[2021] UKFTT 0051 (TC)

TC08037

Keywords: High Income Child Benefit Charge, reasonable excuse for failure to file return, appeal allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/09130/V

BETWEEN

Jonathan Hayden **Appellant**

-and-

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

TRIBUNAL: JUDGE Heather Gething

The hearing took place on 28 January 2021. With the consent of the parties, the form of the hearing was V (video) and all parties attended remotely using the Tribunal video platform. A face to face hearing was not held because of the restrictions imposed by the Covid 19 pandemic. The documents to which I was referred were contained in two bundles, the hearing bundle, labelled Court Bundle, of 199 pages and an authorities bundle, labelled Generic Bundle, of 408 pages. The Respondents submitted written submissions on the availability of on-line facilities to claim Child Benefit Allowance.

I directed that the hearing should be in private on the basis that it was not in the public interest during the pandemic to hold a face to face hearing open to the public and that it was in the public interest for the hearing to go ahead remotely which by necessity meant it must be in private.

Mr Michael Hayden, father of Mr Jonathan Hayden, for the Appellant

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

DECISION

INTRODUCTION

1. The Appellant appealed against a penalty assessment made under Para 6 of Schedule 41 Finance Act 2008 ("**FA 2008**") in respect of a failure to notify liability to the High Income Child Benefit Charge ("**HICBC**") in the years 2014/15, 2015/16 and 2016/17. The HICBC is imposed on individuals earning more than £50,000 where that individual or the partner or spouse is in receipt of Child Benefit. The Appellant had a reasonable excuse for the periods 2014/15 and 2015/16, namely the complexity of the HICBC charge and inadequacy of notes in the Child Benefit Claim form and the lack of provision of information about HICBC in a timely manner by HMRC to those individuals who paid their tax under the PAYE system and had never previously been required to file a self-assessment return. There is no reasonable excuse for 2016/17 as the notes to the 2016 Child Benefit claim form were explicit.

THE HICBC

2. The obligation to notify HMRC of liability in respect of HICBC is set out in section 7 Taxes Management Act 1970 ("**TMA**"). It requires that where a person has not received a notice from HMRC requiring the filing of a self-assessment return under section 8 of the TMA, the taxpayer must notify HMRC within 6 months of the end of the year of assessment in which the liability to HICBC arises ("the notification period").

3. Penalties for failure to notify within the notification period are imposed under Schedule 41 Finance Act 2008. The level of penalty is a percentage of the tax payable and the percentage depends on whether the disclosure was prompted by HMRC, whether the failure was deliberate and the degree of cooperation by the taxpayer. HMRC issued an assessment of penalty on 4 March 2019.

4. The Appellant appeals against the penalty assessed on two grounds:

   (1) That the taxpayer had a reasonable excuse for failure such that no penalty may be imposed.

   (2) That the level of penalty is excessive and does not accord with penalties imposed on others in identical circumstances.

The Facts

5. I find the following facts:

   (1) HMRC have been responsible for administering Child Benefit from January 2013.

   (2) HMRC instigated an awareness campaign about the introduction of the HICBC which was effective on 7 January 2013. This involved press releases being issued in December 2012, 7 March 2013, 5 September 2013, 11 December 2013, 14 January 2014. The issue was also debated in Parliament and the measure was announced by the Chancellor in the 2012 Budget. The issue was also the subject of advertisements including those placed in The Times, The Sunday Times, Daily and Sunday Telegraph, The Guardian, The Observer, The Independent and Independent on Sunday in the four weeks beginning 5th November 2012 and in some Sunday Supplements. There were cards placed on trains and items on radio. Further advertisements were placed in October 2013 to remind taxpayers of how to avoid penalties and the need to register. Other adverts were placed in the Daily Mail and Express newspapers. I note the articles for which there are links in the bundle have introductory paragraphs which are misleading: saying there is to be a cut off at £60,000 and not £42,000 (which is likely to have caused those earning

above 50,000 and below 60,000 not to read on). The article in the Evening Standard speaks of Child Benefit cuts which again is misleading. Even the article in the Guardian is not informative when it says in its opening paragraph those earning up to £60,000 are still entitled to Child Benefit.

