Neutral Citation: [2023] UKFTT 902 (TC)

Case Number: TC08970

FIRST-TIER TRIBUNAL
TAX CHAMBER

Location: Decided on the papers

Appeal reference: TC/2023/00294

HIGH INCOME CHILD BENEFIT CHARGE – penalties for failure to notify liability – whether reasonable excuse – appeal allowed

Judgment date: 23 October 2023

Decided by:

TRIBUNAL JUDGE JEANETTE ZAMAN

Between

MICHAEL BARRETT

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

The Tribunal determined the appeal on 13 October 2023 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 20 January 2023, HMRC's Statement of Case dated 23 March 2023, a hearing bundle of 90 pages (specific to this appeal) and a generic HICBC bundle of 833 pages prepared by HMRC (containing legislation and authorities, as well as publicity material in relation to the HICBC).

DECISION

INTRODUCTION

1. This appeal concerns a penalty issued by HMRC for failure to notify liability to the High Income Child Benefit Charge ("HICBC"). Mr Barrett has been assessed to HICBC for the tax year 2018/2019 ("the tax year in question") together with a penalty of £182.40 ("the penalty") for failing to notify chargeability under s7 Taxes Management Act 1970 ("TMA 1970"). The penalty has been assessed pursuant to Schedule 41 Finance Act 2008 ("Schedule 41").

2. Mr Barrett has not appealed against the assessment of liability to tax. He appeals against the penalty. In his Notice of Appeal to the Tribunal, he said he understood that all tax must be paid but that the penalty was unjustified. His grounds of appeal were, in summary:

(1) He was unaware of the introduction of the HICBC. HMRC's letter dated 14 September 2022 was the first letter he received regarding the HICBC.

(2) HMRC's letters of 29 November 2019 and 4 June 2021were sent to a previous address, at which he had not resided since May 2019. He had set up a re-direct of mail, but these letters were not received.

(3) As his employment income was taxed under PAYE during the tax year in question, he had never been asked to complete a self-assessment tax return and did not realise that he needed to do so to report liability to the HICBC.

(4) His children were born before the introduction of the HICBC legislation and HMRC failed to sufficiently communicate the changes to the law.

(5) He was advised by HMRC that he should appeal the decision to issue the penalty and may not have to pay the penalty imposed. HMRC had said that they could see he had not purposely misled HMRC or tried to avoid any tax due.

3. Mr Barrett's appeal is allowed and the penalty is cancelled.

RELEVANT LEGISLATION

4. The relevant legislation is summarised below.

5. By s681B Income Tax (Earnings and Pensions) Act 2003 (which was inserted by Finance Act 2012 with effect for child benefit payments made after 7 January 2013) a person is liable to a charge to income tax, the HICBC, for a tax year if:

(1) His adjusted net income for the year is greater than £50,000.

(2) His partner's ("partner" is defined in s681G) adjusted net income is less than his.

(3) He or his partner are entitled to child benefit.

6. Section 7 TMA 1970 provides that if a person is chargeable to income tax, he must notify HMRC of that fact within six months after the end of the tax year. But if his income consists of PAYE income and he has no chargeable gains he is not required to notify his chargeability to income tax unless he is liable to the HICBC.

7. Paragraph 1 Schedule 41 provides that a person who has not been sent a tax return is liable to a penalty if he fails to comply with s7 TMA 1970. Paragraph 6 Schedule 41 provides that in the case of a "domestic matter" (which this is) where the failure was neither deliberate or concealed (as HMRC accept), the penalty is 30% of the "potential lost revenue"; but paragraphs 12 and 13 provide for a reduction in that percentage in the case of prompted disclosure where a taxpayer gives HMRC help in quantifying the unpaid tax, but subject to a

minimum penalty rate of 10% if HMRC became aware of the failure less than 12 months after the tax "first becomes unpaid by reason of the failure" (paragraph 13(3)(a)) and 20% otherwise.

8. Paragraph 14 Schedule 41 provides that HMRC may reduce a penalty because of special circumstances (and by paragraph 19 the Tribunal may do so where HMRC's decision in this regard is flawed). Paragraph 20 provides that liability to a penalty does not arise if the taxpayer satisfies HMRC or the Tribunal on an appeal that he had a reasonable excuse for the failure.

