[2021] UKFTT 123 (TC)

TC08104

Keywords: High Income Child Benefit Charge, reasonable excuse for failure to file return, appeal allowed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2020/03966

BETWEEN

AUSTIN ERIC TURLEY **Appellant**

-and-

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

TRIBUNAL: JUDGE Heather Gething

The Tribunal determined the appeal on 8 February 2021 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 2020 (with enclosures) and HMRC's statement of case (with enclosures), the hearing bundle and a generic bundle.

DECISION

1. The Tribunal decided that the penalty appeal be allowed as the Appellant had a reasonable excuse.

2. The Appellant appealed against a penalty assessment made under Para 6 of Schedule 41 Finance Act 2008 ("**FA 2008**") in respect of a failure to notify liability to the High Income Child Benefit Charge ("**HICBC**") in the years 2012/13, 2013/14, 2014/15, 2015/16 and 2017/18.

3. The HICBC is imposed on individuals earning more than £50,000 where that individual or the partner or spouse is in receipt of Child Benefit. The Appellant had a reasonable excuse for all of the periods, namely the fact that Appellant's children were born prior to the introduction of the HICBC and so made the claim for child benefit before the Child benefit claim forms included information about the charge, the SA252 letter was never received, the lack of provision of information about HICBC in a timely manner by HMRC to those individuals who paid their tax under the PAYE system and had never previously been required

to file a self-assessment return, this includes a failure to direct part of the advertising campaign to employers who could have ensured their employees, who earn over £50,000, are aware of the obligation to notify HMRC and HMRC's failure to act in a timely manner in bringing together information in their possession and control.

THE HICBC

4. The obligation to notify HMRC of liability in respect of HICBC is set out in section 7 Taxes Management Act 1970 ("**TMA**"). It requires that where a person has not received a notice from HMRC requiring the filing of a self-assessment return under section 8 of the TMA, the taxpayer must notify HMRC within 6 months of the end of the year of assessment in which the liability to HICBC arises ("the notification period").

5. Penalties for failure to notify within the notification period are imposed under Schedule 41 Finance Act 2008. The level of penalty is a percentage of the tax payable and the percentage depends on whether the disclosure was prompted by HMRC, whether the failure was deliberate and the degree of cooperation by the taxpayer. HMRC issued an assessment of penalty on 17 March 2020.

6. The Appellant appeals against the penalty assessed on the ground that the taxpayer had a reasonable excuse for failure such that no penalty may be imposed.

The Facts

7. I find the following facts:

(1) HMRC have been responsible for administering Child Benefit from January 2013.

(2) HMRC instigated an awareness campaign about the introduction of the HICBC which was effective on 7 January 2013. This involved press releases being issued in December 2012, 7 March 2013, 5 September 2013, 11 December 2013, 14 January 2014. The issue was also debated in Parliament and the measure was announced by the Chancellor in the 2012 Budget. The issue was also the subject of advertisements including those placed in The Times, The Sunday Times, Daily and Sunday Telegraph, The Guardian, The Observer, The Independent and Independent on Sunday in the four weeks beginning 5th November 2012 and in some Sunday Supplements. There were cards placed on trains and items on radio. Further advertisements were placed in October 2013 to remind taxpayers of how to avoid penalties and the need to register. Other adverts were placed in the Daily Mail and Express newspapers. I note the articles for which there are links in the bundle have introductory paragraphs which are misleading: saying there is to be a cut off at £60,000 and not £42,000 (which is likely to have caused those earning above 50,000 and below 60,000 not to read on). The article in the Evening Standard speaks of Child Benefit cuts which again is misleading. Even the article in the Guardian is not informative when it says in its opening paragraph those earning up to £60,000 are still entitled to Child Benefit.

