Neutral Citation: [2023] UKFTT 746 (TC)

Case Number: TC08926

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2022/00633

HIGH INCOME CHILD BENEFIT CHARGE – discovery assessments in respect of HICBC liability – penalties for failure to notify liability – retrospective effect of amendments to s29 TMA 1970 relating to discovery assessments - whether penalties are criminal for purposes of Article 6, European Convention of Human Rights – whether Article 7 in respect of retrospective criminal liabilities engaged – ignorance of the law as a reasonable excuse – s29 Taxes Management Act 1970

Heard on: 15 June 2023
Judgment date: 1 September 2023

Before

TRIBUNAL JUDGE ALEKSANDER
LESLIE BROWN

Between

JOHN SHARP

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: the Appellant in person

For the Respondents: N Campbell, litigator, of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. The form of the hearing was V (video) using the HMCTS video hearing service. The hearing was attended by the Appellant, the witnesses, and the representatives. 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.

2. This is an appeal against the following assessments:

Date	Tax Year	Description	Amount
30 April 2021	2014/15	Discovery Assessment	£1066.00
30 April 2021	2015/16	Discovery Assessment	£1097.00
30 April 2021	2016/17	Discovery Assessment	£1076.00
30 April 2021	2017/18	Discovery Assessment	£1076.00
24 May 2021	2014/15	Sch 41 Penalty	£213.20
24 May 2021	2015/16	Sch 41 Penalty	£219.40
24 May 2021	2016/17	Sch 41 Penalty	£215.20
24 May 2021	2017/18	Sch 41 Penalty	£215.20

3. In addition, interest is chargeable.

4. The discovery assessments are made under s29 Taxes Management Act 1970 ("TMA") in respect of the Mr Sharp's liability to the High Income Child Benefit Charge ("HICBC"). and penalties were charged under Schedule 41, Finance Act 2008 ("Schedule 41") on the basis that he failed to notify HMRC of his liability to HICBC in accordance with his obligations under s7 TMA.

5. The assessments to HICBC were dated 30 April 2021 and the assessments to penalties were dated 24 May 2021. Mr Sharp requested a review, and the review conclusion letter dated 17 December 2021 upheld the liability to HICBC and penalties.

6. Mr Sharp now appeals against both his liability to HICBC and penalties.

7. Witness statements were submitted from Amy Woodham, a caseworker in HMRC's Campaigns & Projects Team, and Steven Thomas a Senior HMRC Officer working in the Campaigns & Projects Team. Their statements were taken as read as evidence in chief. Ms Woodham and Mr Thomas were both cross-examined. Mr Sharp gave oral evidence, but was not cross-examined. The electronic documents to which we were referred were a documents bundle of 160 pages, and HMRC's generic bundle relating to High Income Child Benefit Charge appeals of 808 pages.

BACKGROUND FACTS

8. The background facts are largely undisputed, and we find that they are as follows:

9. Mr Sharp is an employee whose salary is subject to withholding of tax under PAYE.

10. In November 2010, Mr Sharp's spouse claimed child benefit in respect of their first child. Their second child was born in December 2012, but child benefit was not claimed in respect of this child.

11. Mr Sharp was registered into self-assessment from 2 August 2004 in consequence receiving rental income from an investment property. Self-assessment tax returns were submitted for tax years 2012/13 and 2013/14 by an agent. Mr Sharp had engaged an agent to prepare and file tax returns for these years because he had suffered a loss as a result of his tenant failing to to pay rent for 10 months. Although Mr Sharp's Adjusted Net Income for

HICBC purposes was less than £50,000 for 2012/13, he declared his liability to HICBC in his return for 2013/14 and paid HICBC for that tax year.

12. The investment property was sold in January 2014, and Mr Sharp's agent called HMRC to notify them that Mr Sharp no longer qualified for self-assessment treatment. In consequence, the self-assessment tax return issued for 2014/15 was withdrawn, and Mr Sharp did not file self-assessment tax returns for any of the periods under appeal.

13. Mr Sharp was returned to self-assessment for 2018/19, and declared his liability to HICBC for that year in his self-assessment return.

