8 January 2018 the appellant responded to the penalty assessment letter asking to spread the cost of the penalties and reiterating that they had never received any notification from either the Child Benefit Office or from HMRC concerning the HICBC. The appellant also said that he wished to appeal against the penalties.

(14) On 31 January 2018 HMRC wrote to the appellant rejecting his appeal on the basis they did not believe that he had a reasonable excuse for having failed to notify his chargeability to the HICBC.

(15) On 27 February 2018 the appellant requested a review of that decision. The outcome of that review was that the decision to reject the appellant's appeal was upheld. On 8 May 2018 the appellant lodged an appeal with the tribunal.

BURDEN OF PROOF

11. The burden of establishing that it has made a valid in time assessment for the penalty in the correct amount lies with HMRC. The standard of proof is the balance of probabilities.

12. If they can establish this then the burden of proving that he has a reasonable excuse, or that there are special circumstances, lies with the appellant. The standard of proof is the same namely the balance of probabilities.

SUBMISSIONS

13. HMRC submit that the appellant has not challenged the tax assessments and has paid them. Nor is there any dispute regarding the adjusted net income for the relevant tax years; the fact that the appellant received Child Benefit during those tax years; that the appellant was not issued with a notice to file a self-assessment tax return for the tax years in question; nor that the appellant failed to notify HMRC of his liability to the HICBC for those tax years. They also say that the appellant has accepted the assessments and has made steps to pay them. There is therefore no need for these to be considered further and that in the absence of any challenge to the assessments the Schedule 41 requirement that the appellant has failed to notify chargeability is made out. They do not consider that the appellant has a reasonable excuse for failing to notify chargeability. They say that they have a record of issuing a letter (an SA252) to the appellant at his address at 8 Cowper Road Worthing on 17 August 2013. That letter advised him to check his tax code and report any changes required; to check if he was liable to the HICBC; to register for self-assessment if he was liable to the charge. The appellant, therefore, was one of the 800,000 taxpayers who was notified about the HICBC prior to it coming into force. However the taxpayer still failed to notify his chargeability even though he was in a more advantageous position than the general population. Notwithstanding the fact that they issued this letter, their view is that there is no obligation to notify specific taxpayers of any change to legislation might affect the. Individuals need to take steps to understand the law and how it applies in the circumstances. HMRC do not consider that ignorance of the law comprises a reasonable excuse. They cite a variety of extracts from case law to justify this, including paragraph 81 from the Upper Tribunal decision in *Christine Perrin v HMRC* [2018] UKUT 156 (“*Perrin*”) (although, interestingly, and disappointingly, they do not mention paragraph [82] of that decision which is set out below). They submit I have no jurisdiction to consider the appellant’s claim of unfairness.

14. The appellant submits that he was unaware of his liability for the HICBC until he received HMRC’s letter of 18 October 2017. He did not receive the SA252 as HMRC allege. He and his wife have been back through all the correspondence with HMRC and the Child Benefit Office and have no record of receiving anything which puts them on notice that there was a change to the Child Benefit system or that he was liable to notify chargeability to the HICBC. He was disadvantaged compared with those 800,000 taxpayers who were notified of the changes and a smaller number to whom SA252 letters had been sent. If he or his spouse had received a letter, they would have acted on it promptly, as he did when he received HMRC’s letter of 18 October 2017. He had been told by HMRC that he did not need to complete self-assessment tax returns, and all his taxes were paid by his employer’s PAYE payroll as he was an employee throughout the tax years under appeal. It is unfair for HMRC to penalise him for failing to comply with the change in law of which he was unaware.

DISCUSSION

15. I find that the penalties set out in the notice of penalty assessment dated 2 January 2018 were properly and accurately calculated in accordance with the correct legal principles (save as regards the penalty for the year 2015-2016 which has not been correctly calculated and should be £126) and that that notice was served on the appellant.

16. So the pendulum now swings to the appellant to establish that he has a reasonable excuse or that there are special circumstances which warrant a reduction in the penalty.

