Neutral Citation: [2023] UKFTT 00018 (TC)

Case Number: TC08680

FIRST-TIER TRIBUNAL
TAX CHAMBER

Location: Decided on the papers

Appeal reference: TC/2021/02935

INCOME TAX – High Income Child Benefit Charge – penalty for failure to notify – appeal allowed

Judgment date: 29 December 2022

Decided by:

TRIBUNAL JUDGE NIGEL POPPLEWELL

Between

MARK GOODALL

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

The Tribunal determined the appeal on 22 December 2022 without a hearing 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 12 August 2021 (with enclosures), HMRC's Statement of Case dated 20 June 2022. I was also provided with a bundle of documents relevant to this appeal as well as a "generic bundle" which HMRC supply for all HICBC cases.

DECISION

INTRODUCTION

1. This appeal concerns the High Income Child Benefit Charge ("**HICBC**"). The appellant has been assessed to HICBC for two tax years (2018-2019 and 2019-2020), together with 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 assessment for 2018-2019 is £1,788.00. The tax assessment for 2019-2020 is £1,126.

2. The appellant has accepted the tax assessments and paid them pursuant to a settlement agreement under section 54 TMA. Following a review of the penalties, HMRC cancelled the penalty for 2018-2019. This appeal is therefore only against the penalty for 2019-2020. The amount of the penalty is £112.60 ("**the Penalty**").

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. Paragraph 6 Schedule 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.

EVIDENCE AND FACTS

8. I was provided with a hearing bundle of documents which included the appellant's notice of appeal. The respondents' statement of case 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's spouse had been in receipt of child benefit from March 2005. HMRC's records show this.

(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's income for 2018-2019, recorded in the appellant's employers PAYE records was £61,230.23. His income for the tax year 2019-2020 was £56,342.77. For both tax years, the appellant was an employee and outside the self-assessment regime.

(4) On 2 December 2019, HMRC issued a "nudge" letter (the "**nudge letter**"). That letter was addressed to the appellant at 135 Ellesmere Road, Shrewsbury. The appellant's evidence is that he did not receive that letter. It was not, however, returned to HMRC as undelivered.

(5) The nudge letter explained that HMRC wanted to help the taxpayer to understand whether he needed to pay the HICBC. It explained the financial circumstances in which a taxpayer might be liable to pay the charge, what to do next, and that if a taxpayer is not sure if he or she needed to pay the charge, the taxpayer should phone HMRC for assistance.

(6) On 22 March 2021, in a letter addressed to the same address as the nudge letter, HMRC explained that their records showed that the appellant was liable to the HICBC and that they considered that he was liable to a charge of £2,914 for the two years in question. It also explained why late payment penalties and interest might be due.

(7) On 29 March 2021, the appellant contacted HMRC by telephone confirming liability to the charge and agreeing his income figures as set out above.

(8) On 7 April 2021 HMRC issued assessments for both the charge and the penalties. The appellant appealed against these on 21 April 2021. On 21 May 2021 HMRC providing their view of the matter, upheld the decisions, and invited the appellant to request a review. The appellant requested a review, and on 4 August 2021 HMRC provided their review conclusion which cancelled the penalty for 2018-2019, but upheld the penalty for 2019-2020.

(9) On 12 August 2021 the appellant lodged an in-time appeal with the Tribunal against both the penalties and the assessments. It appears from his notice of appeal that by that time the appellant had paid the assessments, and to do so had borrowed money from his parents. His appeal, therefore, was for a refund of the money previously paid.

(10) Following a telephone conversation between HMRC and the appellant on 11 October 2022, the appeal against the HICBC assessments was settled by agreement under section 54 TMA as evidenced in a letter dated 11 October 2022 from HMRC to the appellant. This settlement letter records that the appellant had paid the amounts assessed to the HICBC.

BURDEN OF PROOF

9. The burden of establishing that they have 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.

10. 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

11. The appellant submits as follows;

(1) He was unaware of the introduction of the HICBC and of any obligation to notify liability to the charge.