FACTS

9. I make the following findings of fact (and make additional findings of fact in relation to whether letters were sent by HMRC and received by Mr Barrett in the Discussion).

(1) From the time the HICBC was introduced up to and including the tax year in question, Mr Barrett was not within the self-assessment regime. HMRC did not issue to him a notice to file a tax return under s8 TMA 1970 nor did he make a voluntary return under s12D TMA 1970.

(2) In 2012, prior to the introduction of the HICBC, HMRC issued several press releases which detailed the introduction of the charge and advised parents liable to pay the HICBC to register for self-assessment. Similar press releases came out in 2014. In 2018 and 2019 HMRC, in response to misgivings raised in connection with reasonable excuse defences issued a further round of press releases dealing with that issue. There is considerable information about the HICBC on HMRC's website.

(3) Mr Barrett's partner, Mrs Barrett, has received child benefit since November 2010. In the tax year in question, she received child benefit for two children (who had been born in 2010 and 2012).

(4) In the tax year in question, Mr Barrett's adjusted net income exceeded £50,000, which exceeded that of Mrs Barrett.

(5) Mr Barrett was required to notify HMRC of his chargeability to income tax for the tax year in question by 5 October 2019. He did not do so.

(6) HMRC registered Mr Barrett for self-assessment on their system on 13 September 2022. They did this based on information held or obtained by them, and not as a result of any communication from Mr Barrett.

10. The correspondence and other communications between the parties is set out below. I consider the letters said to have been sent by HMRC dated 29 November 2019 and 4 June 2021 further in the Discussion, in particular whether they were in fact sent and were in fact received; but for all other correspondence I find that it was in fact sent and received:

(1) HMRC say they sent two letters to Mr Barrett at Laburnum Way (the address they held for him on file at that time), and I refer to these two letters together as the "Nudge Letters":

(a) Letter dated 29 November 2019 to Mr Barrett headed "Do you have to pay the High Income Benefit Charge for 2018 to 2019?", setting out the circumstances in which a person has to pay the charge, and that if he thinks he does need to pay the charge he has to tell HMRC he is liable by registering to complete a tax return for 2018/2019, and then registering and filing a return online and paying any tax due by 31 January 2020.

(b) Letter dated 4 June 2021 to Mr Barrett, stating that HMRC's records show the HICBC charge may apply to him but he had not registered to receive a tax return for 2018/2019. That letter also set out the circumstances in which the

HICBC is payable, and explained how "adjusted net income" is calculated. That letter required a response by 4 July 2021, failing which HMRC would send an assessment for the tax they thought was owed.

(2) A print-out of the Contact History Details maintained by HMRC shows that on 11 June 2021 HMRC updated the address held by them for Mr Barrett. The contact channel is stated as "Document In". The hearing bundle included a copy of an online form submitted by Mr Barrett on 20 April 2021, claiming tax relief on allowable expenses for the tax year 2020/2021 (ie unrelated to the HICBC). In that form, he set out his address as Bicknacre – I infer that it was the receipt of this claim and the address set out thereon which prompted the update to HMRC's records.

(3) On 14 September 2022 HMRC sent a letter to Mr Barrett at Bicknacre about the HICBC. Mr Barrett agrees that he received this letter (his grounds of appeal stating that this was the first letter he received in relation to the HICBC). That letter:

(a) referred to the lack of response to the letter dated 4 June 2021 and said HMRC had decided to issue an assessment under s29 TMA 1970 for £912 for 2018/2019 and would be issuing an assessment (separately) for this amount; and

(b) set out that HMRC can charge a penalty. The penalty would be calculated on the basis that the behaviour was not deliberate, but prompted. As to quality of disclosure, HMRC said the lack of reply meant they cannot give the full reduction for telling or helping, but had given the full reduction for giving. They would charge a penalty rate of 27%. They did not think there are any special circumstances. The penalty amount would be £246.24.

(4) Mr Barrett called HMRC on 27 September 2022. This is evidenced by his statement in his Notice of Appeal, and by HMRC's records of such a call being received by them (at 09.25 that day) and which was also referenced by HMRC in their letter of 7 October 2022 enclosing the assessment.

(5) HMRC issued a notice of assessment to Mr Barrett for £912 on 7 October 2022. That letter then stated that they would charge a penalty rate of 20%, stating that "As you have given us full assistance during our check, we have given you the maximum reduction for "telling, helping and giving". The penalty amount they would charge was £182.40.