17. The legal principles which I must consider when an appellant submits that he has a reasonable excuse are set out in *Perrin*. The relevant extract is set out below:

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

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).

(1) Second, decide which of those facts are proven.

(2) 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?”

(3) Fourth, having decided when any reasonable excuse ceased, decide whether the taxpayer remedied the failure without unreasonable delay after that time (unless, exceptionally, the failure was remedied before the reasonable excuse ceased). In doing so, the FTT should again decide the matter objectively, but taking into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times.

82. One situation that can sometimes cause difficulties is when the taxpayer’s asserted reasonable excuse is purely that he/she did not know of the particular requirement that has been shown to have been breached. It is a much-cited aphorism that “ignorance of the law is no excuse”, and on occasion this has been given as a reason why the defence of reasonable excuse cannot be available in such circumstances. We see no basis for this argument. Some requirements of the law are well-known, simple and straightforward but others are much less so. It will be a matter of judgment for the FTT in each case whether it was objectively reasonable for the particular taxpayer, in the circumstances of the case, to have been ignorant of the requirement in question, and for how long. The Clean Car Co itself provides an example of such a situation.”

18. The test I adopt in determining whether the appellant has an objectively reasonable excuse is that set out in *The Clean Car Co Ltd v C&E Commissioners* [1991] VATTR 234, in which Judge Medd QC said:

“The test of whether or not there is a reasonable excuse is an objective one. In my judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?”

19. It is clear from the foregoing extract from *Perrin* that ignorance of the law can, in certain circumstances, comprise a reasonable excuse (notwithstanding HMRC's submission to the contrary). It is a matter of judgment for me as to whether it is objectively reasonable for the appellant in the circumstances of this case to have been ignorant of the requirement to complete a self-assessment tax return in light of his liability to the HICBC.

20. One of the most crucial circumstances of this case concerns whether HMRC did, as they contend, give an SA252 to the appellant in August 2013. The appellant contends that he received no such communication. The importance of this document can be readily seen from an analysis of its contents. An SA 252 explains the changes to the Child Benefit regime and that the HICBC came into effect on 7 January 2013. It goes on to tell the taxpayer that they are liable for the charge if they have income of over £50,000 a year, either the taxpayer or his/her partner received any Child Benefit Payments after 7 January 2013, and the taxpayer's income for the tax year is higher than his/her partners. If the charge applies then the recipient must register for self-assessment by 5 October 2013. In other words it sets out in commendably accurate and clear text the criteria which a taxpayer must meet in order to be liable to the charge and what that taxpayer should do if they fall within those criteria. To my mind it is very difficult for a taxpayer who has received an SA 252 to claim that they were ignorant of those criteria or that he or she needed to register for self-assessment and submit a tax return to declare the Child Benefit. In other words, the requirement to notify chargeability.

21. There is a simple dispute here. HMRC say that they gave an SA 252 to the appellant who denies receipt. I have found as a fact that the appellant did not receive the SA 252. I need to explain why I have made that finding.

22. The Upper Tribunal in the cases of *HMRC v Nigel Rogers and Craig Shaw* [2019] UKUT 0406 (“**Rogers and Shaw**”), and in *Barry Edwards v HMRC* [2019] UKUT 131 (“**Edwards**”) have provided some extremely helpful guidance regarding the evidence required when considering a dispute between HMRC and a taxpayer as to whether HMRC have given a taxpayer a document (in both cases that document was a notice to file a return under section 8 Taxes Management Act 1970).

23. In *Rogers and Shaw* the Upper Tribunal said:

“48..... Conscious that the FTT determines large numbers of “default paper” penalty appeals, we give the following guidance to the FTT on how to address any future concerns that it has on the validity of s8 notices.

49. Paragraph [101] of *Goldsmith* records HMRC's acceptance (which in our view is correct) that, in order to impose a penalty for late filing of a tax return under Schedule 55, HMRC must prove that a notice under s8 was in fact served. Before us, HMRC seemed less ready to accept this point, but we consider it follows from the following passage of the judgment of the Upper Tribunal (Judges Herrington and Poole) in *Christine Perrin v HMRC* [2018] UKUT 156 (TC):

69. 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.

