NCN: [2020] UKFTT 0283 (TC)

TC07767

INCOME TAX – High Income Benefit Charge – tax assessments and penalty assessments for 3 years – tax assessments and penalties upheld – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/00568

BETWEEN

THIMMAIAH GUMMATIRA **Appellant**

-and-

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

TRIBUNAL: JUDGE NIGEL POPPLEWELL

The Tribunal determined the appeal on 1 July 2020 without a hearing with the consent of both parties under the provisions of Rule 29 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. A hearing was not held because of the Covid-19 pandemic. The documents to which I was referred are detailed in the decision and included a 105 page court bundle and a 408 page authorities bundle submitted by the respondents together with their submissions as to why the appellant's appeal should be dismissed; and submissions in correspondence contained in that court bundle from the appellant as to why his appeal should be granted.

DECISION

INTRODUCTION

1. This appeal concerns the High Income Child Benefit Charge ("**HICBC**"). The appellant has been assessed to HICBC for three tax years (2012-2013 to 2015-2016 inclusive), together with penalties for failing to notify chargeability under section 7 Taxes Management Act 1970 ("**TMA**"). The penalties have been assessed pursuant to Schedule 41 Finance Act 2008 ("**Schedule 41**"). The tax assessments for the three years amount to £2,949. The penalties for the three years amount to £407.50.

2. HMRC have treated the appellant as appealing against both the tax assessments and the penalties, but it seems to me on reading the papers that the appellant accepts the tax assessments and that he is liable to the HICBC for the three tax years in question, and challenges only the penalties.

3. However, in case I am wrong on this, I have considered both the tax assessments and the penalties. For reasons given later in this decision I have decided that the tax assessments are valid discovery assessments which assessed the appellant for the correct amount of HICBC; and I have also decided that the appellant is liable to the penalties and has no reasonable excuse for failing to notify HMRC of his chargeability to the HICBC.

THE LAW

4. There was no dispute between the parties as to the relevant legislation which I summarise below.

HICBC and penalties

5. By section 681B 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 3 for the year is greater than £50,000;

(2) His partner's ("partner" is defined in section 681G) adjusted net income is less than his, and

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

6. Section 7 TMA provides that if a person is chargeable to income tax he must notify HMRC of that fact within 6 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 section 7 TMA. Para 6 Sch 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 paras 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.

Discovery assessments

9. Under section 29 TMA where an HMRC Officer discovers that income which ought to have been assessed to income tax on a taxpayer has not been so assessed, then that Officer may make an assessment in the amount which in that Officer's opinion should be charged in order to assess the tax due. The time limit for making such an assessment is 20 years from the end of the tax year of assessment where the loss of income tax arises by failure of a person to comply with his obligations to notify chargeability under section 7 TMA.

EVIDENCE AND FACTS

10. I was provided with a court bundle comprising 105 pages which included the appellant's notice of appeal, the respondents' statement of case, correspondence between the parties and witness statements from two HMRC Officers, namely Officer Rhys Lewis-Garland, and Officer Stephen Thomas. The notice of appeal and correspondence included statements of fact given by the appellant. Neither party challenged the other on the veracity of the statements and information given by the other. On the basis of this information I make the following findings of fact:

(1) The appellant became a British citizen in 2011-2012. He registered for self-assessment on 27 May 2010, and following receipt of his tax return for the 2010-2011 tax year in January 2012, his self-assessment record was closed.

(2) Officer Thomas' evidence, which I accept, was that the government launched an extensive campaign in 2012 using advertisements, television advertisements and letters/mailshots to taxpayers who might be affected by the HICBC. Some of this material was in the authorities bundle presented to me.

(3) A "briefing" was issued by HMRC to over a million higher rate taxpayers in November 2012 explaining what the HICBC was, who was affected by it, how it worked and how HMRC would administer it. Those affected needed to decide whether to keep receiving child benefit and pay the tax charge through self-assessment, or to stop receiving child benefit and not pay the new charge.

(4) By September 2013, over 390,000 of these people had already opted out of receiving child benefit and in September 2013, Self Assessment 252 (SA252) letters were sent to remind anyone who had not taken action that they needed to register for self-assessment before 5 October 2013 to avoid any penalties in relation to the charge.

(5) For the three tax years under assessment, the appellant was employed and received his income net of tax.

