[2021] UKFTT 250 (TC)

TC08196

INCOME TAX – High Income Benefit Charge – penalty assessment – reasonable excuse based on ignorance of the law – ALLOWED/DISMISSED

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2020/03579

BETWEEN

SAID ISSAD **Appellant**

-and-

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

TRIBUNAL: JUDGE AMANDA BROWN QC

The Tribunal determined the appeal on 4 July 2021 without a hearing with the consent of both parties 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 19 September 2020, HMRC's statement of case dated 3 November 2020, and a case specific bundle and a generic bundle of documents provided by HMRC.

DECISION

INTRODUCTION

1. This appeal concerns the High Income Child Benefit Charge ("**HICBC**"). The Appellant has been assessed to HICBC for tax years 2013/14 to 2017/18, together with a penalty (the "**penalty**") for failing to notify chargeability under section 7 Taxes Management Act 1970 ("**TMA**"). The penalty has been assessed pursuant to Schedule 41 Finance Act 2008 ("**Schedule 41**"). The tax assessments for the two years amount to £2,511. The penalty was issued in respect of the tax years 2013/14 to 2016/17 and amounts to £157.20. No penalty was issued for the tax year 2017/18.

2. The Appellant has accepted the tax assessments and paid them. However, he has appealed against the penalties.

THE LAW

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

4. 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/her adjusted net income 3 for the year is greater than £50,000;

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

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

5. 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.

6. 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". However, 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.

7. 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.

EVIDENCE AND FACTS

8. The Tribunal was provided with a court bundle, which included the Appellant's notice of appeal. The respondents' statement of case contains useful background to the appeal. There

was also a substantial generic bundle which contained much information about the "advertising campaign" conducted by HMRC in relation to the HICBC. On the basis of this information the Tribunal makes the following findings of fact:

(1) The Appellant's spouse had been in receipt of Child Benefit from October 1995. HMRC's records show this.

(2) In 2012, prior to the introduction of the HICBC, HMRC issued a number of press releases which detailed the introduction of the charge and advised high income Child Benefit parents to register for self-assessment. Similar press releases came out in 2014.

(3) On 14 October 2012, HMRC also sent Child Benefit Awareness letters. HMRC state that such a letter was sent to the Appellant at the address held on file for him at that point. The letter advised recipients that if their income exceeded £50,000 the charge would apply and the options available to stop payment or otherwise how to account for the HICBC.

(4) On 17 August 2013 HMRC issued what is known as an SA252 letter to the Appellant which advised him, inter alia to check if he was liable to the HICBC and to register for self-assessment if he met the relevant criteria.

(5) 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 charge on HMRC's website.

(6) In the relevant tax years the Appellant was an employee working through an agency company that calculated his tax.

(7) The Appellants adjusted net income in each tax year was:

(i) 2013/13 – £50,538.38

(ii) 2014/15 – £51,642.04

(iii) 2015/16 – £54,211.73

(iv) 2016/17 – £58,379.15

(v) 2017/18 – £58,741.21

(8) The Appellant had not been required to submit a self-assessment tax return for any of the years in question.

(9) On 11 November 2019 HMRC issued a "nudge" letter to the Appellant advising him to check whether he was liable to the charge.

(10) Following receipt of the nudge letter, on 14 November 2019, the Appellant telephoned HMRC for advice on how to complete the online calculation. On 18 November 2019 he disclosed his adjusted net income and confirmed his liability to HICBC. There was further correspondence between the Appellant and HMRC regarding the calculation of the HICBC.

(11) On 28 February 2020 HMRC issued tax assessments for the charge for the tax years 2013/14 – 2017/18.

(12) On 3 March 2020 HMRC issued a notice of penalty assessment to the Appellant for failing to notify chargeability. No penalty was charged for the 2017-2018 tax year but the penalty was charged for the earlier tax years. The penalty was calculated at 10% of the amount of the HICBC for that tax year, on the basis of non-deliberate and unprompted behaviour. The penalty range for that behaviour is 10%-30%.

(13) HMRC received an appeal from the Appellant on 7 March 2020 which was rejected following which, on 19 September 2020 the Appellant lodged his appeal with the Tribunal.

BURDEN OF PROOF

9. The burden of establishing that it has made a valid in time assessment for the penalty in the correct amount lies with HMRC. The standard of proof is the balance of probabilities.

10. If they can establish this then the burden of proving that he has a reasonable excuse, or that there are special circumstances, lies with the Appellant. The standard of proof is the same namely the balance of probabilities.