50. It follows that, if HMRC fail to provide any evidence at all to the effect that a s8 notice was served, they will have failed to demonstrate a crucial fact on which their entitlement to a penalty hinges and the FTT will necessarily set aside the penalties charged for alleged failure to comply with that notice. 51. Where HMRC have given some evidence that a s8 notice was served, it will then be a matter for the FTT to determine whether that evidence is sufficiently strong to discharge HMRC's burden of proof. The FTT's assessment of the evidence should take into account the extent to which the taxpayer is disputing receiving a s8 notice. Evidence to the effect that HMRC's systems record a s8 notice as having been sent is, on its own, relatively weak evidence (since it does not itself demonstrate that a s8 notice was actually sent, and may not itself demonstrate the address to which it was sent). However, the FTT may nevertheless regard such evidence as sufficient if the taxpayer is not disputing having received a notice to file. By contrast, as the Upper Tribunal (Nugee J and Judge Herrington) identified at [56] of *Barry Edwards v HMRC* [2019] UKUT 131 (TCC) if the taxpayer is disputing having received a notice, the Tribunal is unlikely to accept weak evidence consisting only of a record that HMRC's systems record a s8 notice as having been sent to an unspecified address. In such a case, the Tribunal may look for further corroborating evidence: for example evidence that a s8 notice was actually sent to the taxpayer at the correct address or evidence that the taxpayer set about trying to submit a tax return before the deadline, from which it might be inferred that the taxpayer had received a notice requiring him or her to do so."

24. And in *Edwards*:

"47. Mr Ripley submitted that HMRC needed to demonstrate to the FTT that notices to file answering the statutory description in s 8 TMA 1970 have been properly addressed and sent to Mr Edwards. However, HMRC did not produce any copies of the notices to file nor did they produce any witness evidence explaining that valid notices to file had been properly issued but could not be produced for some reason. The FTT appear to have accepted HMRC's factual case merely on the basis of an assertion by HMRC's representative at the hearing.

48. As regards the material referred to at [12] to [14] above, Mr Ripley submits that none of this demonstrates that notices to file were sent or, if they were, that they were sent to the correct address for the following reasons. There was no evidence before the FTT explaining the various screenshots which the material comprised. In particular, there is no evidence of the specific dates on which the notices to file were sent, the fact that the system records that returns were received does not demonstrate that notices to file were in fact sent, and, even if they were, there is no evidence to demonstrate the address to which they were sent. There was nothing to indicate that such address was still valid for the last two of the three tax years to which this appeal relates. In essence, the SA Notes merely evidence the contact that HMRC have had with Mr Edwards over the years.

49. Mr Ripley referred us to *Qureshi v HMRC* [2018] UKFTT 0115 (TC), a decision of the FTT where the Tribunal declined to accept similar evidence as sufficient to demonstrate that notices to file had been sent to the taxpayer. That was a case where it appears that the sole ground of appeal against late filing penalties, of which the FTT found HMRC had express notice, was that the taxpayer had not received any notices requiring her to file any self-assessment tax returns.

50. In that case the FTT, correctly in our view, stated that documents on their own without a supporting witness statement may be sufficient to prove relevant facts. It said this at [8]:

“In this Tribunal witness evidence can be and normally should be adduced to prove relevant facts. Documents (if admitted or proved) are also admissible. Such documents will often contain hearsay evidence, but often from a source of unknown or unspecified provenance. Hearsay evidence is admissible, albeit that it will be a matter of judgement for the Tribunal to decide what weight and reliance can be placed upon it.”