(6) On 17 August 2013 HMRC sent an SA 252 letter to the appellant. The text of this letter indicates that it was being sent to the appellant to help him pay the right amount of

tax and that "if you are affected by the recent changes to Child Benefit for people on high incomes, you might need to complete a Self-Assessment tax return." This letter went on to explain the HICBC regime which came into effect on 7 January 2013 and set out the criteria for its application (namely income over £50,000 a year; effect of partners income; receipt of Child Benefit payments). It went on to explain that there was no need to take any further action if the recipient or their partner stopped Child Benefit payments before 7 January 2013; it provided an email address to enable the recipient to "check whether the tax charge applies to you"; it also went on to explain that if the charge did apply then "you must register for self-assessment for the 2012-13 tax year by 5 October 2013 so that you can declare the Child Benefit you received, pay the tax charge on time and avoid a late payment penalty."

(7) The appellant responded to this on 11 December 2013 when, according to him, he submitted his details online to HMRC regarding the child benefit changes to "check if I was affected by it."

(8) On that date HMRC sent an email back to the appellant stating:

> "Thank you for notifying us that you are not affected by the High Income Child Benefit Charge. HM Revenue & Customs will aim to deal with this within the next 4 weeks.
>
> If we need any further information we will contact you. Sometimes, for security reasons, we may not be able to reply by email. If this is the case we will telephone write to you."

(9) Following a risk assessment, HMRC officer Emma Parfitt selected the appellant's case for a review in November 2017. She reviewed the appellant's PAYE record, performed checks on his self-assessment record and based on the information that was available to her, she came to the conclusion on 27 November 2017, that the appellant was liable to the HICBC for the three tax years under appeal and in the amounts assessed. Accordingly she wrote to the appellant on 30 November 2017 explaining that this was her conclusion and asking the appellant to contact HMRC by 30 December 2017.

(10) The appellant contacted HMRC on the telephone on 22 December 2017 and agreed with the figures which was set out in Officer Parfitt's letter.

(11) On 27 December 2017 HMRC issued discovery assessments to the appellant for the three years under appeal in the amounts set out above. On 29 December 2017 HMRC issued a penalty assessment notice for failure to notify.

(12) In their letter to the appellant of 27 December 2017, HMRC explained the basis on which they were charging the penalties. The penalties would be reduced from the maximum as a result of prompted disclosure and non-deliberate behaviour with an abatement of 100% for the quality of disclosure. The penalties for 2012-2013 and 2014-2015 would be 20% of the HICBC charge for each year, and the penalty for 2015-2016 would be 10% of the HICBC charge for that year. This resulted in penalties for 2012-2013 of £34, for 2014-2015 of £191.20, and for 2015-2016, of £182.30.

(13) On 4 January 2018 the appellant wrote to HMRC. This letter included a penalty appeal and a complaint. HMRC treated the appeal as being against not just the penalties but also against the tax assessments.

(14) By letter dated 12 January 2018 HMRC responded to the appellant's appeal and complaint letter. HMRC considered the points made by the appellant as to why he should not be liable to the penalties, but concluded that the penalties had been correctly calculated and that the appellant had no excuse for failing to notify. On 20 January 2018 the appellant notified his appeal to the tribunal.

BURDEN OF PROOF

11. The burden of establishing that it has made valid in time assessments for the HICBC lies with HMRC. The standard of proof is on the balance of probabilities.

12. The same is true for the penalty assessment. HMRC must show that it is a valid in time assessment on the balance of probabilities.

13. If they can establish these, then the burden of proof shifts, and it is incumbent on the appellant to show, again on the balance of probabilities, that the assessments are incorrect or (in the case of the penalties) that he has a defence to them (for example he has a reasonable excuse or there are special circumstances).

SUBMISSIONS

14. HMRC submit that the evidence shows that the tax assessments are valid, in time assessments and accurately calculate the amount of HICBC for which the appellant is liable for the three years of assessment. The appellant appears to accept that he is liable for the tax assessed and has not challenged the calculations nor the fact that a valid discovery has been made. They do not consider that the appellant has a reasonable excuse for failing to notify chargeability. They accept that the appellant was not aware of the change in legislation but HMRC is not obliged to notify every person of every change to legislation that might affect them. Individuals need to take steps to understand the law and how it applies in their circumstances. They do not consider that ignorance of the law nor the fact that the appellant was not personally notified of the requirement to complete a self-assessment return comprises a reasonable excuse. They cite a variety of extracts from case law to justify this, including paragraph 81 from the Upper Tribunal decision in *Christine Perrin v HMRC* [2018] UKUT 156 ("***Perrin***") (although, interestingly, they do not mention paragraph 82 of that decision which is set out below). Although they did not consider special circumstances when assessing the penalties in December 2017, it is HMRC's view that there is nothing unusual or exceptional in the appellant's circumstances to comprise special circumstances or to render the penalties unfair.

