[2021] UKFTT 0073 (TC)

TC08058V

INCOME TAX – High Income Child Benefit Charge ("HICBC") - penalties for failure to notify liability – Schedule 41 to Finance Act 2008 - whether reasonable excuse - no – whether special circumstances – no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

APPEAL NUMBER: TC/2017/07907

BETWEEN

MR ALI NEDJAI

Appellant

-and-

THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

TRIBUNAL: JUDGE KELVAN SWINNERTON
ANN CHRISTIAN

The hearing took place on 19 February 2021. With the consent of the parties, the form of the hearing was by video using the Tribunal video platform. A face-to-face hearing was not held because of the ongoing Covid 19 pandemic and the related restrictions. The documentation to which we were referred was a bundle of 47 pages and a generic bundle including legislation, case law, press releases and proformas of 656 pages.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

Mr Nedjai in person.

Mr Connor Fallon, HMRC Officer, for the Respondents.

DECISION

INTRODUCTION

1. This is an appeal by Mr Ali Nedjai ("the Appellant") against penalties in the sum of £536.30 chargeable under Schedule 41 to the Finance Act 2008 ("FA2008") in relation to the tax years 2014/2015 and 2015/2016. The penalties were charged as a result of the Appellant's failure to notify his liability to the High Income Child Benefit Charge ("HICBC").

2. The penalties for the relevant years are £354 for 2014/2015 and £182.30 for 2015/2016.

3. The tax liability itself was not in dispute. The only issues for the Tribunal to consider were whether the two penalties set out above were correctly assessed and whether the Appellant had a reasonable excuse for failure to notify chargeability.

4. The Appellant's Notice of Appeal also contested the interest charged on the penalties but he accepted at the hearing that this was outside of the Tribunal's jurisdiction.

RELEVANT LEGISLATION

5. The legislation relating to HICBC was introduced from 7 January 2013.

   5.1 It arises under s.681B of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA 2003"), introduced by para 7 of Sch 1 to the Finance Act 2012.

   5.2 The meaning of "Adjusted Net Income" for the purposes of HICBC is defined by reference to sub-s58(1) of the Income Tax Act 2007 ("ITA 2007").

6. The obligation to notify a liability to HICBC is provided under s.7 of the Taxes Management Act 1970 ("TMA 1970").

7. The penalty regime for failure to notify a relevant obligation is provided under Schedule 41 to the FA 2008 ("Sch 41"). This sets out, inter alia, the minimum penalty that should apply in different circumstances.

FACTS

8. The following facts are not in dispute. The Appellant and his wife have three children. The HICBC relevant to this case relates to the two youngest children of the Appellant and his wife. The Appellant lost his job in June 2012 and did not find another job until April 2014. He continued in that job until the role was made redundant in May 2016 and he began working again in October 2019. His wife worked as a teaching assistant.

9. Prior to 2014/2015, the Appellant was not required to notify his liability to tax to HMRC or to complete a self-assessment tax return.

10. The Appellant's Adjusted Net Income during 2012/2013 and 2013/2014 was not at the £50,000 level needed for HICBC to apply.

11. The Appellant's wife received child benefit for many years including in the tax years 2014/2015 and 2015/2016. In both of those years, the Appellant was the higher earner of the couple.

12. In both of those years, the Appellant was not within the Self-Assessment regime. He did not receive notices to file tax returns under s.8 TMA 1970 and did not file returns.

13. On 25 August 2017 the Respondents issued a generic letter (SA252) to the Appellant alerting him to the fact that he had not notified his liability to the HICBC.

14. The Respondents issued assessments as follows:

Tax Year	**Adjusted Net Income**	**Child benefit received**	**HICBC due**
2014/2015	£62,239	£1770	£1770
2015/2016	£69,461	£1823	£1823
TOTAL			**£3593**

15. On 8 September 2017, the Respondents issued a notice of penalty assessment to the Appellant as a result of his failure to notify the above liability. The penalties are as follows:

Tax year	**Liability to tax**	**FTN penalty structure**	**Penalty range**	**Penalty percentage**	**Penalty charged**
2014/2015	£1770	Non-deliberate, prompted	20-30%	20%	£354
2015/2016	£1823	Non-deliberate, prompted, within 12 months	10-30%	10%	£182.30
TOTAL PENALTIES					**£536.30**

16. On 13 September 2017 the Appellant submitted an appeal to the Respondents against the assessments and penalties shown above.

17. On 2 October 2017, the Respondents upheld the decisions.

18. On 4 October 2017, the Appellant paid back the full amount of child benefit in the sum of £3593. The Appellant then appealed to the Tribunal on 27 October 2017. He subsequently confirmed he was only appealing against the penalties and interest charged.