51. The FTT also made the following observations at [14] to [16] with which we would agree:

“14. We acknowledge that in large organisations, where many processes may be automated, a single individual may not be able to give witness evidence that he/she physically placed a notice to file into an envelope (on a specific date), correctly addressed it to a given appellant’s address held on file and then sealed it in a postage prepaid envelope before committing it to the tender care of the Royal Mail. That is why Courts and Tribunals admit evidence of system which, if sufficiently detailed and cogent, may well be sufficient to discharge the burden of proving that such a notice was sent in the ordinary course of the way in which a particular business or organisation operates its systems for the dispatch of such material.

15. We also point out what should be obvious to all concerned, which is that assertions from a presenting officer or advocate that this or that “would have” or “should have” happened carries no evidential weight whatsoever. An advocate’s assertions and/or submissions are not evidence, even if purportedly based upon knowledge of how any given system should operate.

16. Evidence of system might establish the propositions advanced by [HMRC’s Presenting Officer]; but there is no such evidence before us.”

52. In that particular case, the FTT did not consider the relevant evidence, which appears to be very similar to the evidence available to the FTT in this case, to be “anywhere near sufficient to prove, on the balance of probabilities, that in respect of each relevant tax year the respondent sent the appellant a notice to file...”. The FTT declined to infer that the production of a “Return Summary” sheet showing “Return Issue date” with the date appearing on it alongside was adequate to allow them to find that any notice to file was in fact put in the post by HMRC in an envelope with postage prepaid, properly addressed to the appellant: see [17] of the decision

53. As regards the drawing of inferences, the FTT said this (correctly in our view) at [18]:

“... a Court or Tribunal may only draw proper inferences and an inference will only be properly drawn in a civil action if it is more probable than not that the inference contended for is probably the only available inference that can be properly drawn.”

54. At [19] the FTT concluded that it was not right or proper to draw the necessary inferences in that case because it considered that there was an “absence of cogent and/or

reliable evidence of system”, finding that the documentary evidence produced was “no more than equivocal”.

55. Mr Ripley submitted that the position was the same in this case, that is that the FTT was not entitled to draw an inference from the material provided by HMRC that the relevant notices to file had been sent.

56. We accept that on its own the material before the FTT would not have enabled the FTT properly to draw the necessary inference that notices to file were sent to Mr Edwards. However, there was other evidence available to the FTT on the notice to file issue, namely the oral evidence that Mr Edwards gave at the hearing, as well as the entries in HMRC’s records recording its interactions with Mr Edwards, and in particular the sending of penalty notices and the subsequent communications with Mr Edwards in relation to those notices. Mr Edwards did not dispute the fact that he was sent the various penalty notices and reminders, as recorded by the FTT at [10] of the Decision.”

25. Although it is my view that HMRC was under no obligation to give an SA 252 to the appellant, for the reasons set out below, I also take the view that the provisions of section 118 TMA and section 7 IA are highly relevant to establishing whether an SA252 was sent to and received by this appellant.

26. The only evidence that HMRC have adduced to support their submission in their skeleton argument (which is not itself evidence) is a computer printout. This contains the appellant’s name below which there are various headings which indicate that there was an outbound contact at 11.36 on 17 August 2013 of a document type SA 252. There is no indication on that print out of the address to which the document was sent, although, in a separate document, HMRC have set out the contact addresses which they had for the appellant at that time, and it is clear from that that the relevant contact address in 2013 was the address at Cowper Road, Worthing.

27. Since there is no address on the computer printout which HMRC say evidences the sending of the SA252, there is nothing to tie the contact address which HMRC had on their files at the time with that computer printout. So this falls into “weak evidence consisting only of a record that HMRC’s systems record a s8 notice as having been sent to an unspecified address. In such a case, the Tribunal may look for further corroborating evidence: for example that a s8 notice was actually sent to the taxpayer at the correct address or evidence that the taxpayer set about trying to submit a tax return before the deadline, from which it might be inferred that the taxpayer had received a notice requiring him or her to do so.” (Paragraph [50] from *Rogers and Shaw*).