(2) He did not know that his income was over £50,000 in the years in question. He had cashed in some company shares in 2018-2019 and again in 2019-2020 in order to buy and furnish a new house. He did not realise that the money generated from the sale of the shares was added to his annual salary.

(3) Had he realised he had gone over the £50,000 limit he would have contacted HMRC immediately.

(4) He did not receive the nudge letter. He has checked his records. He is a very nervous person when it comes to money, and had he received the letter he would have contacted HMRC immediately and would not have let another year go by and thus become liable for further charges.

(5) The fact that the letter was not returned to HMRC is not proof that he had received it.

12. HMRC submit as follows:

(1) In the circumstances of this appeal, the appellant might have a reasonable excuse for failing to notify chargeability for the tax year 2018-2019, as he had not been sent an awareness letter until the nudge letter was sent to him on 2 December 2019. As HMRC had not issued the nudge letter to him until that date, HMRC accepted that he did not know about the charge until then and thus had a reasonable excuse for the tax year 2018-2019.

(2) However, he had no such reasonable excuse for the tax year 2019-2020, since the nudge letter clearly put him on notice that he might have been liable to HICBC and he should have contacted HMRC sooner than he did.

(3) The appellant has stated that he did not receive the nudge letter and that had he done so he would have contacted HMRC sooner. He had told HMRC that he had, at that time, just moved into a new house. However, his address changed to 135 Ellesmere Road on 21 December 2018, a year before the nudge letter was issued. There is no record of the letter having been returned by Royal Mail as undelivered. HMRC have no reason to believe that it was not delivered.

(4) No reasonable taxpayer in the appellant's position could believe that they could receive considerable sums for cashing in shares (over £17,700 in total) without it having tax implications. The appellant's failure to consider those tax implications, or to take advice on any tax implications, cannot be deemed to be a reasonable excuse on the basis of ignorance of the law.

DISCUSSION

13. I find that the penalty assessment dated 7 April 2021 has been properly and accurately calculated in accordance with the correct legal principles and was served on the appellant.

14. 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.

15. The legal principles which I must consider when an appellant submits that he has a reasonable excuse are set out in the the Upper Tribunal decision in *Christine Perrin v HMRC* [2018] UKUT 156 ("***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:
>
> (1) 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).
>
> (2) Second, decide which of those facts are proven.
>
> (3) 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?"
>
> (4) 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".

16. 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?"

17. It is clear from the foregoing extract from *Perrin* that ignorance of the law can, in certain circumstances, comprise a reasonable excuse 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.

18. It is equally clear from the evidence in the generic bundle that 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.

19. What is not so clear from the evidence adduced in this case, but which I am aware of because of other HICBC cases which I have read and on which I have sat, is that in November 2012 HMRC issued a briefing to over a million higher rate taxpayers about the charge. And in September 2013 self-assessment letters known as "SA 252" letters were sent to a number of higher rate taxpayers. A pro forma SA252 letter is in the generic bundle which HMRC have provided for this appeal.

20. HMRC have not submitted that an SA 252 letter was sent to this appellant nor indeed that he was one of the million or so higher rate taxpayers notified about the introduction of the charge in 2012. I do not know why this was, but I suspect that he may well have not been a higher rate taxpayer at that time. So no specific communication regarding the HICBC was sent to this appellant until the nudge letter in December 2019.

21. The question arises as to whether the appellant knew, or should have known, about the HICBC, from the information which HMRC had disseminated to the general public when it was first introduced or subsequently, or which was a available on their website. In my decision in *Leigh Jacques v HMRC* UKFTT 311, I said this:

> "27. 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.
>
> 28. 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.
>
> 29. 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".

22. Since that decision, I have seen nothing which has caused me to change my view, and the sentiments expressed above in that case apply equally to the appellant in this appeal. He was an employee throughout the years in question, and before. He was not within the self-assessment regime at any time relevant to this appeal. And this is important. Again, as I said in *Jacques*:

> "25. 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".

23. So as far as ignorance of the law is concerned, and whether the appellant has a reasonable excuse for failing to have notified chargeability, I am satisfied that it was reasonable for this particular taxpayer in his position, given that he was not put on notice by any specific notification from HMRC, not to have been aware of the notification of chargeability criteria in relation to HICBC.