19. It is for the Respondents to show that the penalties have been charged correctly, and for the Appellant to show that he had a reasonable excuse for failure to notify on the ordinary civil standard of the balance of probabilities.

EVIDENCE

20. Mr Nedjai gave the following evidence. His evidence was not challenged, and we found him to be an honest and credible witness.

21. Mr Nedjai had been a 40% taxpayer for approximately 20 years until 2012. He paid his tax through PAYE and had not been required to complete a tax return for some time. He has never been self-employed.

22. After losing his job in June 2012, it took him two years to find another role.

23. He first became aware of his liability to HICBC when HMRC contacted him in 2017. He was shocked to have received this notification. He did not understand why HMRC was not aware that he was earning in excess of £50,000 during the tax years in question and why HMRC did

not have a system in place to have taken this into account in the context of any child benefit to be paid. Mr Nedjai is now training to be a teacher. Household finances were handled by both Mr Nedjai and his wife and they had two joint bank accounts.

APPELLANT'S SUBMISSIONS

24. Mr Nedjai stated that when the 2013 publicity campaign for HICBC took place he was not employed and not earning an income.

25. He could not remember receiving any correspondence from HMRC in 2013 about the introduction of HICBC but very possibly he may have received it. Given that he was out of work at that time, he was not a higher rate tax payer and even if he had seen something about HICBC, it would not have affected him then given his circumstances.

26. Whilst he was out of work, he received Universal Credit. The amount of Universal Credit that he was entitled to fluctuated dependent upon his wife's earnings. They were therefore treated as one unit.

27. HMRC knew how much he earned, and could easily find out how much his wife earned. HMRC should look at them together, and should have told him that he was liable for HICBC at the time.

28. He has always been on PAYE. HMRC take the tax they calculate as due before he gets his net income. HMRC should have done the same here.

29. Mr Nedjai did not claim he should not be liable for the HICBC, but argued it was unfair that he should also have to pay a penalty. He did not know that he should have notified HMRC, and it was wrong for them to put the blame on him.

RESPONDENT'S SUBMISSIONS

30. HMRC are not legally obliged to notify taxpayers of changes in the law that may affect them. However, there was an extensive publicity campaign to raise awareness of the introduction of HICBC.

31. The HICBC was announced in the 2012 budget, and details were provided on HMRC's website. There was an online calculator available, and also a telephone helpline, to provide guidance to taxpayers.

32. The case of *Johnstone v HMRC [2018] UKFTT 689 (TC)* also looked at a taxpayer who contended they were unaware of the introduction of HICBC and its impact on their obligation to notify chargeability. Judge Poon stated that:

> *"(1) HMRC do not have a statutory duty to notify all taxpayers potentially affected by HICBC. By statutory duty, we mean a duty that is provided by Parliament and laid down by statute. For example, HMRC have a statutory duty to issue a notice of assessment for any tax liability to be enforceable.*
>
> *(2) What initiatives or measures HMRC had taken to raise awareness of HICBC were matters of internal policy decisions, over which this Tribunal has no jurisdiction.*
>
> *(3) The cohort of taxpayers likely to be affected by HICB is not readily identifiable from the information held by HMRC, especially when the recipient of the child benefit and the taxpayer liable to HICBC are not the same person, as is the case here.*
>
> *(4) The "Child Benefit" is not a means-tested benefit, and as such, the Child Benefit Agency does not hold data to enable any identification of the recipients that may be affected by HICBC."*

33. Para 1 of Sch 41 FA2008 sets out when a penalty is payable by a person who fails to comply with an obligation, and paras 5 and 6 of Sch 41 FA2008 set out the penalty amounts depending on the behaviour that led to the failure to notify.

34. In this case, the Appellant's behaviour was categorised as "non-deliberate" and so the standard amount of the penalty by reference to para 6(2)(c) Sch 41 FA2008 is 30% of the Potential Lost Revenue ("PLR").

35. PLR is defined in para 7(2) Sch 41 FA2008 as the amount of income tax to which a person was liable in respect of a tax year as was unpaid on 31 January following the tax year, where a person has failed to notify income tax. In this appeal, the PLR is the figure shown in the "HICBC due" column in the table at paragraph 14 above.

36. Para 12 Sch 41 FA2008 details further reductions to the standard amount of a penalty to reflect the quality of a person's disclosure, which is the extent to which they: told HMRC about the failure; gave HMRC reasonable help in quantifying the tax unpaid by reason of the failure; allowed HMRC access to their records for the purpose of checking how much tax is unpaid as a result; and provided HMRC with additional information.

37. Para 13 Sch 41 FA2008 determines minimum amounts of penalties depending on whether a person's disclosure was prompted or unprompted, and whether HMRC became aware of their failure less than 12 months after the due date for income tax unpaid as a result of the failure.