14. We were shown a copy of the Child Benefit claim form used from April 2011 to September 2012 which it was accepted was the version that would have been used by Mrs Sharp to claim Child Benefit in November 2010. As this was utilised before the introduction of HICBC, no mention of HICBC appears on the form.

15. Mrs Sharp did not claim Child Benefit for their second child, who was born in December 2012. It is therefore unclear whether Mr or Mrs Sharp read the claim form used from October 2012 to June 2013. The front page of the October 2012 form was headed "Changes to Child Benefit payments" and stated:

> This information **only** applies if you or your partner have an individual income of more than £50,000 a year.
>
> From 7 January 2013, if either you or your partner have an individual income of more than £50,000 a year then you (or your partner) will have to pay a **High Income Child Benefit Charge** on some or all of the Child Benefit you receive.

16. The second page of the Child Benefit claim form contained the same information about the change to HICBC where the person claiming Child Benefit or their partner earned more than £50,000. However, before the section of the form containing the information about liability to HICBC it stated (in bold in the original):

> **The information below only applies to you if your or your partner's individual income is more than £50,000 a year. If it does not apply, please go straight to page 2 and fill in this claim form.**

17. Since 2011, Mr Sharp has been a senior team leader within an architectural practice, and his income is subject to substantial fluctuations because of the receipt of variable bonuses. For the tax years under appeal, his adjusted net income, the child benefit received by his spouse, and the HICBC liabilities were as follows:

Tax Year	Adjusted Net Income	Child Benefit received	HICBC due
2014/15	£61,334.19	£1066.00	£1066.00
2015/16	£61,672.19	£1097.10	£1097.00
2016/17	£72,728.77	£1076.40	£1076.00
2017/18	£72,061.77	£1076.40	£1076.00

18. The amount of Mr Sharp's adjusted net income for HICBC purposes is not disputed.

19. Mr Thomas's witness statement described the extensive Government campaign in 2012 and 2013 to raise awareness of HICBC and its consequences using advertisements, television adverts and letters/mail shots to customers who would be affected. Of course, at that time, Mr Sharp's income was below the HICBC threshold, and we consider that it is unlikely that they paid much attention to the campaign. Mr Thomas also described the 'briefing' that was issued by HMRC in November 2012 to over a million higher rate taxpayers. His witness statement

was very similar to witness statements given by other HMRC officers in other HICBC appeals. As it was entirely generic and focused mainly on attempts by HMRC to publicise HICBC to higher rate taxpayers in 2012 and 2013, and Mr Sharp was not a higher rate taxpayer at that time, we did not find Mr Thomas's evidence about these campaigns of any material assistance in this case.

20. Possibly because Mr Sharp was not a higher-rate taxpayer at these times, neither he nor Mrs Sharp received any of the letters mentioned in Ms Thomas's evidence.

21. HMRC's records show that Mr Sharp was sent a "nudge" letter. The copy of the letter included in the bundle shows that the letter was dated 18 December 2019. Mr Sharp's unchallenged evidence is that he did not receive this letter. His unchallenged evidence was that he was experiencing problems with receiving post because the name of his road was confusingly similar to another road in the same town. We have omitted setting out the names of the roads in this decision for obvious reasons, but we find that the names are confusingly similar, and we believe Mr Sharp's evidence that this resulted in problems in receiving post, and we find that he did not receive the nudge letter.

22. On 12 January 2021, HMRC's computer system allocated Mr Sharp's case to Ms Woodham. Ms Woodham reviewed HMRC's records. These showed that although Mr Sharp had apparently been sent the "nudge" letter mentioned above, he had not been sent any of the other targeted compliance letters. Ms Woodham noted that the nudge letter had not been returned to HMRC as undeliverable, and that Mr Sharp had not responded to it. The records indicated that Mrs Sharp had claimed Child Benefit and that Mr Sharp's adjusted net income for 2014/15 to 2017/18 inclusive exceeded £50,000.

23. Ms Woodham issued an "opening letter" to Mr Sharp on 1 March 2021 in respect of HICBC for the tax years 2014/15 to 2019/20.

