Neutral Citation: [2023] UKFTT 00651 (TC)

Case Number: TC08872

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2022/12948

INCOME TAX - High Income Child Benefit Charge – whether reasonable excuse – yes – penalties cancelled and two assessments set aside as out of time – whether ESC A19 applies – lack of jurisdiction – whether parentage relevant – appeal allowed in part

Heard on 3 July 2023
Judgment date: 18 July 2023

Before

TRIBUNAL JUDGE ANNE REDSTON
MS JANE SHILLAKER

Between

STEPHEN LEE

Appellant

and

THE COMMISSIONERS FOR
HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: the Appellant's partner ("Ms A")

For the Respondents: Ms Victoria Halfpenny, Litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. On 10 May 2022 Mr Lee was assessed to the High Income Child Benefit Charge ("HICBC") in relation to the tax years 2016-17 through to 2019-20 ("the relevant years"). The assessments totalled £6,278. On the same date, he was issued with penalties totalling £1,164.20 for his failure to notify his liability to the HICBC. The overall total was thus £7,442.20.

2. We found that Mr Lee had a reasonable excuse for not notifying his liability, and we cancelled the penalties. As a result of that reasonable excuse we also cancelled the assessments for 2016-17 and 2017-18, as they were out of time, see further §54.ff. The total owed by Mr Lee thus reduces to £2,702.

3. On behalf of Mr Lee, his partner submitted (see §64.ff) that HMRC should have applied Extra Statutory Concession A19 ("ESC A19"). This begins:

> "Arrears of income tax or capital gains tax may be given up if they result from HMRC's failure to make proper and timely use of information…"

4. HMRC accepted that they had always known that Mr Lee's partner was receiving Child Benefit, and had also had always known how much they were each were earning, as they were both entirely within the PAYE system. It was also clear from HMRC's own evidence that they were using the Child Benefit system to identify those within HICBC, but had failed to make use of that information so as to inform Mr Lee of his liability until they wrote to him in 2021.

5. However, the Tribunal does not have the jurisdiction (broadly speaking, that means "the power") to rule on whether the remaining tax should be cancelled under ESCA19. However, Mr Lee can complain to HMRC, and if the complaint is not accepted, can refer the matter to the independent Adjudicator.

6. Mr Lee also appealed on the basis that he was not the father of one of the two children. That does not, however, prevent him being liable to the HICBC, for the reasons explained at §73.ff.

REDACTIONS

7. This appeal involves not only Mr Lee, but also his partner and their children. If we named Mr Lee's partner, who has a different surname from Mr Lee, there is a significant risk this would allow the children to be identified.

8. In deciding whether to redact this decision notice to remove the names of Mr Lee's partner and the two children, we considered the principle of open justice as set out in the case law, in particular *Cape Intermediate Holdings v Dring* [2019] UKSC 38; *A v BBC* [2014] 2 All ER 1037 and *Clifford v Millicom Services* [2023] EWCA Civ 50 ("*Clifford*").

9. In *Clifford*, Warby LJ gave the only judgment with which Laing and Lewis LJJ both agreed. He held at [31] that in deciding whether to derogate from the principle of open justice:

> "the appropriate starting point is the common law. This holds that open justice is a fundamental principle. But it also contains a key qualification: that every court or tribunal has an inherent power to withhold information where it is necessary in the interests of justice to do so."

10. He continued at [42]:

> "the factors that need to be weighed in the balance include (a) the extent to which the derogation sought would interfere with the principle of open

> justice; (b) the importance to the case of the information which the applicant seeks to protect; and (c) the role or status within the litigation of the person whose rights or interests are under consideration."

11. We decided that the facts and *ratio* of our decision could be fully understood without naming Mr Lee's partner or either child. We also decided that naming the children would be an unjustified interference with their Article 8 rights as set out in the European Convention on Human Rights, and that it was likely that naming Mr Lee's partner would indirectly lead to the children being identified. We therefore decided to redact this decision so as to remove those names. We have called Mr Lee's partner "Ms A" and not named either child.

THE EVIDENCE

12. Mr Lee and Ms A both gave oral evidence, were cross-examined by Ms Halfpenny and answered questions from the Tribunal. We found them both to be transparently honest and credible witnesses.

13. Ms Kirsten Lashmar, the HMRC Officer who issued the assessments and the penalties, provided a witness statement, was cross-examined by Mr Lee and by Ms A, and answered questions asked by the Tribunal. We found Ms Lashmar also to be entirely honest and credible.

