[2020] UKFTT 0394 (TC)

TC07871

INCOME TAX - HIGH INCOME CHILD BENEFIT CHARGE (HICBC) — *taxpayer with liability did not complete tax returns – Discovery assessments under s29(1)(a) TMA 1970 – "income" assessable to income tax? – purposive construction applied to statute – no reasonable excuse found exonerating taxpayer's delay - appeal against penalties dismissed*

Appeal number: TC/2020/00635

FIRST-TIER TRIBUNAL
TAX CHAMBER

Mr MATTHEW KESLAKE **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN MANUELL

The Tribunal determined the appeal on 28 September 2020 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 8 February 2020 and HMRC's Statement of Case (with document bundle) dated 8 April 2020.

DECISION

Introduction

1. The Appellant appealed a series of HMRC's decisions relating to HICBC, all dated 30 January 2020, as follows:

Tax year	**Decision**	**Amount**
2015/16	Discovery Assessment	£512.00
2016/17	Discovery Assessment	£1,076.00
2017/18	Discovery Assessment	£1,076.00
2015/16	Failure to Notify Penalty @ 10%	£51.20
2015/17	Failure to Notify Penalty @ 10%	£107.60
2017/18	Failure to Notify Penalty @ 0%	£00.00

2. In each of the relevant tax years, the Appellant's income exceeded £50,000 and his spouse received Child Benefit. The Appellant was not registered for Self Assessment. On 14 November 2019 HMRC wrote to the Appellant concerning HICBC. Correspondence followed and the decisions under appeal were issued as noted above.

Background

3. From 7 January 2013 changes came into effect as to how the receipt of Child Benefit affected households where an individual's Adjusted Net Income ("ANI") exceeded £50,000 within a tax year, whereby a tax liability of 1% arises for each £100 in excess of £50,000, calculated on the amount of Child Benefit received. This is graduated and the effect is that where an individual's ANI reaches £60,000 100% of the Child Benefit becomes subject to HICBC. Anyone liable to HICBC who elects to continue receiving Child Benefit has a legal obligation to declare that Child Benefit by registering for Self Assessment ("SA") and filing a tax return for each such year.

4. It was not in dispute that:

(a) the Appellant had an ANI exceeding £50,000 for each of the tax years under appeal and that the Appellant's wife had received Child Benefit for each of those tax years;

(b) the Appellant was never issued with a notice to file a SA return (under section 8 TMA 1970), did not file a SA return and did not notify HMRC of his liability to HICBC.

The law

5. Under Chapter 8 Part 10 of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA" 2003), section 681B, a person (P) is liable to a HICBC charge for a tax year if (amongst other circumstances) (1) P's ANI for the tax year exceeds £50,000; (2) a person (Q) other than P is entitled to an amount in respect of child benefit for a week in the tax year; (3) Q is a partner of P (which includes a person to whom P is married, if they are not separated) throughout the week; and (4) P's ANI for the year exceeds Q's.

6. Sub-section 29(1) of the Taxes Management Act 1970 ("TMA 1970") provides that 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 (b) that an assessment to tax is or has become insufficient, or (c) that any relief that has been given is or has become excessive, the officer or, as the case may be, the Board may (subject to provisions not relevant in the present appeal) make an assessment in the amount, or further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.

7. Section 7 TMA 1970 imposes an obligation to notify HMRC of chargeability to income tax (where the person has not received a notice under section 8 TMA 1970) unless three conditions are satisfied, one of which is the person is not liable to HICBC in the tax year. (Another condition is, in broad terms, that all of the person's income is subject to PAYE).

8. Under section 8 TMA 1970, a person may be required by a notice given to him by an officer of HMRC to make and deliver a tax return.

9. An appeal may be brought against any assessment which is not a self-assessment (section 31(1)(d) TMA 1970). If the appellant notifies the appeal to the Tribunal, the Tribunal is to decide the matter in question (section 49D TMA 1970).

10. Concerning the meaning of "discover" in section 29 TMA 1970, Floyd LJ said in *Tooth v HMRC* [2019] STC 1316 at [60]: "Both parties accepted that the legal approach to whether there is a 'discovery' is correctly set out in this first passage from the decision of the Upper Tribunal in *Charlton v Revenue and Customs Commissioner* [2012] UKUT 770 (TCC) at [37], where the tribunal said: '[37] In our judgment, no new information, of fact or law, is required for there to be a discovery. All that is required is that it has newly appeared to an officer, acting honestly and reasonably, that there is an insufficiency in an assessment. That can be for any reason, including a change of view, change of opinion, or correction of an oversight.' The UT continued in a second passage: 'The requirement for newness does not relate to the reason for the conclusion reached by the officer, but to the conclusion itself. If an officer has concluded that a discovery assessment should be issued, but for some reason the assessment is not made within a reasonable period after that conclusion is reached, it might, depending on the circumstances, be the case that the conclusion would lose its essential newness by the time of the actual assessment.' [61] I agree with the UT's approach in both passages."

11. In *Reeves v HMRC* [2018] STC 2056, the Upper Tribunal gave guidance on statutory interpretation. The following are extracts (edited) from [34], [35] and [37]: In *Barclays Mercantile Business Finance Ltd v Mawson* [2005] STC 1, the House of Lords held that a taxing statute is to be applied by reference to the ordinary principles of statutory construction, i.e., by giving the provision a purposive construction in order to identify its requirements and then deciding whether the actual transaction answers to the statutory description. The question is always whether the relevant provision of the statute, upon its true construction, applies to the facts as found.