24. Mr Sharp telephoned HMRC on 18 March 2021. During the course of that call, the HMRC officer to whom Mr Sharp spoke completed a "behaviour audit trail". Based on the responses given by Mr Sharp to questions from the HMRC officer, the officer considered whether Mr Sharp's behaviour gave rise to a liability to penalties. He decided that as a nudge letter had been sent to Mr Sharp in December 2019, Mr Sharp did not have a reasonable excuse for his failure to notify HMRC of his liability to HICBC based on ignorance of the law, and that penalties were chargeable under Schedule 41.

25. On 30 April 2021 HMRC raised assessments for HICBC, and assessments for penalties were issued on 24 May 2021. Mr Sharp's behaviour was considered by HMRC to be "non-deliberate", and that any disclosure of his liability to HICBC was prompted, as he had made no attempt to notify HMRC of his liability prior to the March 2021 letter. Under paragraph 6 of Schedule 41, the minimum level of penalty for non-deliberate prompted disclosure (where the disclosure was made more than 12 months after the tax was due) is 20% of the potential lost revenue (in this case HICBC liability). A 20% penalty was assessed.

26. On 15 June 2021 Mr Sharp submitted an appeal to the HMRC against the assessments and penalties.

27. On 28 June 2021 the HMRC replied to the appeal letter, providing their view of the matter, upholding the decisions, and inviting Mr Sharp to request a statutory review or appeal to the Tribunal. The offer of a review was accepted. The review decision letter, upholding the assessments to HICBC and penalties, was issued on 17 December 2021. It is against that review decision that Mr Sharp now appeals.

THE LAW

28. HICBC was introduced with effect from 7 January 2013. HICBC is imposed on individuals who have an adjusted net income of more than £50,000 in a tax year where that individual or their partner or spouse is in receipt of Child Benefit. Where liability to HICBC arises in any tax year, the individual who is subject to the charge must notify HMRC of their liability to income tax pursuant to s7 TMA.

29. Until the Finance Act 2022 ("FA 2022") came into force on 24 February 2022, section 29(1)(a) TMA 1970 provided, as far as relevant to this appeal, that:

> 29(1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment—
>
> (a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or
>
> […]
>
> the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.

30. Subsections (2) and (3) of section 29 TMA only apply where the taxpayer has made and delivered a return and do apply in this case as Mr Sharp did not make a self-assessment tax return in the years assessed.

31. The ability of HMRC to raise assessments under s29 TMA is subject to time limits set out in section 36(1A) as follows:

> 36(1A) An assessment on a person in a case involving a loss of income tax or capital gains tax–
>
> […]
>
> (b) attributable to a failure by the person to comply with an obligation under section 7,
>
> […]
>
> may be made at any time not more than 20 years after the end of the year of assessment to which it relates (subject to any provision of the Taxes Acts allowing a longer period).

32. Section 7 TMA sets out the requirement for persons who are chargeable to income tax to give notice to HMRC that they are liable to income tax within 6 months of the end of the relevant tax year.

33. In relation to assessments under section 29 TMA to collect HICBC a series of decisions relating to an appeal brought by Jason Wilkes (ultimately confirmed by the Court of Appeal in *HMRC v Wilkes* [2022] EWCA Civ 1612 ("*Wilkes*")) held that HICBC was "neither 'income' nor even charged on income" nor was it "income which ought to have been assessed to income tax" or an "amount which ought to have been assessed to income tax" (see *Wilkes* at [29]). Accordingly, HICBC could not be assessed under section 29(1)(a) TMA.

34. Section 29(1)(a) TMA 1970 was amended by s97 FA 2022 to read as follows:

> that an amount of income tax or capital gains tax ought to have been assessed but has not been assessed

The change in wording introduced by s97 FA 2022 reversed the decisions in *Wilkes* and allowed HMRC to make discovery assessments, subject to the usual conditions, in relation to HICBC and some other things.

