[2020] UKFTT 273 (TC)

# TC07757

*INCOME TAX – high income child benefit charge – penalties for failure to notify – amount of penalties reduced – appeal allowed in part*

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**Appeal number: TC/2018/03705**

**BETWEEN**

**NICHOLAS HEDGE** **Appellant**

**-and-**

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

**TRIBUNAL: JUDGE DAVID BEDENHAM**

The Tribunal determined the appeal on 19 June 2020 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 11 June 2018 (with enclosures), HMRC's Skeleton Argument dated 12 December 2019 (which I have taken to be HMRC's Statement of Case), the Appellant's reply received on 13 May 2020 (with enclosures), and a bundle of documents.

## DECISION

### INTRODUCTION

1. The Appellant appeals against penalties totalling £995.94 charged to him pursuant to Schedule 41 to the Finance Act 2008 ("FA 2008") as a result of his failure to notify liability to the High Income Child Benefit Charge ("HICBC").

2. In his notice of appeal, the Appellant also stated that his appeal related to interest charges. I have no jurisdiction in relation to interest (which is applied by s 86 of the Taxes Management Act 1970) – see *HMRC v Neil & Megan Gretton* [2012] UKUT 261 (TCC).

### BACKGROUND FACTS

3. I find the following (most of which was not in dispute) as fact:

4. On 16 June 2017, HMRC wrote to the Appellant as follows:

> "Our records indicate that the recent changes to Child Benefit for people on higher incomes may apply to you and you did not register to receive a Self Assessment tax return for the tax years ended 5 April 2013, 2014, 2015 and 2016.
>
> **Changes to Child Benefit**
>
> The new High Income Child Benefit Charge came into effect on 7 January 2013. You have to pay the tax charge if all of the following statements applied to you in any of the tax years ended 5 April 2013, 2014, 2015 and 2016:
>
> - you have an individual income of over £50,000 a year
> - either you or your partner received any Child Benefit payments between 6 April 2012 and 5 April 2013, 6 April 2013 and 5 April 2014, 6 April 2014 and 5 April 2015 and 6 April 2015 and 5 April 2016
> - your income for the tax year is higher than your partner's
>
> The partner with the higher income has to pay the charge if both partners have income over £50,000,"

HMRC then proceeded to state that they believed the Appellant to be liable to the HICBC in the years ended 5 April 2013, 5 April 2014, 5 April 2015 and 5 April 2016, with a total amount due of £5,067. HMRC concluded the letter by asking the Appellant to contact them with any further information by 17 July 2017.

5. On 4 July 2017, the Appellant wrote to HMRC stating that, save for in the year ended 5 April 2016, he "did not earn enough…for me to have to pay the child benefit back". The Appellant enclosed copies of his P60s which, in the "pay" section, showed for each of the relevant years a figure of less than £50,000 save for the year ended 5 April 2016 which showed a figure of £50,235.

6. On 25 July 2017, HMRC wrote to the Appellant stating that HICBC is calculated on the basis of a taxpayer's Annual Net Income and, therefore, the Appellant's car benefit and car fuel benefit fell to be taken into consideration. When the Appellant's car benefit and car fuel benefit fell was considered in addition to pay, the Appellant's Annual Net Income exceeded £50,000 in each of the relevant years.

7. On 2 August 2017, the Appellant wrote to HMRC stating that he had previously had no idea that car and fuel benefits fell to be considered for HICBC purposes. The Appellant went

on to query the amount of the HICBC said to be due as, from the Appellant's records, it seemed to exceed the amount of Child Benefit received.

8. On 23 August 2017, HMRC wrote to the Appellant setting out the Child Benefit rates. The letter went on to state "if you disagree with the HICBC charge, you can call the Child Benefits office…to obtain the exact amount."

9. On 2 September 2017, the Appellant wrote to HMRC again querying the calculation of the HICBC. The Appellant stated that his bank statements showed that he had received less in child benefit than the amount of the HICBC now said by HMRC to be payable.

10. On 22 September 2017, HMRC wrote to the Appellant repeating that the HICBC amount was calculated in the basis of information held, and "if you disagree with the HICBC charge, you can call the Child Benefits office…to obtain the exact amount." However, the Appellant did not receive this letter.

11. On 5 January 2018, HMRC notified the Appellant that he would shortly receive assessments in relation to the HICBC and penalties for failing to notify his liability to HICBC.

12. On 1 February 2018, HMRC sent to the Appellant a number of assessments and penalty notices as follows:

| Year to | HICBC Assessment | Penalty |
|---|---|---|
| 5 April 2013 | £13 | £2.99 |
| 5 April 2014 | £648 | £149.04 |
| 5 April 2015 | £1,985 | £456.55 |
| 5 April 2016 | £2,421 | £387.36 |

13. On 22 February 2018, the Appellant wrote to HMRC to appeal against "the High Income Child Benefit Charges that have been brought against me". The Appellant went on to state "I am not disputing that money is owed, I am simply waiting on a reply as the calculations differ from mine. I would like to ask that you strongly consider revoking the added penalties and interest….". The Appellant stated that at all material times he had been unaware that car and fuel benefits fell to be taken into consideration and so had not realised that his income crossed the £50,000 threshold for HICBC purposes.