24. Indeed, HMRC appear to accept this, given that, on review, they cancelled the penalty for tax year 2018-2019 on the basis that the appellant did have a reasonable excuse which ended when he received the nudge letter.

25. I agree with HMRC that if the appellant had received the nudge letter then he has no reasonable excuse for failure to notify chargeability for the Penalty. The million-dollar question, therefore, is whether he received the nudge letter.

26. Under section 7 of the Interpretation Act 1978, which applies to service of documents authorised or required by legislation, "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".

27. Clearly the nudge letter is not a document authorised or required by legislation. But I intend to adopt the same approach towards service set out above. It seems to me common sense. If HMRC are alleging that the nudge letter was sent to the appellant and thus he was on notice that someone earning more than £50,000 was liable to the HICBC, they need to show that they had sent it to him. If the appellant then alleges reasonable excuse on the basis that he did not receive it, he needs to establish non-receipt.

28. HMRC have provided no evidence that the nudge letter was put into a properly addressed and pre-paid envelope, but I believe are asking me to imply that was the case from the fact that there was a copy of the nudge letter on their file, and in the documents bundle, with the appellant's address at 135 Ellesmere Road at its head. I am prepared to do this. There is a presumption of regularity which assists HMRC. This presumption allows me to reasonably draw an inference where an intention to do some formal act is established, and the evidence is consistent with that intention having been carried into effect in a proper way but where the actual observance of all due formalities can only be inferred as a matter of probability. I do not believe that HMRC simply created a ghost letter which they put onto the documents bundle and then suggested that it reflected a real letter which was sent to the appellant. To my mind the copy in the documents bundle reflects an actual letter which was sent by HMRC to the appellant on the date specified in that copy letter. And I think it more likely than not that HMRC's systems would have operated so as to ensure that such a letter was placed in a pre-paid, properly addressed envelope.

29. And so, the burden shifts to the appellant to show that it was more likely than not that he did not receive the nudge letter. In support of this contention he points out that he had recently moved house and the state of the housing estate was like a building site and that few houses had numbers. However I accept, against this, HMRC's observation that he had moved into his new address on 21 December 2018, a year before the nudge letter was issued.

30. He also asserts that he would have acted promptly on receipt of the nudge letter given that he is nervous about money matters, and if he had a liability, he would have made sure that he had sorted things out with HMRC as he would not have wanted to incur further liability.

31. The appellant asserts that simply because the letter was not returned to HMRC is not evidence of receipt by him. I agree.

32. HMRC's view towards the appellant's claim of non-receipt is, essentially, "well you would say that wouldn't you".

33. This is finally balanced. But I believe the appellant when he says that he did not receive the nudge letter. It seems to me that he is an honest and honourable taxpayer who was mortified to find that he owed HMRC money, and rushed to pay the charges, borrowing money to do so from his parents. This is consistent with his assertion that he would not have let another year go by in which he would have had to pay charges. Had he received the nudge letter, it seems to me, and I find as a fact, that he would have contacted HMRC and paid the HICBC for the years in question. This would have been, essentially, notifying HMRC of chargeability, and thus he would not have suffered a penalty for failure to do this, for the tax year 2019-2020 as he would have corrected his failure to notify at the beginning of that tax year, without unreasonable delay.

34. In my judgment the appellant was not on notice about his liability to the HICBC with effect from 2 December 2019, i.e. the date of the nudge letter, since he had not received it. Furthermore, as I have said above, he was not more generally aware of the HICBC regime, nor of the possibility of its impact on him, and his liability to notify, until HMRC notified him on 22 March 2021 that he was due to pay the HICBC for the relevant tax years.

35. The appellant therefore has a reasonable excuse for not notifying his liability to chargeability to the HICBC for the tax year 2019-2020. This is based on ignorance of the law which is objectively justifiable for this particular taxpayer in his particular circumstances.

DECISION

36. For the foregoing reasons, I allow the appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

37. 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: 29th December 2023