35. The new wording has retrospective effect but that is subject to an exception for discovery assessments in respect of HICBC in relation to which notice of appeal had been given to HMRC on or before 30 June 2021 which met certain conditions. The relevant provisions in section 97 are as follows:

> (3) The amendments made by this section—
>
> (a) have effect in relation to the tax year 2021-22 and subsequent tax years, and
>
> (b) also have effect in relation to the tax year 2020-21 and earlier tax years but only if the discovery assessment is a relevant protected assessment (see subsections (4) to (6)).
>
> (4) A discovery assessment is a relevant protected assessment if it is in respect of an amount of tax chargeable under—
>
> (a) Chapter 8 of Part 10 of ITEPA 2003 (high income child benefit charge),
>
> […]
>
> (5) But a discovery assessment is not a relevant protected assessment if it is subject to an appeal notice of which was given to HMRC on or before 30 June 2021 where—
>
> (a) an issue in the appeal is that the assessment is invalid as a result of its not relating to the discovery of income which ought to have been assessed to income tax but which had not been so assessed, and
>
> (b) the issue was raised on or before 30 June 2021 (whether by the appellant or in a decision given by the tribunal).
>
> (6) In addition, a discovery assessment is not a relevant protected assessment if—
>
> (a) it is subject to an appeal notice of which was given to HMRC on or before 30 June 2021,
>
> (b) the appeal is subject to a temporary pause which occurred before 27 October 2021, and
>
> (c) it is reasonable to conclude that the temporary pausing of the appeal occurred (wholly or partly) on the basis that an issue of a kind mentioned in subsection (5)(a) is, or might be, relevant to the determination of the appeal.
>
> (7) For the purposes of this section the cases where notice of an appeal was given to HMRC on or before 30 June 2021 include a case where—
>
> (a) notice of an appeal is given after that date as a result of section 49 of TMA 1970, but
>
> (b) a request in writing was made to HMRC on or before that date seeking HMRC's agreement to the notice being given after the relevant time limit (within the meaning of that section).
>
> (8) For the purposes of this section an appeal is subject to a temporary pause which occurred before 27 October 2021 if—
>
> (a) the appeal has been stayed by the tribunal before that date,

> (b) the parties to the appeal have agreed before that date to stay the appeal, or
>
> (c) HMRC have notified the appellant ("A") before that date that they are suspending work on the appeal pending the determination of another appeal the details of which have been notified to A.

36. In summary, the retrospective changes made by s97 FA 2022 do not apply to an appeal that was made on or before 30 June 2021 which concerned the issue identified in the decisions in *Wilkes* and that issue was raised by a party or this Tribunal before that date or the appeal was subject to a temporary pause on or before 27 October 2021 because of that issue.

THE EUROPEAN CONVENTION

37. Following the hearing and during the course of the preparation of this decision, we considered whether the European Convention of Human Rights might have relevance to this appeal. Article 6 addresses the right to a fair trial, and the case law of the European Court of Human Rights is that tax penalties in certain circumstances would be treated as "criminal" for the purposes of the Convention.

38. Article 7(1) of the Convention (No punishment without law) provides as follows:

> 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

39. We asked the parties to file their written submissions on the potential relevance of Articles 6 and 7 of the Convention to this appeal, and in particular to the retrospective effect of the amendments made to s29. Mr Sharp was not represented, and (for reasons we entirely appreciate) did not consider that he was capable of making submissions on the application of the Convention. HMRC provided written submissions, and our decision takes account of these.

40. It is not disputed that the imposition of penalties in the circumstances of this appeal is "criminal" for the purposes of the Convention.

41. However, "ordinary" liabilities to tax are not criminal. We find that the liability to HICBC is such an ordinary tax liability. The amendments made to s29 address the ability of HMRC to make a "discovery assessment" in order to collect HICBC, and we agree that the provisions of Article 7 are not engaged in relation to the retrospective amendments to s29 to allow HMRC to collect ordinary tax liabilities such as HICBC.

42. However, can penalties be imposed on the basis of a retrospective amendment to s29? HMRC submit that Mr Sharp's obligation to notify his liability to HICBC under s7 TMA was not imposed retrospectively. At all relevant times the law required Mr Sharp to notify his liability to HICBC within 6 months of the end of the relevant tax year. His failure to do so, submit HMRC, gives rise to a penalty under Schedule 48, irrespective of whether HMRC had power to raise a discovery assessment for HICBC liability.

43. We agree with HMRC – there was no retrospective imposition of an obligation on Mr Sharp to notify his liability to HICBC under s7. Even if s29 had not been amended by FA 2022, Mr Sharp would still have had an obligation to notify HMRC of his HICBC liability under s7 TMA. And it is his failure to comply with his s7 obligation that gives rise to penalties in this case.