14. On 23 March 2018, HMRC wrote to the Appellant upholding the decision to issue the HICBC assessments and the failure to notify penalties. HMRC's letter ended by asking the Appellant to "withdraw your appeal or provide valid grounds within 30 days."

15. On 18 April 2016, the Appellant wrote to HMRC repeating that at all material times he had been unaware that car and fuel benefits fell to be taken into consideration and so had not realised that his income crossed the £50,000 threshold for HICBC purposes. The Appellant asked for a breakdown of the HICBC levied for each year and the amount of interest charged.

16. On 11 May 2018, HMRC wrote to the Appellant providing details of the HICBC levied for each year and the amount of interest charged to date. The letter stated that HMRC was not satisfied that the Appellant had a reasonable excuse for the failure to notify and so the penalties would stand.

17. On 11 June 2018, the Appellant appealed to the Tribunal.

**THE APPELLANT'S CASE**

18. In his Notice of Appeal to the Tribunal, the Appellant stated that the appeal related to "interest and penalties". The Appellant's case is that at all material times he was unaware that car and fuel benefits fell to be taken into consideration and so had not realised that his income crossed the £50,000 threshold for HICBC purposes. The Appellant stated that numerous friends and colleagues were also unaware of this - suggesting that it was not something widely known about. The Appellant stated that since being notified of his liability to HICBC he has visited HMRC's website and does not think that the website makes it sufficiently clear that "income" for HICBC purposes includes, for example, car and fuel benefits.

19. The Appellant stated that he is an employee and his tax is accounted for through PAYE. He has never knowingly underpaid tax.

**HMRC'S CASE**

20. HMRC's case is simple: there was an extensive media campaign about the change in the law around child benefit and, in any event, ignorance of the change in the law and/or of what income fell to be taken into account for HICBC purposes does not constitute a reasonable excuse.

**RELEVANT LAW**

21. The Finance Act 2012 ("FA 2012") inserted the provisions relating to the HICBC into the Income Tax (Earnings and Pensions) Act 2003. The charge took effect from the tax year 2012/13 in relation to child benefit amounts received after 6 January 2013. The relevant provisions are:

> *"681B High income child benefit charge*
>
> (1) A person ("P") is liable to a charge to income tax for a tax year if—
>
> (a) P's adjusted net income for the year exceeds £50,000, and
>
> (b) one or both of conditions A and B are met.
>
> (2) The charge is to be known as a *"high income child benefit charge"* .
>
> (3) Condition A is that—
>
> (a) P is entitled to an amount in respect of child benefit for a week in the tax year, and
>
> (b) there is no other person who is a partner of P throughout the week and has an adjusted net income for the year which exceeds that of P.
>
> (4) Condition B is that—
>
> (a) a person ("Q") other than P is entitled to an amount in respect of child benefit for a week in the tax year,
>
> (b) Q is a partner of P throughout the week, and
>
> (c) P has an adjusted net income for the year which exceeds that of Q."
>
> …
>
> *681H Other interpretation provisions*
>
> (1) This section applies for the purposes of this Chapter.
>
> (2) *"Adjusted net income"* of a person for a tax year means the person's adjusted net income for that tax year as determined under section 58 of ITA 2007.

(3) *"Week"* means a period of 7 days beginning with a Monday; and a week is in a tax year if (and only if) the Monday with which it begins is in the tax year."

22. FA 2012 also amended the provisions requiring notification of chargeability by the addition of a new section 7(3)(c) to the TMA 1970 which, at the relevant time, provided:

"7.— Notice of liability to income tax and capital gains tax.

(1) Every person who—

(a) is chargeable to income tax or capital gains tax for any year of assessment, and

(b) falls within subsection (1A) or (1B),

shall, subject to subsection (3) below, within the notification period, give notice to an officer of the Board that he is so chargeable.

…

(3) A person shall not be required to give notice under subsection (1) above in respect of a year of assessment if for that year

(a) the person's total income consists of income from sources falling within subsections (4) to (7) below,

(b) the person has no chargeable gains, and

(c) the person is not liable to a high income child benefit charge

…"

23. Paragraph 1 of Schedule 41 FA 2008 provides a penalty is payable by a person who fails to comply with an obligation under, *inter alia*, s 7 TMA 1970. Paragraphs 6(2) and 6A(1) set out how the amount of that penalty is to be calculated. Paragraphs 12 and 13 provide for reductions for disclosure.

24. Paragraph 14 of Schedule 41 FA 2008 provides that if HMRC think it right because of special circumstances they may reduce a penalty.

25. Paragraph 17(1) of Schedule 41 FA 2008 provides that a person issued with a penalty may appeal against the decision that a penalty is payable. Paragraph 17(2) of Schedule 41 FA 2008 provides that a person issued with a penalty may appeal the amount of the penalty.