(3) The Appellants income in the years in question and associated penalty on HICBC was:

Year	Adjusted Net Income	HICBC	Penalty at 10%
2012/13	£52,110	£92	£9.20
2013/14	£61,238	£1,752	£175.20
2014/15	£58,344	£1,770	£146,90

2015/16	£53,580	£1,823	£177.90
2017/18	£59,746	£1,352	£0
	Total penalties		£509.20

(4) The Appellant's children were born on 4/10/98 and 12/05/05; before the introduction of HICBC.

(5) HMRC's electronic record of correspondence indicates that in August 2013 a pro forma letter contained in the Generic Bundle was sent to the Appellant informing him of the liability to HICBC. This specimen letter is referred to an "***SA252 letter***".

(6) The Appellant was unaware of the HICBC until he received a letter dated 14 October 2019. The Appellant immediately engaged an agent to resolve the liability to pay HICBC but appealed against any penalty.

(7) The Appellant did not receive the SA252 letter, if he had done so he would have retained it. The Appellant had meticulously kept all correspondence with HMRC concerning his PAYE coding. He was able to provide the entirety of this correspondence to the agent appointed to represent him.

(8) Throughout the periods of assessment in question the Appellant was liable to pay tax on his earnings through the PAYE system. He had received frequent notification of coding from HMRC concerning his liability to tax (because of the impact of benefits in kind) and was entitled to believe that HMRC was accurately using information from all available sources in a timely manner.

(9) HMRC's awareness campaign did not target PAYE employers who would be able to inform every employee, whose taxable earnings from that employment exceed the threshold of £50,000, of the obligation to file a return if they or their partners claimed the child benefit allowance in the year.

(10) HMRC has had access to the information concerning the Appellant's income and his wife's claim to Child Benefit as Child Benefit is operated by HMRC, for the entire period. It is through this system that HMRC was enabled to write to the Appellant concerning HICBC in October 2019. HMRC waited for over 6 years to take this step, i.e. HMRC waited 6 years to follow up on the letter they say they sent the appellant in August 2013.

(11) The Appellant sought a Review. The Review Officer issued a letter dated 24 April 2019. The Review Officer considered that neither (a) the Appellant's lack of knowledge of the obligations imposed upon him, nor (b) the HMRC's delay in bringing the issue to his attention, amounted to a reasonable excuse. The Review Officer confirmed the assessments

(12) The Appellant appealed against the Review Officer's decision.

(13) On 1 December 2018 HMRC announced a review of penalty cases for failure to notify liability but would not include any person in receipt of a communication pertaining to the introduction of the charge. That review concluded in June 2019. Refunds were paid to those who claimed Child Benefit before the introduction of the HICBC and where their income rose above £50,000 after the introduction of the charge, and to those where the liability arose in 2013/14 and who had formed new partnerships after the introduction of HICBC. These individuals were found to have had a reasonable excuse for failure to notify.

The Appellant's position

8. The Appellant considered that he had a reasonable excuse within the meaning of Para 20 of Schedule 41 because:

(1) as he had not been made aware of the HICBC charge.

(2) His children were born before the introduction of HICBC, so neither he nor his wife became aware of the charge through completion of a claim for Child Benefit.

(3) He never received the letter SA252 which HMRC's records indicate was sent in August 2013 but, had he done so he would have acted on it and he would have retained it as he retained every communication with HMRC concerning his coding,

(4) He has never been registered as liable to file a self-assessment return. He has always paid tax through PAYE system and had had regular communications with HMRC regarding his coding. He believed his tax affairs were up to date.

(5) The liability to HICBC would not have arisen had HMRC followed up on the SA252 letter they say they sent in 2013.

(6) HMRC has access to the information concerning his tax and his wife's claim for child benefit. HMRC used it to commence communications in 2019. It could and should have been done so earlier.

(7) The Appellant had cooperated fully and quickly as soon as he became aware of the HICBC.

9. The Appellant wished to be treated as others had in the review of penalty cases and have the penalties reduced to zero. I take this to be a reference to there being special circumstance within para 14 of Schedule 41. It is mere happenstance that HMRC dealt with his case in 2019 and not before 2018. This fact alone should not prevent the Appellant benefiting from the same treatment.