38. In this case, the penalties have been charged at the minimum percentages allowed under paras 12 and 13 Sch 41 FA2008.

39. If a person has a reasonable excuse for failing to notify their liability, they will not be liable to a penalty – para 20 Sch 41 FA 2008.

40. The Upper Tribunal (UT) case of *Christine Perrin v HMRC [2018] UKUT 0156* dealt with the issue of what constitutes a reasonable excuse. Para 81 states:

"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 believe) 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."

41. The UT then went on to say at para 82 that:

"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."

42. It is for the Appellant to show he had a reasonable excuse, and therefore for the Appellant to show any specific factors that are relevant.

43. If there had in fact been a reasonable excuse initially, then following the fourth limb of the *Perrin* test, it should have been remedied without unreasonable delay.

44. Here, the delay amounted to 2 years and was not reasonable.

45. In respect of the Appellant's remaining contentions, the Respondents maintain that only the Appellant held information about many of the variables that determine liability to HICBC: non-PAYE income; tax reliefs available in calculating ANI; the identity of a person's partner (if relevant); and which partner has the higher ANI.

46. The Appellant states that the penalty is unfair, as the Respondent should have told him about his liability to HICBC.

47. The Respondents have a record of sending the Appellant a generic letter about HICBC on 17 August 2013, advising him to check if he was liable to it.

48. The Appellant may not remember seeing that letter, but the letter was sent to the correct address and was not returned as undeliverable. On the balance of probabilities, he did receive it.

49. Even if he did not receive it, that would not amount to a reasonable excuse. There was also an extensive media campaign, but in any event the Respondents were not legally obliged to inform the Appellant of the change in the law.

50. As to the question of "unfairness" generally, in the case of *HMRC v Hock Ltd [2012] UKUT 363* the UT held that the FTT does not have jurisdiction to discharge a penalty simply because it is unfair.

51. The question of interest is not within the FTT's jurisdiction – this was confirmed by the UT in *HMRC v Neil and Megan Gretton [2012] UKUT 261*.

52. HMRC have considered whether a special reduction is due, but find no special circumstances to merit this. They did, in a number of HICBC cases, remove the penalties on a discretionary basis, but here they sent the Appellant direct correspondence about HICBC and so he would not have been included in that review.

DISCUSSION

53. It is for HMRC to prove, on the balance of probabilities, that the discovery assessments were valid and in time, and the penalties correctly calculated.

54. The facts as set out above are clear, and HMRC have given the maximum reduction for disclosure as is permitted by the legislation. We agree that the penalties have been assessed correctly and that the maximum reduction is appropriate in this case.

55. It is for the Appellant to show that he had a reasonable excuse for failure to notify.

56. The Appellant's contentions are that he was not aware of HICBC, and that HMRC had enough information about his circumstances in order to establish that HICBC was relevant to him and should have told him. It is unfair that he is being penalised.

57. The liability of an individual to notify HMRC of their liability to tax where appropriate is clearly set out in s 7(1) Taxes Management Act 1970.

58. We accept that the Appellant was not a higher rate taxpayer when HICBC was first introduced, and so he may not have considered it relevant to him, if he had seen any publicity about it. However, that does not affect the legal position.

59. The case of *Johnstone* shows that HMRC are not required to advise taxpayers of changes to tax law.

60. Following *Perrin*, whilst ignorance of the law can possibly amount to a reasonable excuse, the question is not whether a person was in fact personally unaware [of the introduction of HICBC] but rather it was objectively reasonable for him to be unaware.

61. Here, we do accept that if the Appellant saw the media campaign, or read the generic letter HMRC sent to him in August 2013, he may have not considered HICBC any further as it was not relevant to him at that particular time. However, that does not provide a reasonable excuse.

62. The Appellant has not shown that it was objectively reasonable, taking into account all the circumstances, for him to be unaware of HICBC. Without being able to show that, he does not have a reasonable excuse for failure to notify, simply because he did not know he had to.

63. We do accept that for some purposes, the combined income of a couple is assessed, but that does not mean that a taxpayer can assume HMRC will do that automatically.

64. Whether or not the penalty system is fair is not a matter for this tribunal. It is provided for in statute.

65. We also considered whether special circumstances should apply, as provided for in para 14 Sch 41 FA2008.

66. We did not consider that there were any relevant special circumstances.

67. The Respondents did refund HICBC "failure to notify" penalties in some cases, but these were on a discretionary basis and we accept that the Appellant was not included because he had been sent direct correspondence about HICBC.

68. The interest element on the HICBC liability is not a matter over which this Tribunal has jurisdiction.

DECISION

69. For the reasons stated above, the appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

70. 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.

KELVAN SWINNERTON

TRIBUNAL JUDGE

RELEASE DATE: 15 MARCH 2021