15. The appellant's submissions are that he only became a British citizen in 2011-2012 and his experience with the British tax system is limited. He has always been employed and tax was always deducted by his employers. If he was not eligible for child benefit he would not have claimed it or would have paid it back. He did not realise that he was liable to the HICBC until December 2017 and as soon as he was told by HMRC of this liability he contacted them. Following that he did some "digging" and discovered that he had sent an email to HMRC in December 2013. That email told him that HMRC would contact him within four weeks and since he heard nothing, he assumed that no further action was required from him. Having completed an online form in December 2013 and having had no response from HMRC, he did not complete a self-assessment tax return. His understanding was that self-assessment was for small businesses and for the self-employed. He could not notify HMRC of a liability since he was not aware of that liability and he would have expected HMRC to notify him of his liability in each of the years 2013, 2014, 2015 and 2016. He agreed that he was liable for the HICBC

on the basis of information supplied over the telephone to him by the gentleman with whom he spoke on 22 December 2017.

DISCUSSION

16. On the basis of the evidence that I have seen, I am satisfied that Officer Parfitt made a valid discovery and that the tax assessments based on that discovery were accurately calculated and properly served on the appellant. I make this finding notwithstanding that the appellant has not seriously challenged the validity of the tax assessments. I therefore uphold these assessments and the amounts set out therein.

17. I also find that the penalty assessment has been properly and accurately calculated in accordance with the correct legal principles and as set out by HMRC in their letter of 27 December 2017, and was served on the appellant.

18. So the pendulum now swings to the appellant to establish, in so far as the penalties are concerned, that he has a reasonable excuse or that there are special circumstances which warrant a reduction in the penalties.

19. The legal principles which I must consider when an appellant submits that he has a reasonable excuse are set out in *Perrin*. 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:
>
> 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).
>
> (1) Second, decide which of those facts are proven.
>
> (2) 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?"
>
> (3) 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."

20. The test I adopt in determining whether the appellant 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?"

21. It is clear from the evidence that prior to the introduction of the HICBC, HMRC launched an extensive information campaign to make the general public aware of the introduction of the charge; and, as importantly, targeted higher rate taxpayers who they thought might be affected, specifically, by the charge.

22. I have found as a fact that this appellant received a letter in the form of SA252 which was sent to the appellant on 17 August 2013. The appellant has not denied receipt of this letter. His email to HMRC which HMRC's response states told them that he was not affected by the charge was dated 11 December 2013. I cannot say definitely that the cause of this email was the SA252. However I think it is highly likely that this was the case. I say this for a number of reasons. The letter indicates that if the recipient is "affected" by the changes to the legislation, they might need to complete a self-assessment tax return. The use of the word "affected" in both the SA 252 and what HMRC's response email suggests that the appellant told them in his email, seems to me to be more than just a coincidence. Furthermore, there is nothing indicating that, on receipt of the email from HMRC on 11 December 2013 acknowledging response of his email, the appellant sought to challenge HMRC's statement in it that "Thank you for notifying us that you are not affected by the High Income Child Benefit charge....." . The appellant accepts that he received this response, indeed he sent it to the tribunal, and it is the basis of his submission that having heard nothing from HMRC for four weeks he assumed that no further action was required from him.

23. SA252 makes it very clear, as the extract from it that I have recited at [10(6)] shows, that if the recipient falls within one of the criteria then he might be liable to pay the charge; and, importantly, the recipient is directed to an HMRC website specifically designed to deal with the charge in order to decide whether the charge applies to him.

24. It is not therefore unreasonable, as HMRC have suggested, that when the recipient of a SA252 writes to HMRC saying that they are not affected by the charge, that recipient will have done so on the basis of the information provided in SA 252 and further research on the website.

25. I would have expected that a reasonable taxpayer in the position of this appellant who received SA252 would have done what was suggested by HMRC; namely, if there was any uncertainty as to whether he was affected by the changes to the child benefit regime, he would have researched the position initially on the website suggested to him by HMRC and, if that was not clear, more widely.