(6) HMRC's records show that Mr Barrett then called HMRC on 17 October 2022. The note of that call sets out that Mr Barrett agreed with the assessment, but objected to the interest being charged and disagreed with the penalty. HMRC told him how to appeal, and gave him a contact number to discuss setting up a "time to pay" arrangement.

(7) Mr Barrett wrote to HMRC (Individual and Small Business Compliance) on 21 October 2022 to appeal against the decision to charge penalties and interest. The reasons he set out in that letter are broadly those he later set out in the Notice of Appeal to the Tribunal. In that letter he stated that HMRC's letter of 14 September 2022 was the first letter he had received regarding the HICBC. He sent largely the same letter to HMRC CCG Campaigns and Projects on 25 October 2022.

(8) HMRC sent a view of the matter letter on 15 November 2022, setting out HMRC's position that the penalty assessment was correctly charged, and that interest is statutory and there is no statutory right of appeal against the interest, which accrues from when the liability became due. Mr Barrett requested a review on 22 November 2022. HMRC's review conclusion letter dated 6 January 2023 upheld the penalty assessment. Mr Barrett then appealed against the penalty to the Tribunal.

DISCUSSION

11. The burden is on HMRC to establish that the penalty has been validly issued. Once established, the burden is on Mr Barrett to establish that he had a reasonable excuse for failure to notify. The standard of proof is the balance of probabilities.

12. Mr Barrett was liable to pay the HICBC for the tax year 2018/2019. He should have notified HMRC of this by 5 October 2019 but did not do so. HMRC charged a penalty of 20%, on the basis that the behaviour was not deliberate, disclosure was prompted, and giving the maximum reduction for telling, helping and giving.

13. On the basis of the facts as found, I am satisfied that the penalty was validly issued. The issue is whether Mr Barrett had a reasonable excuse for the failure to notify, or if there were special circumstances. If Mr Barrett can establish that he had a reasonable excuse for not notifying his liability to the HICBC, then he can be excused from his liability to the penalty.

14. The relevant legal principles are set out in the Upper Tribunal decision in *Christine Perrin v HMRC* [2018] UKUT 156, and the relevant extract is set out below:

> "81. 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.
>
> 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."

15. The test I adopt in determining whether Mr Barrett has an objectively reasonable excuse is that set out in *The Clean Car Co Ltd v C&E Commissioners* [1991] VATTR 234, in which Judge Medd QC said:

> "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 at the relevant time, a reasonable thing to do?"

16. That this is the correct approach has also recently been confirmed by the Court of Appeal in *William Archer v HMRC* [2023] EWCA Civ 626.

17. It is clear from *Perrin* that ignorance of the law can, in certain circumstances, comprise a reasonable excuse. It is a matter of judgment as to whether it is objectively reasonable for Mr Barrett in the circumstances of this case to have been ignorant of the requirement to complete a tax return in light of his liability to the HICBC.

18. There have been a number of appeals to the Tribunal against HICBC penalties in recent years, with differing outcomes. I adopt the approach (which has been set out and applied by Judge Popplewell in various cases, eg *Chattaway v HMRC* [2023] UKFF 752 (TC)) that a taxpayer is likely to have a reasonable excuse where:

(1) they were not under an obligation to complete a tax return up to the tax year prior to that in which the HICBC applied because, primarily, they were paid through PAYE and had no other income justifying a need to notify;

(2) they (or their partner) were in receipt of child benefit payments prior to the introduction of HICBC with the consequence that the application itself made no reference to HICBC (the child benefit claim form since the introduction of HICBC clearly sets out when the charge applies);

(3) they had not received notification from HMRC directly at any point prior to the contact which led to the issue of the tax assessment; but

(4) acted promptly in ceasing to claim child benefit and engaged actively with resolving the historic tax liabilities as soon as HMRC did make contact.

19. This approach recognises the position faced by taxpayers whose claims for child benefit were made before the introduction of the HICBC, but enables consideration of the actual notifications they received from HMRC in relation to their potential liability to the charge.