HMRC's position

10. The Respondent's case is that the HICBC charge was correctly imposed and the level of penalties have been correctly assessed as they are dependent on whether the compliance was prompted and whether the failure was non-deliberate and having regard to the Appellant's cooperation. The maximum discount has been given to the Appellant.

11. That being so, the only issue is whether the Appellant had a reasonable excuse within para 20 Schedule 41. The four-step approach adopted accepted in *Christine Perrin v HMRC* [2018] UKUT 165 ("*the Perrin test*") is relevant to determine whether the taxpayer's non-compliance is reasonable in the circumstances.

> *"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."

12. The Respondents refer to the passage of the UT in Perrin at [82] where the Tribunal recognised that ignorance of the law could be a reasonable excuse having regard to the complexity of the law and the test is 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. But the Respondents contend that the burden of proof is on the Appellant and in their view the Appellant had not provided any objectively reasonable excuse for his ignorance.

13. The Respondents rely on a number of First-tier Tax Tribunal decisions, including *Lau*, [2018] UKFTT 230, where the Tribunal had concluded that ignorance of the law is not a reasonable excuse and ignorance of the law is not caused by HMRC's failure to notify the taxpayer of an obligation. The cases assert that there is no statutory obligation on the Respondents to notify taxpayers of their liability. The Respondents accept that these decisions are not binding on the Tribunal but invite the Tribunal to follow them.

14. In this case, the Respondents undertook a full information campaign (as described above), there is a calculator of income on HMRC's website, there is child benefit helpline. Further, there is no obligation on HMRC to inform taxpayers of their obligations to file returns and pay HICBC. Further the Appellant was sent an SA252 letter in August 2013. The Appellant ought to have been aware and he ought to have filed a return as a result. Whether the Appellant received the SA252 is immaterial because there was sufficient publication of HICBC for there to have been substantial compliance and the Appellant has no excuse. The Respondents accepted that there is no statutory presumption that the letter was received because an SA252 is not a statutory notice.

15. The failure lasted from 6 April 2013 until 2019 and it is inconceivable the reasonable excuse could have lasted for the entire period even if it existed in the first place.

16. The Tribunal has no jurisdiction to consider inconsistent behaviour on the part of HMRC.

17. I take HMRC's position on special circumstance to be that there are no such circumstances.

The Discussion

18. The issues in this case are whether

(1) The Appellant's ignorance of the law was a reasonable excuse in relation to his failure to file a return in each of 2013/14, 2014/15, 15/16 and 17/18 or

(2) Whether there is a special circumstance which could justify a reduction in the penalties.

19. In relation to the issue of reasonable excuse, I am not bound by the decisions of the first-tier tribunal where various judges in different contexts have considered that ignorance of the law does not provide a reasonable excuse for the failures in the cases before them. I note however, that the Upper tribunal in Perrin considered that it was a question of whether it was objectively reasonable for this taxpayer not to have knowledge and Judge Mosedale in *Welland v HMRC* [2017] UKFTT 870 (TC) considered that it was inappropriate to treat the rule that ignorance of law is no excuse, as an absolute rule as that would be inconsistent with the dicta

in a decision of Simon Brown J in *Neal v CCE* [1988] STC 131 and concluded that there could be a reasonable excuse where the law is complex or uncertain. I also note the review undertaken by HMRC of 35,000 penalty cases involving HICBC and the forgiveness of some 5,000 penalties where there was ignorance, on the basis that ignorance was indeed a reasonable excuse.

20. I consider that the Appellant had a reasonable excuse in the context of the HICBC for all the years for the following reasons.

(1) The HICBC is a novel form of tax. It is not income tax. Its operation can involve a charge to tax or a disclaimer of a benefit. The optionality is unusual and these features have resulted in misleading headlines and articles in the press referred to above, even if the Appellant had chanced upon one of them.