26. There is no indication from the appellant that he undertook any form of research, notwithstanding that he told HMRC that he was not affected by the changes. In my view a reasonable taxpayer in the position of the appellant conscious of and intending to comply with his obligations towards the tax system, would have done what HMRC suggested and undertaken research into the position.

27. It is clear from the extract from *Perrin* that ignorance of the law can, in certain circumstances, comprise a reasonable excuse (notwithstanding HMRC's submission to the contrary). It is a matter of judgment for me as to whether it is objectively reasonable for the appellant in the circumstances of this case to have been ignorant of the requirement to complete a self-assessment tax return in light of his liability to the HICBC. I do not think that it was reasonable for this appellant to have been ignorant of this obligation. HMRC had notified him that he might be affected by the charge; they set out in brief the parameters of the circumstances in which that might be the case; they directed him to a website where he could check whether the charge applied to him; they explained that if it did apply he should register for self-assessment by 5 October 2013 so that he could declare the child benefit that he received and pay the tax charge; they told him that he might be able to avoid self-assessment in future years if he chose to opt out of receiving child benefit.

28. The appellant complains that HMRC should have notified him of his liability to pay the charge in each of tax years 2013, 2014, 2015 and 2016. There is no such obligation HMRC to specifically notify taxpayers of changes in law. But in this case HMRC have done pretty much that by dint of sending him SA 252. It seems to me there is little more that HMRC could have done to tell the appellant about the charge and how and why it might impact on him. It is reasonable to expect that the appellant would have checked his position, and having done so, would notify HMRC if the charge applied. The appellant did notify HMRC, but told them that he was not affected by the charge. It is wholly unsurprising, therefore, that HMRC took no further action until Officer Parfitt checked the appellant's position in November 2017.

29. So for the foregoing reasons I find that the appellant has no reasonable excuse for failing to notify HMRC of his liability to pay HICBC for the three years in question.

30. There is nothing in the correspondence which suggests that HMRC considered special circumstances in November or December 2017when assessing the appellant for penalties or when reviewing his position. In HMRC statement of case, they submit there is nothing exceptional or unusual in the appellant's grounds of appeal which renders the penalty is unfair or contrary to what Parliament intended when enacting the legislation.

31. I disagree with HMRC that special circumstances only apply where there are exceptional unusual circumstances. The following extract from the Upper Tribunal decision in *Barry Edwards v HMRC* [2019] UKUT 131, sets out the correct test.

"73. The FTT then said this at [101] and [102]:

> "101. I appreciate that care must be taken in deriving principles based on cases dealing with different legislation. However, I can see nothing in schedule 55 which evidences any intention that the phrase "special circumstances" should be given a narrow meaning.
>
> 102. It is clear that, in enacting paragraph 16 of schedule 55, Parliament intended to give HMRC and, if HMRC's decision is flawed, the Tribunal a wide discretion to reduce a penalty where there are circumstances which, in their view, make it right to do so. The only restriction is that the circumstances must be "special". Whether this is interpreted as being out of the ordinary,

> uncommon, exceptional, abnormal, unusual, peculiar or distinctive does not really take the debate any further. What matters is whether HMRC (or, where appropriate, the Tribunal) consider that the circumstances are sufficiently special that it is right to reduce the amount of the penalty."

74. We respectfully agree. As the FTT went on to say at [105], special circumstances may or may not operate on the person involved but what is key is whether the circumstance is relevant to the issue under consideration."

32. The definition of special circumstances should not be limited to the exceptional or the unusual. But even adopting this broader definition I do not think that there are any circumstances which are special for this appellant. He simply failed to undertake adequate research into the application of the changes to child benefit which came into effect on 7 January 2013 having been advised to do so by HMRC. Even if HMRC had applied the correct test as to what comprises special circumstances, I have no doubt that they would come to the same conclusion; namely that there are none. Their decision is not flawed.

DECISION

33. And so it is my decision that the assessments for the HICBC which have been visited by HMRC on the appellant for the tax years under appeal should be upheld; and so, too, should the penalties which HMRC have assessed on the appellant for failing to notify chargeability to HICBC for those years. I dismiss the appellant's appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

34. 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.

NIGEL POPPLEWELL

TRIBUNAL JUDGE

RELEASE DATE: 3 JULY 2020