26. Paragraph 19 of Schedule 41 FA 2008 provides:

"(1) On an appeal under paragraph 17(1) the tribunal may affirm or cancel HMRC's decision.

(2) On an appeal under paragraph 17(2) the tribunal may–

(a) affirm HMRC's decision, or

(b) substitute for HMRC's decision another decision that HMRC had power to make.

(3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 14–

(a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or

(b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 14 was flawed.

(4) In sub-paragraph (3)(b) *"flawed"* means flawed when considered in the light of the principles applicable in proceedings for judicial review."

27. Paragraph 20 of Schedule 41 FA 2008 provides:

"(1) Liability to a penalty under any of paragraphs 1, 2, 3(1) and 4 does not arise in relation to an act or failure which is not deliberate if P satisfies HMRC or (on an appeal notified to the tribunal) the tribunal that there is a reasonable excuse for the act or failure.

(2) For the purposes of sub-paragraph (1)–

(a) an insufficiency of funds is not a reasonable excuse unless attributable to events outside P's control,

(b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the relevant act or failure, and

(c) where P had a reasonable excuse for the relevant act or failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the relevant act or failure is remedied without unreasonable delay after the excuse ceased."

**DISCUSSION AND DECISION**

28. The Appellant does not dispute that he was liable to the HICBC and that he failed to notify that liability to HMRC. However, the Appellant submits that in circumstances where he was not aware that his car and fuel benefits fell to be considered as part of his income for HICBC purposes, he ought not to be liable to a penalty.

29. I wish to make clear that there is no suggestion at all that the Appellant deliberately sought to avoid paying the HICBC. I accept that he genuinely did not know that he breached the income threshold because he did not know that his car and fuel benefits fell to be taken into account. However, I unable to find that the Appellant has a reasonable excuse such as to mean that he is not liable to the penalties.

30. The case advanced by the Appellant amounts to arguing that his ignorance of the law gives rise to a reasonable excuse. I am of the view that ignorance of the law cannot here constitute a reasonable excuse. I agree with and endorse the observations and approach of Judge Scott at paragraphs 29-38 of *Lau v HMRC* [2018] UKFTT 230 (TC).

31. The Appellant also submitted that the imposition of a penalty was "unfair". However, if a penalty is lawfully imposed (which I find the penalties in this case were), I do not have the power to discharge or adjust the penalty on the basis of a perceived unfairness (see *HMRC v HOK Ltd* [2012] UKUT 363 (TCC)).

32. As to the amount of the penalties:

33. The Appellant has suggested in correspondence that the amount of HICBC to which he has been assessed exceeds the amount of Child Benefit received. Whilst there is no appeal against the HICBC assessments, if the HICBC amounts are incorrect the penalty amounts will also be incorrect. However, HMRC has satisfied me that it has properly calculated the amounts of HICBC based on information in its possession. The Appellant could have provided evidence from the Child Benefit office setting out the amount of Child Benefit received in each of the relevant years. The Appellant did not do so (despite this course of action being suggested by HMRC in the letter of 23 August 2017) and instead produced limited extracts from his bank

statements. I do not consider that those extracts are sufficient to demonstrate that HMRC has made an error in calculating the HICBC amount.

34. At paragraph 20 of HMRC's skeleton, HMRC states that there has been an error of calculation in relation to the year ended 5 April 2013 and the penalty amount should have been £1.84 not £2.99. I am satisfied that the penalty should be reduced in this way.

35. At paragraph 19 of HMRC's skeleton, HMRC states the Appellant was not given the full reduction for disclosure because "the Appellant did not reply to letters". I consider that to be an error. The Appellant did reply to HMRC's letters and answered questions put to him. In my view, the Appellant ought to have been given the full reduction for disclosure in relation to each of the years for which he has been issued with a penalty. Accordingly, the penalty percentage for all years will be reduced to 20% save for 2015/16 where it will be reduced to 10%.

36. I note that in *Simon Clarke v HMRC* [2020] UKFTT 00144 (TC), Judge Connell allowed an appeal against penalties for failing to notify a liability to HICBC because, on the facts of the case before him, the taxpayer fell within "HMRC's own penalty refund guidance". Without expressing a view as to whether such HMRC guidance is enforceable in this Tribunal, I am satisfied that the guidance does not apply to the Appellant's case because it expressly only applies where a taxpayer's income increased to over £50,000 in or after the 2013/14 tax year. On the facts of the present case, the Appellant's adjusted net income exceeded £50,000 in the 2012/13 tax year (albeit only marginally).

37. This appeal is allowed to the extent that the penalties should be reduced to reflect paragraphs 34 and 35 of this decision. Otherwise, this appeal is dismissed.

**RIGHT TO APPLY FOR PERMISSION TO APPEAL**

38. 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.

**DAVID BEDENHAM**

**TRIBUNAL JUDGE**

**RELEASE DATE: 25 JUNE 2020**