SUBMISSIONS

11. HMRC submit that the penalties have been correctly charged on the basis that there was an accepted failure to notify additional income tax due by the Appellant. They have applied the appropriate reductions to the standard penalty amounts to reflect the quality of the Appellant's disclosure and by reference to the fact that for the years 2013/14 – 2016/17 HMRC were not made aware of the failure to notify within 12 months of the due date for the tax in question. HMRC contend that the assessments have been raised in time.

12. HMRC do not consider that the Appellant has a reasonable excuse for failing to notify chargeability. By reference to the Upper Tribunal decision in *Christine Perrin v HMRC* [2018] UKUT 156 HMRC accept that ignorance of the law may represent a reasonable excuse but the question to be determined in establishing in the present case whether the Appellant's lack of knowledge of the introduction of HICBC constituted a reasonable excuse is to be determined by whether it was "objectively reasonable in all the circumstances for him to be unaware". The application of that test is to be determined, so they contend relying on the judgement of the Upper Tribunal in *Gilbert v HMRC* [2018] UKFTT 0437 by reference to the actions of a hypothetical person who had in mind the need to comply with whatever statutory obligations might apply to him from time to time. In this regard establishing the reason for the lack of knowledge will assist in determining whether the defence of reasonable excuse is made out.

13. The Appellant, so HMRC contends, has given no reason for his lack of knowledge other than that HMRC did not directly and individually make him aware of the need to notify until the nudge letter in November 2019 by which time he had been in breach of his obligations for 7 years. HMRC contend that is not sufficient reason of the type identified in *Gilbert*. By reference to the Tribunal's decision in *Johnstone v HMRC* [2018] UKFTT 689 HMRC had no statutory duty to notify taxpayers individually of the potential implications of HICBC as the cohort of taxpayers affected by the charge was not readily discernible by HMRC (child benefit being a non-means tested benefit administered by the Child Benefits Agency often payable to someone other than the taxpayer on whom the charge would crystalise). Despite there being

no such obligation, HMRC contend that they took extensive steps to communicate the introduction of HICBC which did precipitate 397,000 opting out of receipt of HICBC.

14. Further, HMRC contend that the obligation to determine liability must rest with the individual as the HICBC will crystalise on whichever of the individuals within a partnership receiving child benefit has the higher adjusted net income (which takes account not only of employment earnings but also other income sources, benefits, interest share dividends and after certain permitted deductions including gift aid and pension contributions). As such an individual cannot be absolved of responsibility for failure to notify simply because their main source of income from which tax was deducted at source.

15. In connection with the Appellant's contention that the penalties are unfair HMRC rely on the Tribunal's decision in *Christpher Devine v HMRC* [2020] UKFTT 0255 which determined on the basis of previous precedent case law regarding other penalties, that the Tribunal has no jurisdiction to consider the fairness of penalties.

16. HMRC contend that they used all reasonable efforts to make the Appellant aware of the introduction of HICBC and it is not therefore objectively reasonable for the Appellant to claim that he was not so aware.

17. In relation to special circumstances HMRC accept that there is a wide discretion to reduce penalties by reference to special circumstances but the circumstances giving rise to the reduction must be "out of the ordinary, uncommon, exceptional, abnormal, unusual, peculiar or distinctive". HMRC contend that the Appellant has not identified any such circumstances justifying a reduction in the penalties.

DISCUSSION

18. The Tribunal finds that the penalty assessment dated 3 March 2020 has been properly and accurately calculated in accordance with the correct legal principles and was served on the Appellant.

19. So the pendulum now swings to the Appellant to establish that he has a reasonable excuse or that there are special circumstances which warrant a reduction in the penalty.

20. The legal tests to be applied when determining whether the Appellant has a reasonable excuse or has identified special circumstances justifying a reduction in the penalty are as summarised above in connection with HMRC's submissions.

21. Applying those principles to the findings of fact as set out above the Tribunal considers that the Appellant was made aware of the introduction of HICBC by the communications sent to him in October 2012 and August 2013. He may not have appreciated the significance of those changes for him but on the balance of probabilities he was aware of them and should have acted on them.

22. No other excuse has been provided for his failure to notify he has not therefore established a reasonable excuse.

23. No circumstances which could be considered to be special have been identified and as such no reduction in the penalty is appropriate

RIGHT TO APPLY FOR PERMISSION TO APPEAL

24. 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.

AMANDA BROWN QC
TRIBUNAL JUDGE

RELEASE DATE: 06 JULY 2021