[2020] UKFTT 00147 (TC)

TC07640

INCOME TAX – High Income Child Benefit Charge ('HICBC') – penalty for failure to notify liability – Schedule 41 Finance Act 2008 – whether HMRC have the duty to notify the 'debt' at the time – whether being completely unaware of HICBC a reasonable excuse – whether HICBC 'penalty refund' as indicated on HMRC's leaflet applies in the instant case – whether Tribunal has jurisdiction over the penalty refund matter – appeal dismissed

Appeal number: TC/2018/01985

FIRST-TIER TRIBUNAL
TAX CHAMBER

BETWEEN

ALISTAIR SMITH **Appellant**

-and-

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

TRIBUNAL: JUDGE HEIDI POON

Sitting in public at the Magistrates' Court, Market Street, Newcastle on 19 February 2020

Mr Smith in person for the Appellant

Mr Robison, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. The appellant appeals against Failure to Notify ('FTN') penalties in the sum of £629.20 imposed under Schedule 41 Finance Act 2008 for the tax years 2013-14, 2014-15 and 2015-16.

2. The failure to notify was in respect of the appellant's liability to the High Income Child Benefit Charge ('HICBC'), and the notice of penalty assessment was dated 23 February 2018.

THE LEGISLATIVE FRAMEWORK

3. The legislation on HICBC is under Schedule 1 to the Finance Act 2012. The enactment amended provisions in the Income Tax (Earnings and Pensions Act) 2003 ('ITEPA') by introducing HICBC in Chapter 8, Part 10 of ITEPA.

4. In summary, with effect from 7 January 2013, households where a parent's 'Adjusted Net Income' ('ANI') exceeds £50,000 in a tax year are affected by HICBC. For each £100 over the threshold of £50,000, a 1% tax liability arises on the amount of child benefit received in the year. Where a parent's ANI is £55,000, the HICBC equates to 50% of the sum of child benefit received, and when the higher earner of a household has an ANI of £60,000 or above, the HICBC equates to 100% of the child benefit received, with the result that such a household will often opt to stop receiving child benefit altogether.

5. Under s 7(1) of the Taxes Management Act 1970 ('TMA'), an individual who is liable to an income tax or capital gains tax charge for a year of assessment is required to notify HMRC of such a liability within six months of the end of the tax year in question. An income tax liability under s 7(1) TMA includes a HICBC liability.

6. The obligation is on the individual to notify HMRC of the level of income and to register to receive a self-assessment tax return for HICBC to be assessed. A failure to notify the HICBC liability gives rise to a penalty imposable under Sch 41 to FA 2008.

7. The first tax year for HICBC to arise was 2012-13, and the charge was applied with reference to the amounts of child benefit received from the week beginning after 6 January 2013. A couple can choose whether to claim child benefit, but if they do, and one partner has an ANI over £50,000, that partner will be liable to HICBC.

8. Under s 29 TMA, HMRC are empowered to raise a discovery assessment to recover the amount of HICBC that would have been payable for a relevant tax year.

FINDINGS OF FACT

9. The appellant works as an IT manager. He had worked in Belgium from 2001-2005, and during those years working abroad, he had filled in a self-assessment return every year. He had an ANI exceeding £50,000 for the years in question, being 2013-14 to 2016-17, and his partner was in receipt of child benefit for those years.

10. On 17 August 2013, HRMC's records show that the appellant was sent the standard letter SA252, with its subject heading as 'Changes to Child Benefit' to draw attention to the introduction of HICBC from 7 January 2013, and the need for taxpayers to check their position.

11. On 8 February 2018, HMRC issued an 'opening letter' with the heading 'Do you have to pay the High Income Child Benefit Charge?' The appellant was asked to check if a HICBC liability applied to him by using the online calculator, and to contact HMRC with the details.

12. On 14 February 2018, the appellant's wife contacted HMRC and handed the conversation over to the appellant. During that conversation, the appellant agreed the assessment figures for HICBC, and was advised that penalties would likely be assessed.

13. On 23 February 2018, HMRC issued a decision letter, together with a discovery assessment charging HICBC in the total sum of £3,146 for the years in question. The appellant did not appeal the discovery assessments.

14. On 23 February 2019, HMRC also issued a penalty notice with the following details:

(1) For the three years 2013-14 to 2015-16, the failure was made known to HMRC after the first 12 months of the HICBC being due, and falls within 'Case B' definition as set down under para 13 of Sch 41 FA 2008.

(2) The failure is categorised as 'non-deliberate' with 'prompted' disclosure.

(3) The penalty range is set by the statute at 20% to 30% for a 'Case B' failure, where HMRC became aware of the failure 12 months after the tax first became unpaid.

(4) Reduction at 100% was given for the quality of disclosure, bringing the penalty percentage to its minimum of 20%.

(5) The penalties assessed in the sum of £629.20 are at 20% of the HICBC arrears of £3,146 for the three years.