14. The Tribunal was additionally provided with a witness statement from Ms Jaqueline White, a Senior HMRC Officer whose role is to provide technical support to HMRC's "Campaigns and Projects" team, including campaigns and projects relating to HICBC. Ms White has worked in that role since 2017. Although she did not attend the hearing to be cross-examined, the evidence in her witness statement about the general approach taken in HICBC cases (rather than in Mr Lee's particular case) was not challenged and we accepted it.

15. In addition, the Tribunal was provided with a document bundle of 192 pages, and a further bundle of 833 pages, which included legislation, press releases, sample letters and child benefit claim forms.

FINDINGS OF FACT

16. On the basis of the evidence set out above, we make the following findings of fact.

Ms A and Mr Lee

17. Ms A works as a personal assistant and project co-ordinator, and part of her role is to ensure that identified tasks are completed by the specified dates.

18. In 2000, she and her then partner had a son. Ms A claimed what she called "family allowance"; this was the name given previously to the predecessor payment before Child Benefit was introduced. Ms A's understanding, which was correct at that time, was that all parents were entitled to Child Benefit when they had a child, and its receipt had no tax consequences.

19. Ms A's entitlement to Child Benefit was recorded on HMRC's Child Benefit system as beginning shortly after her son's birth. Child Benefit payments were received into her bank account. At some subsequent point, Ms A and her partner separated; Ms A retained custody, and her partner was required to pay child support.

20. Ms A subsequently began a relationship with Mr Lee, and in 2006 they had a daughter. The Child Benefit payable to Ms A increased to reflect the fact that she now had two children. The money continued to be paid into her bank account.

21. Ms A and Mr Lee live together at the same address but keep their financial affairs separate. Until HMRC's letter of 18 December 2019 (see further below), neither knew how much the other earned, and Mr Lee did not know Ms A was receiving Child Benefit.

The Child Benefit changes

22. The HICBC was introduced with effect from 7 January 2013. In the period leading up to that change in the law, HMRC ran a publicity campaign. However, neither Mr Lee nor Ms A saw the publicity.

23. HMRC also sent a "briefing" to over 1 million higher rate taxpayers: Ms White's evidence said that this explained "what HICBC was, who was affected, how it worked and how HMRC would administer it". She continued:

> "those affected needed to decide whether to keep receiving child benefit and pay the tax charge through Self-Assessment (SA), or to stop receiving child benefit and not pay the new charge."

24. She went on to say that:

> "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 SA before 5 October 2013 to avoid any penalties in relation to the charge."

25. From this evidence we make the reasonable inference that HMRC were using both the tax information (to identify higher rate taxpayers) and the Child Benefit information (to identify those who were receiving Child Benefit) so as to send these targeted "briefings" and SA252 letters to those affected by the HICBC.

26. Neither Mr Lee nor Ms A were higher rate taxpayers when the HICBC was introduced, and they were not sent the "briefing" or a SA252 letter.

Mr Lee's and Ms A's position after 2012

27. Mr Lee completed self-assessment returns for the tax years 2012-13 to 2015-16. In those years he was not a higher rate taxpayer so could not be liable for the HICBC. We were provided with the Notes to the SA return for 2012-13 but not for any later year. These cover 31 pages of closely typed text, and include a section on the HICBC. Mr Lee did not recall having seen that guidance, and it was not relevant to his circumstances at the time he completed those returns.

28. On 27 March 2017, Mr Lee called HMRC to ask how payments on account worked; HMRC decided to remove the requirement for him to complete an SA return for 2016-17; the reason given in HMRC's internal records is that "SA criteria not met". Mr Lee's evidence, which was not challenged, was that he was removed from SA because he was employed and all his income was dealt with under PAYE. This remained the case for all the relevant years.

29. However, in 2016-17 Mr Lee's earnings exceeded £50,000, the relevant threshold for the HICBC, and it remained over that threshold for all the relevant years.

The "nudge" letter

30. On 18 December 2019, HMRC sent a letter to Mr Lee. It was headed "Do you have to pay the High Income Child Benefit Charge?" and began:

> "A lot of our customers have told us that they do not know about the High Income Child Benefit Charge. We're writing to you because we want to help you to get this right. Please help us by reading this letter carefully.
>
> You have to pay the charge if:
>
> • you have taxable income and benefits over £50,000 in a tax year
>
> • you, or your spouse or partner, got any Child Benefit payments

• your income is higher than your spouse or partner's income."

31. The next paragraph was headed "What you need to do" and it read:

> "Please check now to see if you need to pay the charge for the tax year 2017 to 2018 or any other tax year beginning with the tax year 2012 to 2013, when the charge began. A tax year runs from 6 April one year to 5 April the next."