The Appellant's case

12. The Appellant submitted that neither he nor his wife was aware of HICBC when it was introduced, and (by implication) that HMRC did not inform him. By implication, the Appellant had cooperated fully with HMRC as soon as enquiries began. He had not been advised by HMRC in his first telephone call that penalties would be imposed and he wanted the penalties to be cancelled as it was difficult enough for him to pay the unexpected additional tax.

The Respondent's case

13. HMRC's position is that it has no obligation in law to notify changes in legislation to individual taxpayers. Nevertheless, HICBC was debated in Parliament after its announcement by the Chancellor of the Exchequer in the 2012 budget. Full details of HICBC are provided on HMRC's website, with a calculator available. There was an extensive publicity campaign to raise public awareness. Child benefit claim forms provided HICBC information.

14. The Discovery Assessments were all validly raised. HMRC had established the facts indicating that the Appellant had an HICBC liability for each of the tax years in question. Subsequent disclosure of information by the Appellant was prompted, and categorised as "non deliberate", making him liable to a penalty of up to 30%. The penalties imposed were only 10%, 10% and 0%, allowing the Appellant the maximum mitigation.

15. Applying the tests set out in *Perrin* [2018] UKUT 158 (TC), no reasonable excuse could be shown. HICBC was widely notified. It was the Appellant's decision to continue to receive Child Benefit after his income rose above £50,000. There were no grounds for a special reduction. The appeal should be dismissed.

Burden and standard of proof

16. The burden of proof lies on HMRC to show that the discovery assessments were validly made. The standard of proof is the normal civil standard, the balance of probabilities. The burden of proof to show that there is a reasonable excuse and/or special circumstances lies on the Appellant to the same civil standard.

Evidence

17. A bundle of copy documents was served prior to the hearing by HMRC, incorporating the Appellant's documents, together with authorities and materials relevant to HICBC cases. The Tribunal will be referring to few of the documents as the appeal turns largely if not entirely on points of law.

Discussion

18. HICBC has some complexity and it seems also some degree of legislative infelicity. In *Robertson* [2019] UKUT 0202 (TCC) at [28] the Upper Tribunal noted that the meaning of "income" in its section 29(1) TMA 1970 context was open to doubt and that respectable arguments either way were available. The Upper Tribunal were not required to determine the issue which was left open. In *Wilkes* [2020] UKFTT 256 (TC), it was held that the Discovery Assessments in that appeal were invalid as they did not relate to "income". That decision is not, of course, binding on the Tribunal and may become the subject of a permission to appeal application.

19. This Tribunal takes the view that a purposive interpretation of statute makes it plain that "income" in section 29(1) TMA 1970 for HICBC purposes include amounts received as Child Benefit. That was in its view the plain intention of Parliament.

20. Applying that purposive interpretation means that all of the Discovery Assessments in the present appeal have been validly raised and so must stand. The Appellant is accordingly liable to HICBC as notified to him.

21. The Tribunal therefore turns to consider whether there was a reasonable excuse for the failure to notify the HICBC liability by filing what in the Appellant's case would have been voluntary SA returns. It is undoubtedly the case that HMRC have no obligation to inform individual taxpayers about the consequences of changes in legislation: see, e.g., *Lau v HMRC* [2018] UKFTT 0230 (TC). In practice HMRC see value in attempting to do so and there is obviously public benefit in that approach. That however does not change the essential position.

22. HMRC has access to Child Benefits payment information and that is how the Appellant's (and no doubt many others) failure to file a SA tax return declaring receipt of Child Benefit came to light. The relevant records were available to HMRC but it required manual checking. Thus it was several years before the liability of the Appellant came to light.

23. As is well established, there is no statutory definition of reasonable excuse because there are so many possibilities according to the circumstances affecting individual taxpayers: see *Perrin* (above). The difficulty in the present appeal is that there is no explanation of why or how the Appellant was unaware, given all of the information publicly available, that HICBC would apply to him if Child Benefit was received. That liability could have been established readily, not least from the Child Benefit claim form which was completed in 2015, after the form had been revised to show the HICBC applicable from 2012 onwards. That form clearly explained the consequences of claiming Child Benefit where a relevant person's income exceeded £50,000 per year.

24. The Appellant has not challenged his liability to pay HICBC. He seeks merely to escape the penalty. Whatever the Appellant may have understood in his call to HMRC, it is in the Tribunal's view improbable that he was in fact informed that there would be no penalty. Even if some mistake by an HMRC officer had occurred, the only way a penalty can be withdrawn is for a fresh decision to be made and communicated to the Appellant in writing. That plainly was never done, as there could be no appeal to the Tribunal in such circumstances, as there would be no penalties against which to appeal. Moreover and in any event, any such conversation has no bearing on the underlying question of why the Appellant failed to declare his HICBC liability. The Tribunal finds that no reasonable excuse has been shown by the Appellant.

25. It is not necessary for The Tribunal to consider whether there were any special circumstances. None was put forward and none was obvious.

26. There was no appeal against the three Discovery Assessments. The appeal against the three Penalty Notices is dismissed.

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.

TRIBUNAL JUDGE MANUELL
RELEASE DATE: 07 OCTOBER 2020