(2) HMRC recognised the necessity to embark on a campaign of information. The HICBC requires a self-assessment return to be filed. HMRC rightly recognise that self-assessment can only occur when taxpayers are aware of their obligations. The idea that taxpayers whose only source of income is employment income, the tax on which is administered by HMRC through their employer and who receive benefits such as Child Benefit, that is also administered by HMRC, are likely to be monitoring HMRC's website to see if there is a new obligation to file a return is fanciful. That is not the real world. Publicity campaigns have their limits as even where a newspaper is delivered to your door it is not always the case that one has the time to read it.

(3) The information campaign did not include a general letter to be sent to all PAYE operators to enable employers to specifically notify the higher earners employed by them of the obligation to notify. This could have been done at the same time as a P60 was issued. PAYE taxpayers must have been a significant category of taxpayers that needed attention. Those already filing self-assessment returns would become aware of the issue when filing the next return. Those paying tax under the PAYE have no knowledge of the self-assessment system because tax is not taught in schools, colleges and universities or even in the workplace.

(4) HMRC had the information in their possession and control as to who was a higher earner and who was claiming child benefit in the same household. HMRC have administered child benefit throughout the period. It is because they have access to the information and can identify high earners in households claiming Child Benefit that correspondence was commenced in this case in 2019. I observe that HMRC's delay in bringing together the information they had available to them has exacerbated the position in this case.

(5) The facts on which the Appellant relies for his reasonable excuse in this case:

(a) The Appellant claimed child benefit prior to the introduction of HICBC. There was no renewal of the child benefit claim for the issue of HICBC to be raised.

(b) He never received the SA252 letter in 2013.He kept a meticulous record of his communications with HMRC and had he received the letter, it would have been in the records.

(c) The Appellant is a PAYE taxpayer and had frequent communications with HMRC in the years in question concerning his code and assumed HMRC all relevant information available to it in determining his code.

(d) The Appellant did not become aware of the HICBC as a result of the publicity campaign. HMRC's publicity campaign did not engage PAYE employers to assist in ensuring HICBC was being paid.

(e) The Appellant was unaware of the HICBC until he received a letter dated October 2019. The Appellant immediately engaged an agent and brought his tax affairs up to date.

These facts are proven. The first and second limb of the Perrin test are satisfied.

(6) I consider that the above amount to a reasonable excuse for the Appellant for all the years because he was a PAYE taxpayer with no history of filing self-assessment returns and no way of identifying a liability to file a self-assessment return following the introduction of HICBC. Because he was in regular contact with HMRC concerning notices of coding he believed HMRC knew all of the information concerning his tax affairs. As his children were born before HICBC he and his spouse did not receive the information offered to new claimants of Child Benefit after the introduction of HICBC. He had kept meticulous records of his notifications of coding which he provided to an agent. His records did not include the SA252. He never received the SA252. He could not reasonably have become aware of the obligation to file a return. The third limb of the Perrin test is satisfied in relation to 2013/14 and 2014/15.

(7) The Appellant became aware of the obligation in October 2019, appointed an agent and remedied the situation quickly. The fourth limb of the Perrin test is satisfied in relation to all periods.

21. As there is a reasonable excuse there is no need for me to consider whether there is a special circumstance in the periods under review. If the Appellant could have benefited from the review undertaken by HMRC in 2018 if his earnings were below £50,000. I note the Appellant's salary was below £50,000 in 2012/13 but his adjusted income is increased by reference to car benefit. I do not know what the Appellant does for a living. In many HICBC cases I have seen the taxpayers are sales representatives who travel around the country and for whom a car is a necessity and not really a benefit. They are also unlikely to have seen the newspaper adverts posted by HMRC of the introduction of HICBC as they do not have the luxury of reading newspapers on their journey to work.

22. I allow the appeal in full in respect of all periods.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

23. 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.

HEATHER GETHING
TRIBUNAL JUDGE

RELEASE DATE: 27 APRIL 2021