28. In *Edwards* the Upper Tribunal indicated that on its own the material before the FTT would not have enabled the FTT properly to draw the necessary inference that a notice to file was sent to the taxpayer. The material in question comprised a copy of a “return summary” sheet showing the return issue date with the date appearing on it alongside. The tribunal went on to find, however, that there was other evidence available to the FTT on which it could and should have drawn the inference that a notice to file had been served on the appellant.

29. The lesson from these two cases, therefore, is that where a taxpayer disputes receipt of a notice, HMRC need to show corroborating evidence in addition to a computer printout which itself includes no specified address to discharge their burden of proving that a document was given to the taxpayer.

30. There is no such additional or corroborating evidence in the case of this taxpayer. He disputes receipt of the document. I accept this. There is no evidence that the appellant undertook any form of action in 2013. There is, however, unequivocal evidence, which is not disputed, that following HMRC's letter of 18 October 2017, the appellant promptly contacted HMRC by telephone on 1 November 2017. It is my view that had the appellant received a document in 2013, he would have responded with equal alacrity. His failure to do so is cogent evidence that he did not receive an SA252 in 2013 as alleged by HMRC.

31. What this computer printout does, however, show is that HMRC were aware that this taxpayer was claiming Child Benefit prior to the introduction of the changes to the law in January 2013.

32. So this appellant is in the same position as any other appellant in an HICBC appeal who has received no notification of the change to the law relating to the taxation of Child Benefit which took effect in January 2013.

33. It is clear from the evidence in the generic bundle that notwithstanding that the appellant was not specifically notified of the change in law, prior to the introduction of the HICBC, HMRC launched an extensive information campaign to make the general public aware of the introduction of the charge.

34. However I have found as a fact that notwithstanding HMRC's advertising campaign, this appellant was not aware of the HICBC until October 2017.

35. The appellant submits that he should have been made specifically aware of the charge. HMRC should have notified him of his liability. HMRC say that there is no such obligation on them. I agree with them on this point. But I would point out that it is not unreasonable for this appellant to make the point that HMRC had known that he was claiming Child Benefit, and it would have been open to HMRC to have specifically notified him in 2012 about the introduction of HICBC given this knowledge even if the appellant had not been a high earner at that time. Indeed, given that he was an ongoing claimant, and known to be such by HMRC, it would have been open to HMRC to have sent him some form of communication between 2013 and 2020, along the lines of an SA252, suggesting that the recipient might test whether they could be liable to the HICBC. However I do not believe that that gives rise to any legitimate expectation on the part of this appellant that he could justifiably expect HMRC to specifically notify him of the change in law. So a lack of any such specific notification cannot be a reasonable excuse. But I do think that it is objectively reasonable for the appellant in the circumstances of this case to have been ignorant of the requirement to complete a self-assessment tax return in light of his liability to the HICBC.

36. The reason I have come to this conclusion is largely because the appellant was not within the self assessment regime up to and including the three tax years in question, and during those tax years he was an employee. There was nothing that put him on notice that the HICBC had been introduced, and that he was affected by it. Whilst I have already said that I did not expect HMRC to specifically notify this particular taxpayer of the changes in law, nor indeed to alert him to the fact that he might be affected by these changes, there seems equally no reason why this appellant should have thought that there was any change to the Child Benefit regime having been claiming it before January 2013. In the generic bundle, HMRC have included copies of the documents which a Child Benefit claimant would have completed both before and after the introduction of the HICBC. It is clear from those documents that a claimant making a Child Benefit claim after the introduction of the charge would have clearly been put on notice of the

charge. However HMRC have not submitted that this appellant had been sent those documents, nor that, as an ongoing claimant, he would have seen them in order to make his ongoing claims. HMRC have simply included them in the bundle but have not referred to their relevance regarding the knowledge of this taxpayer and his spouse in their detailed and specific submissions.