(3) The Appellant has been part of the sales team for pharmaceutical companies in the period. He has earned a base salary and bonus depending on sales.

(4) In the year 2012/13 when HICBC was introduced the Appellant's earnings were £44,403.00, i.e. below the £50,000 threshold.

(5) The Appellant's first child was born in July 2013.

(6) HMRC's electronic record of correspondence indicates that in August 2013 a pro forma letter of the sort at page 109 of the Generic Bundle was sent to the Appellant informing him of the liability to HICBC. This specimen letter is referred to an "***SA252 letter***".

(7) The Appellant has no recollection of receiving the SA252 letter but explained that had he received it, he would likely have paid it next to no attention as he was earning less than £50,000 a year at the time and he had a lot on his plate as his first child had just been born.

(8) The Appellant's wife claimed the child benefit allowance and would have completed the claim form. A specimen claim form printed in July 2013 is at page 91 of the Court Bundle and does include a question asking whether either parent earns more than £50,000. It indicates that "*tax may arise*". The notes that accompanied the form indicate that the Child Benefit "*may need to be declared*". It is unclear whether the Appellant's wife completed this form or a printed copy of an earlier version. The earlier version was not in the bundle. HMRC have not retained actual forms completed by the Appellant's wife but collated data which indicates that there may be an HICBC liability.

(9) The Appellant's second child was born in April 2016.

(10) The Child Benefit claim form printed in April 2016 is at page 106 of the Court Bundle. It makes clear that a self-assessment return must be filed if a person earns more than £50,000 per annum.

(11) The Appellant considers that his wife might have asked him about his salary before she made the claim, and if she did he would have said he didn't have a salary in excess of £50,000. His taxable income was only in excess of £50,000 when sales dependent bonuses and the value of car benefits were included and pension contributions are disregarded. The Appellant said that in retrospect he regrets not paying more attention at the time.

(12) The Appellant's base salary for each of the years 2014/15 and 2015/16 was below £50,000. His base salary in 2016/17 was above £50,000 because of a change in his role. (I note the Appellant changed jobs in 2 May 2014 and so had two employers in that year.)

(13) Throughout the three periods of assessment in question the Appellant was liable to pay tax on his earning through the PAYE system.

(14) HMRC's awareness campaign did not target PAYE employers who would be able to inform every employee, whose taxable earnings from that employment exceed the

£50,000 threshold, of the obligation to file a return if they or their partners claimed the child benefit allowance in the year.

(15) On 28 September 2018, HMRC's records show a letter was sent to the Appellant. It was a generic letter concerning liability to pay HICBC and what must be done to avoid a liability to penalty in respect of the year 2016/17. HMRC's records show a second letter entitled "*final reminder"* was sent on 30 October 2018.

(16) The Appellant had appointed his father, Mr Michael Heyden, as his agent. His father is a former Inspector of Taxes. He assists only his family with any tax issues that arise. Neither the Appellant nor his father received the letters of 28 September 2018 and 30 October 2019. It transpired that his father had moved home and this change of address had not been notified to HMRC.

(17) On 11 January 2019 HMRC wrote a letter to the Appellant advising him that he has a liability to pay HICBC in respect of the years 2014/15, 2015/16 and 2016/17. The Appellant received this letter.

(18) The Appellant had no knowledge of the HICBC until he received the letter of 11 January 2019.

(19) The Appellant's father was unaware of the HICBC.

(20) The Appellant's father wrote on behalf of his son to HMRC on 17 March 2019 explaining that no letters had been received by the Appellant. He had received no correspondence, as his son's agent, until he had received two letters in March 2019. Liability to pay the HICBC was accepted along with interest, but as the Appellant had no knowledge of the HICBC and HMRC had not been in touch with either the Appellant or his agent to raise an enquiry into any return, his father sought a reconsideration of any penalty and enclosed an article which had been published in a newspaper indicating that HMRC were undertaking a review of penalties imposed in 35,000 cases for failure to notify liability to HICBC where the taxpayers had received no prior notification of the charge.