15. On 25 February 2018, the appellant contacted his local MP, the Rt. Hon. Alan Campbell, who then emailed HMRC's ministerial communications department as follows:

> 'In his email Mr Smith advises that in January 2013 the rules of child benefit changed … Mr Smith's child benefit was applied for 10 years ago, before this rule applied.
>
> … Mr Smith has no problem paying the tax owed but believes it is unfair to then add a 20% penalty because "HMRC took 4 years to contact".
>
> Mr Smith would like to know why it has taken 4 years to be informed of this tax bill and why he is also being penalised for what he believes is an oversight by HMRC.'

16. Mr Campbell MP's email communication was dealt with as a complaint, as well as an appeal against the penalties.

17. On 14 March 2018, a letter from the chief executive of HMRC, Mr Jon Thompson, was sent to the House of Commons for Mr Campbell MP, explaining the basis for the imposition of a HICBC penalty as due to the failure to notify the liability, and advised of the appeals process via the tribunal.

18. On 19 March 2018, the appellant lodged an appeal with the Tribunal.

19. On 24 April 2018, HMRC issued a 'view of the matter' letter on being notified of the appeal lodged with the Tribunal.

THE APPELLANT'S CASE

20. From the Notice of Appeal and the appellant's representations at the hearing, his grounds of appeal are similar to those stated in Mr Campbell MP's email, and are as follows:

(1) '… to add a 20% penalty to the amount because the tax authority took 4 years to contact me is wrong.'

(2) 'I pay income tax at source and so have never been required to send a tax return, this should have been flagged up 4 years ago rather than all of a sudden now. I'm being penalised for a debt I was never told about, this is unfair.'

(3) 'The standard response has been that HMRC put adverts in the press in 2013 to alert people to this situation, surely as you have my details could you not have put the 2 things together (my taxable income and child benefit payments to my wife for my children) and sent me a tax bill at the time …'

(4) 'I never received a letter announcing the change in the tax law and that I need to fill in a tax return … I never saw any advertisements in the press outlining I need to start sending in tax returns.'

(5) That his children were born 'long before the change of policy' and he was 'fully unaware' of the change of policy that affected his tax position.

21. In the alternative, Mr Smith submitted during the hearing that even if the penalties should apply, he is eligible for a 'refund'. In this respect, Mr Smith relied on HMRC's leaflet included in the generic bundle (at page 85) which has the heading as **HICBC Penalty Refund**. The leaflet contains a decision flow chart for 'HICBC FTN Penalty Review refunds', and the chart branches out to the left and to the right, with two scenarios being outlined on the left branch when a HICBC penalty will be refunded. The scenarios for refunding a HICBC penalty are:

(1) '[The taxpayers'] income increased to over £50,000 since HICBC was introduced in 2013, and they have not made a new claim to Child Benefit since.'

(2) 'They had income over £50,000, were not in Self Assessment (and not claiming Child Benefit) and started a new relationship with a Child Benefit recipient between 2013 and 2016.'

22. Mr Smith averred that the first scenario applies to him, in that his ANI increased to over £50,000 and that he has not made a 'new claim' to child benefit since 2013. By a new claim, Mr Smith meant that his two children were born before the introduction of HICBC in 2013, and that his wife has not made a 'new claim' for child benefit for a *new* child since 2013.

HMRC'S CASE

23. Mr Robison submitted that all penalties have been charged at the lowest possible rate of 20%, in consequence of the appellant's disclosure and full co-operation following the issue of the opening letter on 8 February 2018.

24. The penalties have been correctly assessed in line with the legislation and that HMRC 'have acted with utmost reasonableness in allowing the maximum mitigation provided for in the legislation'.

25. As to the penalty refund referred to in HMRC's leaflet, Mr Robison submitted that it would be a matter for HMRC by discretion and not a matter within the Tribunal's jurisdiction.

DISCUSSION

26. Mr Smith's grounds of appeal can be summarised as follows:

(1) It is unfair to penalise him for a debt which HMRC took four years to notify.

(2) He was 'fully unaware' of the changes to child benefit affecting him.

(3) The penalty refund applies to him.

Ground 1 – the onus to notify a liability

27. This ground of appeal is founded on the basis of two supposed facts. First, that it is HMRC's responsibility to notify Mr Smith of his debt. Secondly, that HMRC could have 'put the [two] things together'; namely Mr Smith's taxable income and the child benefit received by his wife for each relevant year and sent him 'the tax bill at the time'.

28. For the following reasons, I reject this ground in its entirety as giving rise to a reasonable excuse, since the two supposed facts have neither basis in law or in fact.

(1) The chief tenor of this ground of appeal is to reverse the onus, by holding HMRC as liable for notifying the taxpayer of a HICBC liability.

(2) The fundamental flaw in this argument is that the statute has stipulated the onus to lie with a taxpayer to notify his or her liability to a tax charge under s 7 of TMA, which is in line with the general principle of the Self-Assessment regime.