44. We find that Article 7 of the Convention is not engaged, and HMRC are not prevented from imposing penalties for breach of s7 TMA obligations.

THE ASSESSMENT TO HICBC

45. Mr Sharp notified his appeal to HMRC on 15 June 2021 and directions issued on 30 March 2022 stayed this appeal behind *Wilkes*. This appeal was not, therefore, subject to "a temporary pause" within s97(6)(b). However, as the appeal was notified to HMRC before 30 June 2021, we need to consider whether the exception in s97(5) applies. For this to apply:

(1) the question raised in the *Wilkes* cases must be an issue in the appeal; and

(2) that issue must have been raised (whether by Mr Sharp or the Tribunal) on or before 30 June 2021.

46. As Mr Sharp's grounds of appeal do not raise the *Wilkes* point, we find that Mr Sharp does not escape the retrospective effect of s97 FA 2022.

47. There is no dispute that Mr Sharp was within the scope of HICBC, and no submissions were made that the amount of Mr Sharp's liability to HICBC was calculated incorrectly. We find that Mr Sharp is liable to HICBC in the amounts assessed. We also find that the assessment to HICBC complied with the requirements of s29 TMA. As Mr Sharp had not notified HMRC of his liability to HICBC, we find that the 20-year time limit in s36(1A) applies, and the assessments were made in time.

PENALTIES

48. Paragraph 1, Schedule 48 imposes a penalty in the circumstances listed in that paragraph. These include the failure to give notification under s7 TMA. For the reasons already given, we find that Mr Sharp did not notify HMRC of his liability to HICBC.

49. Paragraph 5 sets out the "degrees of culpability" – namely "deliberate and concealed" and "deliberate and not concealed". Paragraph 6 then sets out the standard penalty for the different degrees of culpability as follows:

(a) for a deliberate and concealed act or failure, 100% of the potential lost revenue,

(b) for a deliberate but not concealed act or failure, 70% of the potential lost revenue, and

(c) for any other case, 30% of the potential lost revenue.

HMRC levied penalties on the basis that Mr Sharp's degree of culpability was "non-deliberate", in other words it falls within paragraph (c) and the standard penalty is 30% of the potential lost revenue. In the circumstances of this case, there is no dispute that the potential lost revenue is Mr Sharp's liability to HICBC.

50. Paragraph 13 provides for a reduction in the amount of the penalty where the taxpayer has provided disclosure to HMRC. HMRC have given Mr Sharp the benefit of the maximum reduction allowed under that provision and have reduced the penalty to 20% of HICBC liability.

REASONABLE EXCUSE

51. Paragraph 20 of Schedule 41 provides that a penalty will not arise in circumstances where the taxpayer has a reasonable excuse for his default.

52. The Upper Tribunal considered the correct test for reasonable excuse in *Perrin v HMRC* [2018] UKUT 156 (TCC). At [75], the Upper Tribunal concluded that the FTT in that case had correctly stated that “to be a reasonable excuse, the excuse must not only be genuine, but also objectively reasonable when the circumstances and attributes of the actual taxpayer are taken

into account." The Upper Tribunal set out helpful guidance as to how the FTT should approach the issue of reasonable excuse at [81] of *Perrin* as follows:

> 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."

53. The Upper Tribunal in *Perrin* then made the following further observation at [82]:

> 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.

54. The reference to *The Clean Car Co* in [82] of Perrin is to the decision of the VAT Tribunal in *The Clean Car Co Ltd v Custom and Excise Commissioners* [1991] VATTR 234. In that case, HH Judge Medd QC held:

> […] 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 in at the relevant time, a reasonable thing to do? Put in another way which does not I think alter the sense of the question: was what the taxpayer did not an unreasonable thing for a trader of the sort I have envisaged, in the position the taxpayer found himself, to do? ... It seems to me that Parliament in passing this legislation must have intended

> that the question of whether a particular trader had a reasonable excuse should be judged by the standards of reasonableness which one would expect to be exhibited by a taxpayer who had a responsible attitude to his duties as a taxpayer, but who in other respects shared such attributes of the particular appellant as the tribunal considered relevant to the situation being considered. Thus though such a taxpayer would give a reasonable priority to complying with his duties in regard to tax and would conscientiously seek to ensure that his returns were accurate and made timeously, his age and experience, his health or the incidence of some particular difficulty or misfortune and, doubtless, many other facts, may all have a bearing on whether, in acting as he did, he acted reasonably and so had a reasonable excuse.