(21) The Appellant's father could not understand why HMRC would write, as they say they did, in 2013 and not follow up within 30 days as they are required to do when making enquiries. To wait for more than four years to raise the issue of liability was extraordinary. He has subsequently become aware from former colleagues who are part of the HICBC project team that many are deeply unhappy with the way in which HMRC has handled it.

(22) A letter imposing penalties was sent by HMRC on 11 April 2019 and a further one on 3 May 2019 reducing the penalties to 20% so that the liability to HICBC and penalties was as follows:

Tax year	Estimated income and benefits in £	No of children	Amount of Child benefit in £	HICBC in £	Penalty for failure to notify	Penalty amount in £
2014/15	58,062	1	1,066	852	20%	170.40
2015/16	65,826	1	1,097	746	20%	149.20
2016/17	66,195	2	1,761	1,761	20%	352.20

Totals				3,359		671.80

(23) The Appellant sought a Review. The Review Officer issued a letter dated 24 May 2019. The Review Officer considered that neither (a) the Appellant's lack of knowledge of the obligations imposed upon him, nor (b) the HMRC's delay in bringing the issue to his attention, amounted to a reasonable excuse. The Review Officer confirmed the assessments although I note the error in the table which indicates the penalty for 2016/17 should be reduced to 10% but the amount of the penalty is stated as £352.20, which is 20%. The Appellant's wish, to be treated as others had in the review of 35.000 cases conducted by HMRC, was declined by the Review Officer.

(24) The Appellant appealed against the Review Officer's decision.

(25) On 1 December 2018 HMRC announced a review of penalty cases for failure to notify liability but would not include any person in receipt of a communication pertaining to the introduction of the charge. That review concluded in June 2019. Refunds were paid to those who claimed Child Benefit before the introduction of the HICBC and where their income rose above £50,000 after the introduction of the charge, and to those where the liability arose in 2013/14 and who had formed new partnerships after the introduction of HICBC. These individuals were found to have had a reasonable excuse for failure to notify.

The Appellant's position

6. The Appellant considered that he had a reasonable excuse within the meaning of Para 20 of Schedule 41as he had not been made aware of the HICBC charge. He never received the letter SA252 which records indicate was sent in August 2013 but, had he done so, he likely would have dismissed it as his earnings at the time were well below £50,000 and he had so much to do with the recent arrival of his first child.

7. The Appellant had cooperated fully and quickly as soon as he became aware of the HICBC.

8. The Appellant was ware of a case in which Mr fallen had also been involved in which the penalty imposed had been reduced to 10 per cent.

9. The Appellant wished to be treated as others had in the review of penalty cases and have the penalties reduced to zero. I took this to be a reference to there being special circumstance within para 14 of Schedule 41.

HMRC's position

10. The Respondent's case is that the HICBC charge was correctly imposed and the level of penalties have been correctly assessed as they are dependent on whether the compliance was prompted and whether the failure was non-deliberate and having regard to the Appellant's cooperation. The maximum discount has been given to the Appellant. The 20% penalty is the lowest that can be awarded in the case of a prompted disclosure for a non-deliberate failure to file a return, where the taxpayer cooperates fully and where the issue is not discovered within 12 months of the failure.

11. That being so, the only issue is whether the Appellant had a reasonable excuse within para 20 Schedule 41. The four-step approach adopted accepted in *Christine Perrin v HMRC* [2018] UKUT 165 ("*the Perrin test*") is relevant to determine whether the taxpayer's non-compliance is reasonable in the circumstances.

"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."

12. The Respondents rely on a number of First-tier Tax Tribunal decisions, including *Lau*, [2018] UKFTT 230, where the Tribunal had concluded that ignorance of the law is not a reasonable excuse and ignorance of the law is not caused by HMRC's failure to notify the taxpayer of an obligation. The cases assert that there is no statutory obligation on the Respondents to notify taxpayers of their liability. The Respondents accept that these decisions are not binding on the Tribunal but invite the Tribunal to follow them.

13. In this case, the Respondents undertook a full information campaign (as described above), there is a calculator of income on HMRC's website, there is child benefit helpline. Further, there is no obligation on HMRC to inform taxpayers of their obligations to file returns and pay HICBC. Further the Appellant was sent an SA252 letter in August 2013 and his spouse would have claimed the Child Benefit three weeks earlier. The Appellant ought to have been aware and he ought to have filed a return as a result. Whether the Appellant received the SA252 is immaterial because there was sufficient publication of HICBC for there to have been substantial compliance and the Appellant has no excuse. The Respondents accepted that there is no statutory presumption that the letter was received because an SA252 is not a statutory notice.