37. There is an important difference between the circumstances of someone who is within the self assessment regime and someone who is not. This difference is twofold. Firstly, a taxpayer who submits a self-assessment tax return makes a declaration that the information given in the return is correct and complete to the best of the taxpayer's knowledge and belief. It is implicit in making that declaration that the taxpayer will have undertaken some form of analysis concerning his tax position, and it would be reasonable to assume that such a taxpayer would have considered HMRC's website and might therefore have come across the HICBC information. Secondly, and equally if not more importantly, the tax return guide which explains to a taxpayer how to complete a return, contains detailed information (on page TRG 22) about the charge and the criteria which a taxpayer completing the return needs to consider. To my mind it would be very difficult for a taxpayer who completes a tax return after 7 January 2013 to allege that he or she was not on notice about the charge. But of course an employee who does not complete a self-assessment tax return makes no such declaration, nor are the notes in the guide something of which he or she will be aware.

38. As I have previously stated, it is my view that the appellant is a conscientious taxpayer, and that had anything prompted him to enquire into the charge, he would have done so promptly.

39. But there was nothing which prompted the appellant to access the information which is available about the charge on HMRC's website. HMRC cite an extract from a case with which I deal in more detail below, which according to them indicates that it is not reasonable for HMRC to trawl through their records for information and notify a taxpayer of a liability based on that information. This extract is taken out of context since it relates to the provision of information required to gainsay an HMRC tax assessment. But equally it seems to me unreasonable for HMRC to expect taxpayers to trawl through HMRC's website and the prolific number of public notices to see whether they might be affected by a tax change of which they have no knowledge.

40. In my view it is not incumbent on the objectively reasonable taxpayer without notice of a change in tax law to go rummaging through all of HMRC's information on the off chance that there might be something which is hidden away in it which is relevant to his tax position.

41. Is it a reasonable for this taxpayer not to have so rummaged? In my view yes. I can see no reason why he was not entitled to assume that the Child Benefit regime would not continue unaffected given that he was outside the self-assessment regime, was being paid as an employee, and there was nothing to put him specifically on notice of the changes other than HMRC's information (press releases etc) together with information on their website of which I have found as a fact that this appellant was not aware. HMRC have not indicated the publications in which those press releases featured, and that they had "trickled down" so that it would have been impossible for any individual in this country not to have seen them.

42. In the generic bundle, HMRC have included copies of a number of cases. In their skeleton argument they have identified a number of these under the heading "relevant case law". They have then referred to some of those cases (but not all of them) in more detail in that skeleton. .

I have been through those cases. There is nothing in them which causes me to depart from my foregoing view that in the circumstances of this appellant, his ignorance comprises a reasonable excuse for his failure to notify chargeability.

43. The cases identified by HMRC as being relevant are:

- (1) *Nicholson v Morris* [1976] STC 269
- (2) *HMRC v Hok Ltd* [2012] UKUT 363 (TCC)
- (3) *Christine Perrin v HMRC* [2018] UKUT 156 (TC)
- (4) *HMRC v Robertson* [2019] UKUT 0202 TCC
- (5) *Nonyane v HMRC* [2017] UKFTT 011 (TC)
- (6) *Hesketh & Anor v HMRC* [2017] UKFTT 871 (TC)
- (7) *Lau v HMRC* [2018] UKFTT 0230 (TC)
- (8) *Birkett v HMRC* [2017] UKUT 0089
- (9) *Johnstone v HMRC* [2018] UKFTT 689 (TC)

44. *Lau, Robertson, Johnston, Nonayne* and *Hesketh* are all cited as authority for the proposition that there is no obligation on HMRC to notify, specifically, a taxpayer of new legislation. I take no issue with that proposition and agree with it.

45. *Robertson* is also authority for the proposition that the potential lost revenue is the income tax to which the appellant is liable in respect of the tax years in question by reason of the failure to notify and the fact that there was no assessment does not affect the liability. I am bound by that proposition, and I have found in this case that the potential lost revenue was correctly calculated. *Lau* and *Birkett* are cited as supporting this principle. I accept that.

46. HMRC then cite a number of cases which, in their view, show that ignorance of the law cannot be a reasonable excuse. One of these cases is *Nicholson v Morris* and HMRC extract the following from paragraph [109] of that decision:

“...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.”