55. The situation in *The Clean Car Co* was that the taxpayer had wrongly claimed input tax on the basis of an architect's certificate rather than a VAT invoice and became liable to a penalty as a result. The taxpayer appealed on the grounds that it had a reasonable excuse for the error, based upon a genuine belief that recovery of the input tax was permissible on the basis of the architect's certificate and the hospitalisation of the managing director's daughter. The Upper Tribunal in *Perrin*, having quoted the passage from *The Clean Car Co* above at [51], summarised the VAT Tribunal's decision at [52]:

> The tribunal therefore decided that, even though the company (through its managing director) honestly and genuinely believed it had complied with its obligations, that was not enough on its own to afford it a reasonable excuse for the failure; but also that bearing in mind the managing director's unfamiliarity with the special rules applied to building contracts by the VAT legislation at the time and his daughter's serious illness, the excuse that was being put forward did satisfy the objective requirement of reasonableness that he had propounded, and did therefore amount to a reasonable excuse in law.

56. Another situation where ignorance of the law may constitute a reasonable excuse was identified by Simon Brown J, as he then was, in *Neal v Customs and Excise Commissioners* [1988] STC 131. The Upper Tribunal referred to this decision in *Perrin*, but the case itself was not cited to us. *Neil* concerned a 19-year-old model with no experience of tax, business or law who was subject to a late registration VAT penalty. She contended that her "total basic ignorance" of the law amounted to a reasonable excuse. The Tribunal disagreed. On appeal, having referred to section 61 of Trustee Act 1925 and its predecessor legislation which provided a trustee with relief from a liability for a breach of trust if they had acted "honestly and reasonably and ought reasonably to be excused", Simon Brown J said (at 134-5):

> They clearly establish that at least some degree of ignorance of the law may well constitute an exonerating excuse for a trustee. In that context, as in the value added tax legislation, the court is not concerned with ignorance of the law being raised as a defence, let alone to excuse conduct which is intrinsically immoral; rather it is invoked so as to secure relief from penalty in the absence of *mens rea*. The analogy, contends counsel for the taxpayer, is very close in that both trustees and taxpaying traders are concerned with self-administered duties. Indeed, the argument runs, taxpaying traders are more deserving of indulgence even than trustees because their status has been forced upon them and not, as in the case of trustees, voluntarily assumed by people to whom the law ascribes some business knowledge.
>
> […]
>
> It seems to me essential to recognise a distinction between on the one hand basic ignorance of the primary law governing value added tax including the liability to register and on the other hand ignorance of aspects of law which less directly impinge upon such liability.

> […]
>
> In the result, whilst not accepting the wider submissions of either party, I have decided that the tribunal was right to conclude that they were bound to reject the taxpayer's argument that she could invoke her ignorance of basic value added tax law as reasonably excusing her default. That, it is plain from the context, is all that the tribunal meant when they said that 'ignorance of the law cannot be an excuse'. This case was simply not concerned with the taxpayer's ignorance other than of basic value added tax law let alone ignorance of mixed law and fact. Had it been, then in my judgment the tribunal ought certainly to take such matter into account as part of the overall facts of the case.

57. In considering whether Mr Sharp had a reasonable excuse for his failure to notify his liability to HICBC, we must consider whether he had an excuse that is objectively reasonable, taking into account his attributes and circumstances. We apply the approach set out in *Perrin* in considering whether Mr Sharp had a reasonable excuse.

58. The relevant facts are that Mr Sharp's income exceeded HICBC threshold in the 2014/15 tax year - as his adjusted net income for that year exceeded £50,000. Accordingly, he should have notified HMRC by no later 5 October 2015 that he was chargeable to HICBC and thus liable to make a self-assessment tax return for 2014/15. Mr Sharp's case is in essence that, having first claimed Child Benefit in November 2010 at a time when HICBC did not exist, and having never been sent information by HMRC about HICBC, it was reasonable for him in all the circumstances to fail to appreciate that he had become liable to HICBC and thus also liable to notify HMRC of his chargeability to income tax for the years under appeal.