14. Further by April 2016 the Child Benefit claim form had been amended and stated clearly that a self-assessment return must be filed if a person earns more than £50,000 per annum.

15. The failure lasted from 6 October 2014 until January 2019 and it is inconceivable the reasonable excuse could have lasted for the entire period even if it existed in the first place.

16. The Tribunal has no jurisdiction to consider inconsistent behaviour on the part of HMRC.

17. I take HMRC's position on special circumstance to be that there are no such circumstances.

The Discussion

18. The issues in this case are whether

(1) The level of penalty is correct and whether it should be set at 10% for 2016/17

(2) The Appellant's ignorance of the law was a reasonable excuse in relation to his failure to file a return in each of 2014/15, 15/16 and 16/17 or whether there is a special circumstance which could justify a reduction in the penalties.

19. In relation to the level of penalty, the issue is whether Para 13(6) of Schedule 41 of FA 2008 is satisfied. Para 13(6) provides

> "*Where a person who would otherwise be liable to a 30% penalty has made a prompted disclosure, HMRC shall reduce the 30% -*
>
> *(a) If the penalty is under paragraph 1 and HMRC become aware of the failure less than 12 months after the time when tax first becomes unpaid by reason of the failure, to a percentage not below 10%, or*
>
> *(b) In any other case, to a percentage not below 20%,*
>
> *which reflects the quality of disclosure.*"

20. HMRC accept that the obligation to notify a liability to HICBC falls within paragraph 1. In relation to any year the due date for payment of the tax is 31 January next after the end of the year of assessment. In relation to 2016/17, the due date for payment would have been 31 January 2018. HMRC sent a letter to the Appellant on 11 January 2019 indicating the Appellant had a liability to HICBC. That letter indicates that HMRC had become aware of the failure within 12 months of the date the tax was payable. The percentage reduction available to the Appellant in respect of 16/17 is 10%. The Review Officer had identified 10% as the correct percentage but had failed to correct the value which it represents. I consider 10% is the correct percentage and the penalty should be £176.10.

21. In relation to the issue of reasonable excuse, I am not bound by the decisions of the first-tier tribunal where various judges in different contexts have considered that ignorance of the law does not provide a reasonable excuse for the failures in the cases before them. I note however, that Judge Mosedale in *Welland v HMRC* [2017] UKFTT 870 (TC) considered that it was inappropriate to treat the rule that ignorance of law is no excuse, as an absolute rule as that would be inconsistent with the dicta in a decision of Simon Brown J in *Neal v CCE* [1988] STC 131 and concluded that there could be a reasonable excuse where the law is complex or uncertain. I also note the review undertaken by HMRC of 35,000 penalty cases involving HICBC and the forgiveness of some 5,000 penalties where there was ignorance, on the basis that ignorance was indeed a reasonable excuse.

22. I consider that the Appellant had a reasonable excuse in the context of the HICBC for the years 2014/15 and 2015/16 (but not in respect of 2016/17) for the following reasons.

(1) The HICBC is a novel form of tax. It is not income tax. Its operation can involve a charge to tax or a disclaimer of a benefit. The optionality is unusual and these features have resulted in misleading headlines and articles in the press referred to above.

(2) HMRC recognised the necessity to embark on a campaign of information. The HICBC requires a self-assessment return to be filed. HMRC rightly recognise that self-assessment can only occur when taxpayers are aware of their obligations. The idea that taxpayers whose only source of income is employment income, the tax on which is administered by HMRC through their employer and who receive benefits such as Child Benefit, that is also administered by HMRC, are likely to be monitoring HMRC's website to see if there is a new obligation to file a return is fanciful. That is not the real world. Publicity campaigns have their limits as even where a newspaper is delivered to your door it is not always the case that one has the time to read it, especially when there are exceptional demands being made of you at the time. In the case of the HICBC, the

life changing event that gives rise to the claim for Child Benefit must be the biggest event in most people's lives. Especially the arrival of the first child.