47. I take issue with HMRC’s contention that either the case or this extract from it shows what they claim it to show. This is not a reasonable excuse case, it concerns a barristers clerk who was assessed to an additional amount of income tax on the basis that he had under declared his income. The issue was whether he could displace the estimated assessments made by HMRC to recover that income when he had given no evidence of what his income actually was. It was not a reasonable excuse case, and earlier in the extract set out above, the Judge said:

“..... That is why, of course, the Taxes Management Act throws upon the taxpayer the onus of showing that the assessments are wrong. It is the taxpayer who knows and the taxpayer who is in a position (or, if not in a position, who certainly should be in a position) to provide the right answer and chapter and verse for the right answer.....”

48. It is disingenuous for HMRC to include such a self-serving extract in their skeleton argument and suggest that the issue which it is discussing is reasonable excuse.

49. It seems to me that in any case, in the case of HICBC, HMRC have, to a limited extent, dug into their vaults even though they claim to be under no obligation on the basis of this extract to do so. They had sent to approximately 800,000 higher rate taxpayers notification that they thought might be affected by the changes to the Child Benefit regime and followed this up by issuing to a proportion of those an SA252. Presumably they did this on the basis that, as they say in the taxpayer's charter (broadly paraphrased) that one of their aims is to help taxpayers get their tax affairs right. And that of course is a highly commendable aim. And I accept too there is no statutory or other binding obligation on HMRC to notify an individual taxpayer of a change of law. But I ask myself whether HMRC might not have done better to have informed the Child Benefit Agency of the changes (there is no evidence before me whether they did or did not) and then left it to that Agency to notify every single claimant of the law changes. I strongly suspect that that Agency did have the names and addresses of everyone who was claiming Child Benefit, even though HMRC does not. This would have been a proportionate means of promulgating the information about the change of law to the cohort of people who were affected by it.

50. I also think it is unattractive for HMRC to argue that, on the one hand, it has no obligation to dig through its vaults, yet it expects a taxpayer to do so.

51. I have commented on HMRC's failure to include, in its extract from *Perrin*, the crucial paragraph, paragraph [82], of that decision, and I am concerned about that failure since paragraph [82] makes clear that in certain circumstances ignorance of the law can comprise a reasonable excuse. The cases of *Hesketh*, *Lau*, *Nicholson* and *Johnston* are all cases decided before the publication of the Upper Tribunal decision in *Perrin*, and all, broadly speaking, state that as a matter of principle, ignorance of the law cannot comprise a reasonable excuse. Furthermore, *Hesketh* is a case which deals with a failure to file NRCGT returns following the disposal of UK property. This is a very different position to an appellant who has failed to notify chargeability to HICBC.

52. *Hok* is cited as authority for the proposition that the FTT has no jurisdiction to discharge or adjust a penalty on the basis of unfairness. I agree with that proposition.

53. So for the foregoing reasons I find that the appellant has a reasonable excuse for failing to notify HMRC of his liability to pay HICBC for the three tax years in question.

54. HMRC had considered special circumstances when reviewing the appellant's appeal and concluded that there were none. I agree.

55. I agree too with HMRC that I do not have jurisdiction to consider the appellant's claim that he has been dealt with unfairly.

DECISION

56. I allow the appellant's appeal.

A FINAL WORD

57. I have made my misgivings about HMRC's reliance on the case of *Nicholson v Morris* earlier in this decision. I am also critical that the extract from *Perrin* which they include in their skeleton argument (and as they have done in a number of other HICBC cases which I have dealt with) does not include the crucial paragraph [82] which deals with the principle that in certain circumstances ignorance of the law can comprise a reasonable excuse. If HMRC are going to cite *Perrin* and include extracts from that case then it is only fair that they include paragraph [82].

RIGHT TO APPLY FOR PERMISSION TO APPEAL

58. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

NIGEL POPPLEWELL

TRIBUNAL JUDGE

RELEASE DATE: 30 JULY 2020