(3) In contrast, there is no statutory provision which obligates HMRC to notify a taxpayer of a potential liability to a tax charge.

(4) Furthermore, it is a presumption in law that the tax affairs of an individual are best known by that individual.

(5) The appellant has not succeeded in rebuffing this presumption by asserting that HMRC could have 'put the two things together' by collating his employment income for the relevant years with the child benefit received by his wife for those years.

(6) It remains the fact that the appellant, more than anybody else, is in the best position to 'put the two things together'.

(7) As a matter of fact, and as stated in *Neil Johnstone v HMRC* [2018] UKFTT 0689 (TC) at [49]: 'The cohort of taxpayers likely to be affected by HICBC is not readily identifiable from the information held by HMRC, especially when the receipt of the child benefit and the taxpayer liable to HICBC are not the same person'.

29. The discovery assessments for the HICBC arrears were raised within the statutory time limits of four years (s 34 TMA). That being the case, the length of time taken (within the statutory time limits) for HMRC to assess the appellant to his HICBC liabilities is not relevant to whether the penalties in question are due. The basis of the penalty charge is for a failure to notify. The appellant has accepted that the HICBC liabilities were correctly assessed; the agreement to the discovery assessments is an acknowledgement that these liabilities existed. The arrears are in consequence of the failure to notify those liabilities at the time when they arose; the penalties have therefore been correctly imposed, since the onus to notify the liability rests squarely with the taxpayer.

30. In any event, it is settled law that the Tribunal has no jurisdiction to consider the issue of fairness in relation to the imposition of a penalty in the absence of specific provisions by the relevant statute: *HMRC v Hok* [2012] UKUT 363.

Ground 2 – ignorance of the law

31. Whether ignorance of the law can give rise to a reasonable excuse depends on at least two factors: (1) the particular piece of legislation in question, and (2) the circumstances of the taxpayer. As stated in *Johnstone* at [56], the HICBC legislation is not difficult to understand; a prudent and reasonable taxpayer would have acquainted himself with the fundamental change to the basis of child benefit entitlement when the announcement in the Budget was made.

32. Mr Smith, however, staunchly maintained that he was 'fully unware' of the change in legislation for HICBC. Even if I were to accept this complete lack of awareness to be true as a matter of fact, whether that lack of knowledge can give rise to a reasonable excuse remains to be tested by the objective standard of reasonableness, and by taking into account the subjective attributes of the taxpayer in question. In *Collis v HMRC* [2011] UKFTT 588 (TC), it is stated at [29] that 'the standard by which this falls to be judged is that of a prudent and reasonable taxpayer in the position of the taxpayer in question'.

33. Mr Smith is not new to Self-Assessment; he had filed SA returns for the tax years when he worked in Belgium. As an IT manager, and in common with the appellant in *Johnstone*, he can be regarded as adept at using the internet as a source of information. Even if he were to be completely oblivious to the initial press releases and media announcements of the legislative change concerning HICBC, he would have to maintain this complete ignorance for the long duration of five years from January 2013 until he received the opening letter of 8 February 2018. Regardless whether the appellant, being in active employment in a place of work with a responsible position, had succeeded in insulating himself from being aware of the change, the extent and duration of information insulation in question is not reasonable in the digital age, when viewed objectively against the subjective circumstances of the appellant.

34. Even if a reasonable excuse had existed initially, it would have to be deemed to continue for the duration of the five-year period when there was a continual failure to notify. I do not find that the appellant's ignorance of his liability under HICBC gave rise to a reasonable excuse initially, or could be deemed to continue for half a decade, for any of the penalties to be vacated.

Ground 3 – entitlement to a penalty refund

35. Mr Smith interprets the term used on the penalty refund leaflet pertaining to a 'new claim' to mean a claim made on a *new* child born after 2013. In his interpretation, a 'new claim' therefore excludes all *existing* claims to child benefit in relation to children born before 2013. Such an interpretation is inconsistent with the charging provisions under the HICBC penalty regime. In the context of the leaflet, a 'new claim' would appear to refer to a claim in a taxpayer's household with no existing claim made prior to 2013.

36. In any event, the leaflet with the flow chart showing scenarios when HMRC would consider a refund of a FTN penalty in relation to HICBC is not part of the legislative provision. It is by HMRC's discretion and is a matter of internal policy to refund a HICBC penalty charge in certain cases.

37. The relevant facts pertaining to the necessary conditions to be satisfied before a HICBC penalty can be refunded are for HMRC to find, and the decision for making such a refund is for HMRC to make.

38. The Tribunal's jurisdiction in relation to this appeal is confined to the provisions by statute. This Tribunal therefore has no jurisdiction to interpret the terms contained in HMRC's leaflet, nor to direct HMRC to refund a penalty by making any relevant finding of fact.

DISPOSITION

39. The appeal is accordingly dismissed; the penalties in the sum of £629.20 are confirmed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

40. 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.

DR HEIDI POON

TRIBUNAL JUDGE

RELEASE DATE: 17 MARCH 2020