59. Mr Sharp's evidence, which was not challenged, was that having claimed child benefit in November 2010, he did not receive any further communications from HMRC about HICBC. The first time that Mr Sharp became aware that he was liable to pay HICBC was in March 2021 when he received HMRC's opening letter. Mr Sharp's evidence that he did not receive the "nudge" letter was not challenged by HMRC, and we believe and find that he did not receive the nudge letter.

60. In essence, Mr Sharp seeks to rely on "ignorance of the law" as a reasonable excuse. As the Upper Tribunal states in [82] of *Perrin*, it is a matter of judgment 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.

61. We have not found this an easy case to decide. Mr Sharp was liable to HICBC for 2013/14, and declared his liability to HICBC on his self-assessment tax return for that year, and paid the charge. Mr Sharp's submission was that as this tax return had been completed by an agent on his behalf, he was not aware of the relevance of this declaration on his tax return. Mr Sharp was required to file a self-assessment tax return for 2018/19, and he declared and paid HICBC for that tax year.

62. We find it odd that Mrs Sharp made no claim for child benefit for their second child who was born in December 2012. As Mr Sharp was not cross-examined on his evidence, we do not know whether her decision not to claim child benefit was because of the notification on the claim form of HICBC? In the absence of any evidence on this point we make no findings in this respect. On the other hand, there was no mention in the claim form used at that time of the obligation to notify HMRC of liability to HICBC within six months of the end of that tax year or any instructions on how to make such a notification.

63. Mr Thomas's evidence described HMRC's publicity campaigns in 2012 and 2013 to alert higher rate taxpayers to the existence of HICBC and the consequent need to register for self-assessment. The Generic Bundle also included certain materials from such campaigns.

However, we were not shown any evidence of campaigns or materials from 2015 or later which were intended to alert existing claimants of their obligations in relation to HICBC in the event that their income rose above £50,000 after they had begun to claim Child Benefit. And we have found that Mr Sharp did not receive HMRC's "nudge" letter.

64. Was it was objectively reasonable, in the circumstances of the case, for Mr Sharp to have been unaware of the requirement to notify HMRC that he had become liable to HICBC, taking into account the fact that HICBC did not exist when Mrs Sharp claimed child benefit and the absence of any subsequent communications, either by way of a general campaign aimed at those in their position or direct correspondence, in the tax years under appeal?

65. We note that Mr Sharp declared a liability to HICBC in his 2013/14 and 2018/19 tax returns. Even if Mr Sharp did not appreciate that he had made such a declaration for 2013/15 because of the use of an agent to prepare that return, no such excuse could apply to 2018/19 when he prepared the return himself. So, even if Mr Sharp had a reasonable excuse because of his ignorance of the law, that excuse would have ceased by the time he filed his 2018/19 tax return on 4 April 2020 at the latest. And in any event, a prudent and reasonable taxpayer in Mr Sharp's position would have checked a draft of his 2013/14 return before it was filed, and so would have become aware of HICBC on reviewing the draft return.

66. We find that Mr Sharp ought reasonably to have become aware of his liability to HICBC by 31 January 2015 (the statutory filing date for his 2013/14 tax return) and certainly by 4 April 2020 (the date on which he actually filed his 2018/19 tax return). We therefore find that – by the time HMRC sent its opening letter to Mr Sharp in March 2021 - it was no longer objectively reasonable for Mr Sharp, in the circumstances of the case, to have been ignorant of his liability to HICBC for the tax years under appeal. To the extent that he may have had a reasonable excuse, that excuse would have ceased, and Mr Sharp would have had a duty to notify his liability to HICBC.

67. Accordingly, we find that Mr Sharp did not have a reasonable excuse for failing to notify his liability to HICBC under s7 TMA.

CONCLUSION

68. We have found that Mr Sharp is liable to HICBC in the amount assessed.

69. We have found that Mr Sharp is liable to penalties for his failure to notify HMRC of his liability to HICBC. We note that HMRC have given the maximum permitted reduction as regards the amount of penalties. We therefore find that Mr Sharp is liable to penalties for the amount assessed.

70. The appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

71. 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.

NICHOLAS ALEKSANDER
TRIBUNAL JUDGE

Release date: 01st SEPTEMEBR 2023