(3) Further, the changes made by HMRC to the Child Benefit claim form and notes between 2013 and 2016 indicate that HMRC recognised the inadequacy of the statements in the 2013 claim form. The 2016 claim form expressly states that the claimant or their spouse must file a self-assessment tax return where income of one of them exceeds £50,000, whereas the 2013 form speaks of the possibility that income **may** need to be **declared**.

(4) It is an unusual feature of HICBC that these notices of liability are in a document which is completed by one spouse or partner but may relate to the income of the other spouse or partner. This is another highly unusual feature of the HICBC although it is possible to think of policy reasons why the claim form should not have to be signed also by the Appellant. In this case that aspect has contributed to the failure to notify by the Appellant.

(5) The Appellant told me in evidence which I accept as a fact that he considered he may not have given the issue enough attention in 2016.

(6) The information campaign did not include a general letter to be sent to all PAYE operators to enable employers to specifically notify the higher earners employed by them of the obligation to notify. This could have been done at the same time as a P60 was issued. PAYE taxpayers must have been a significant category of taxpayers that needed attention. Those already filing self-assessment returns would become aware of the issue when filing the next return. Those paying tax under the PAYE have no knowledge of the self-assessment system because tax is not taught in schools, colleges and universities or even in the workplace.

(7) HMRC had the information in their possession and control as to who was a higher earner and who was claiming child benefit in the same household. HMRC have administered child benefit throughout the period. It is because they have access to the information and can identify high earners in households claiming Child Benefit that correspondence was commenced in this case in 2018/19. I observe that HMRC's delay in bringing together the information they had available to them has exacerbated the position in this case, resulting in interest on unpaid tax that could have been paid earlier had the correspondence begun earlier or had HMRC issued to all those earning more than £50,000 a demand to file a self-assessment return.

(8) The facts on which the Appellant relies for his reasonable excuse in this case:

(a) the Appellant was not liable to the HICBC in the first year of introduction of the tax. He never received the SA252 letter in the year his first child was born. He did not become aware of the HICBC as a result of the publicity campaign and nor did his father, a former HMRC officer. There is no simple guide to the tax system available to all taxpayers.

(b) The Appellant had no clear recollection of his wife completing the Child Benefit claim form in 2013 and suspects that as his base salary was below £50,000 (although his income including bonuses and benefits ignoring pension contributions was above £50,000) his wife likely asked him about his salary and he had given the natural answer.

(c) The complexities of the HICBC and the fact that the child benefit was claimed by the Appellant's wife explain the Appellant's failure to notify liability to HICBC.

(d) These facts are proven. The first and second limb of the Perrin test are satisfied.

(9) I consider that the above amount to a reasonable excuse for the Appellant for the years 2013/14 and 2014/15 because the complexities of the HICBC and the absence of sufficiently clear notes in the Child Benefit claim form in 2013/14 which HMRC corrected in the 2016 claim form. Clear words are needed to enable compliance with the self-assessment system by a person whose earnings are taxed through the PAYE system. The third limb of the Perrin test is satisfied in relation to 2013/14 and 2014/15.

(10) The appellant became aware of the obligation in 2019 and remedied the situation quickly. The fourth limb of the Perrin test is satisfied in relation to 2014/15 and 2015/16.

(11) However, I cannot accept ignorance after the birth of the Appellant's second child as a reasonable excuse in the light of the very clear statement in the notes to the 2016 Child Benefit claim form and the fact that the Appellant had changed jobs and his new base salary was in excess of £50,000 in 2016/17.

23. As there is a reasonable excuse there is no need for me to consider whether there is a special circumstance in 2014/15 and 2015/16.

24. There is no evidence of a special circumstance to justify non-compliance in 2016/17 given the very clear statement in the 2016 Child Benefit claim from.

25. I allow the appeal in full in respect of 2014/15 and 15/16. In respect of the appeal in respect of 2016/17, I allow the appeal in part and reduce the penalty to 10% of the HICBC.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

26. 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.

JUDGE HEATHER GETHING
TRIBUNAL JUDGE

RELEASE DATE: 23 FEBRUARY 2021