20. In the present appeal, it is clear that the criteria at (1) and (2) were met.

21. The main issue is whether Mr Barrett had received notification from HMRC of the need to notify his liability to the HICBC prior to the letter of 14 September 2022. On the chronology here, the obligation was to notify HMRC by 5 October 2019. HMRC's case relies on their general communications about the HICBC and the two Nudge Letters (although I recognise that both Nudge Letters were said to have been sent after the deadline for notifying had already passed). HMRC's records show that they set up Mr Barrett on their system for self-assessment on 13 September 2022. Mr Barrett cannot be said to have remedied the failure at any time – but he did not need to do so, as HMRC had registered him themselves.

22. HMRC say that Mr Barrett had received two specific communications, the Nudge Letters, that should have put him on notice that he might be liable to pay the HICBC and that he should have responded to them, ie that his failure to do so prevents him from having a reasonable

excuse. Mr Barrett says that he did not receive either of the Nudge Letters, and that the first letter he received in relation to the HICBC was that of 14 September 2022, to which he did respond by calling HMRC.

23. My view is that if Mr Barrett had received either of the Nudge Letters, he could not have a reasonable excuse for failure to notify liability to the HICBC which persisted until either HMRC registered him for self-assessment, or until he did make contact with HMRC (in September 2022). The reason for this is that those letters as drafted are very clear and set out the actions that should be taken by Mr Barrett by specified dates, which he did not take.

24. The question of fact is then whether Mr Barrett received the Nudge Letters. In this regard:

(1) I am satisfied that the Nudge Letters were sent by HMRC, and that they were sent to Laburnum Way, and that this was the address that HMRC held on file for Mr Barrett at that time. I make this finding based on the copies of the letters included in the hearing bundle and HMRC's address records.

(2) I accept Mr Barrett's statement that he no longer lived at Laburnum Way at this time. He says he had not lived there since May 2019, and HMRC did not challenge this in their Statement of Case.

(3) The Nudge Letters were not returned undelivered to HMRC.

(4) Mr Barrett says he had set up a re-direction of his post, but that these letters were nevertheless not received by him. Setting up a re-direction should have meant that the Nudge Letters would have been sent to him at Bicknacre. That is the very purpose of re-directing mail, but I recognise that the system is not infallible.

(5) HMRC did write to Mr Barrett at Bicknacre on 14 September 2022 and 7 October 2022. Mr Barrett received these letters and he took action to respond to them – he called HMRC on 27 September 2022 and 17 October 2022.

(6) HMRC say that Mr Barrett should have informed them of his change of address at the "appropriate time". I do not accept this broad statement. The underlying difficulty, common in many of these HICBC penalty appeals, is that taxpayers whose income tax liabilities are dealt with through PAYE and who have not been sent a notice to file a tax return would not necessarily perceive that they need to keep HMRC updated of their current address at all times. That is not an objectively unreasonable position to take. Here, Mr Barrett did inform HMRC of his current address when applying for tax relief in April 2021. There is no evidence that he did this to notify a change of address; simply that he disclosed, when required to do so in a form he was completing, his current address.

25. I remind myself that Mr Barrett bears the burden of establishing that he had a reasonable excuse for his failure to notify. This burden must extend to establishing the facts on which he relies, namely that he did not receive the Nudge Letters. Whilst there is some evidence in support of the position of each party, on balance I accept Mr Barrett's statement that he did not receive these letters. When assessing all of the evidence and reaching this conclusion I place particular weight on the actions Mr Barrett did take following receipt of the letters later sent to him at Bicknacre (this demonstrating his intention to deal with HMRC to resolve his tax position), and do not accept HMRC's submission that he should have been keeping HMRC appraised of his current address throughout.

26. Having reached this conclusion as to the issue of fact, I am satisfied that the proven facts before me do amount to an objectively reasonable excuse for the failure to notify, taking account of the attributes of Mr Barrett and the situation in which he found himself (particularly

that his partner had been claiming child benefit since before the introduction of the HICBC and he had not received any specific communications about the charge until September 2022).

27. I therefore conclude that liability to a penalty does not arise; the appeal is allowed and the penalty is cancelled.

28. In the light of this conclusion, I do not need to consider whether there were special circumstances, nor do I address the amount of the penalty (in particular the reduction to be allowed for the quality of the disclosure).

CONCLUSION

29. I am satisfied that Mr Barrett had a reasonable excuse for his failure to notify, and the penalty is cancelled.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

30. 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.

JEANETTE ZAMAN
TRIBUNAL JUDGE

Release date: 23rd OCOTBER 2023