32. No part of the letter explained what the HICBC was. Instead, it said "For more information about the charge, go to www.gov.uk/child-benefit-tax-charge". This was followed by a section headed "How to avoid a penalty for not telling us about the charge for 2017 to 2018".

33. HMRC call this type of letter a "nudge letter". It does not tell the recipient that they have a tax liability but is intended to "nudge" them into taking action.

What Mr Lee and Ms A did next

34. The nudge letter was addressed to Mr Lee; he opened it but did not understand it. He asked Ms A to look at it; Ms A realised it related to Child Benefit, and also knew that it was she, not Mr Lee, who received that payment. She told Mr Lee she would deal with the letter, and called the HMRC number shown on the top of the first page. This was the HICBC line, but Ms A spoke to the Child Benefit team. She could not remember if she was transferred internally, but we make the reasonable inference that this was the case.

35. Ms A told the person she spoke to about the letter Mr Lee had received, and was informed that she was not entitled to Child Benefit; she therefore cancelled the claim. Her Child Benefit stopped in consequence, and no payments were subsequently received.

36. Ms A thought the issue had been resolved and told Mr Lee this. At no point during her call with HMRC was it explained to her that the HICBC was not the same as Child Benefit, or that she and/or Mr Lee needed to check the HICBC position for previous years. Ms A said she would not have left this task part-finished, any more than she would have left a work-related task part-finished. She would also not have told Mr Lee she had dealt with the issue, if she had been informed that separate action was required in relation to the HICBC. None of that evidence was challenged and we accepted it.

37. Where a person does not respond appropriately to the nudge letter, HMRC's normal practice was to send a second nudge letter around a month later. No second nudge letter was sent to Mr Lee.

The letter sent by Ms Lashmar

38. Ms Lashmar began working in HMRC's Campaigns and Projects team in February 2019. She described the process which preceded the issuance of Mr Lee's assessments as follows:

(1) She was provided with Mr Lee's name by another part of HMRC's system in order to check whether he had failed to notify liability to the HICBC.

(2) She first checked whether he had received a nudge letter, and found a reference to the letter on his PAYE and SA notes.

(3) She next referred to a database shared between the tax and Child Benefit parts of HMRC. This included a list of Child Benefit claimants, but when Ms Lashmar checked, it was clear that Mr Lee was not a claimant.

(4) Using the same shared database, she then:

(a) checked Mr Lee's address against the addresses of Child Benefit claimants and identified Ms A as living at the same address as Mr Lee and claiming Child Benefit; and

(b) identified when Ms A's Child Benefit claim had begun, the number of children and the fact that payments were continuing.

(5) Next, using HMRC's tax information, she checked both Mr Lee's and Ms A's Adjusted Net Income ("ANI"); this showed that Mr Lee was the higher earner.

(6) Finally, she calculated the amount of HICBC payable for the four years 2016-17 to 2019-20.

39. On 24 March 2021, Ms Lashmar sent a letter to Mr Lee saying that based on HMRC's records, he was due to pay a total of £6,728, made up of £1,788 for each of the first three of the years, and £1,364 for the fourth year, because the Child Benefit had come to an end in the course of that year.

Communications and the assessments

40. Mr Lee contacted HMRC on Friday 26 March 2021, immediately on receipt of Ms Lashmar's letter, and the HICBC was explained to him over the phone. He then spoke to Ms A, who called HMRC on Monday 29 March 2021.

41. Ms A disagreed with Ms Lashmar's figure as to the amount of Child Benefit received in 2019-20 and Ms Lashmar contacted the Child Benefit Office ("the CBO"). On 15 April 2021, the CBO confirmed that the figure previously accessed by Ms Lashmar for that year was too high. Ms Lashmar recalculated the relevant amount as £914. The overall HICBC total was thus £6,278.

42. On 2 May 2021, Ms A drafted a letter on behalf of Mr Lee which he agreed and signed. This asked HMRC to apply ESC A19 and cancel the amounts due, given that HMRC had been in possession of the Child Benefit information throughout, and had also been in possession of her and Mr Lee's ANI because all their income came within PAYE. Correspondence between the parties about ESC A19 then continued, see our separate findings at §64.ff.

43. On 10 May 2022, HMRC issued Mr Lee with assessments for each of the relevant years in the amounts set out above, and on the same day, issued penalties of £1,164.20. Mr Lee appealed, and subsequently made an in-time notification of his appeal to the Tribunal.

WHETHER MR LEE HAD A REASONABLE EXCUSE

44. The penalties for Mr Lee's failure to notify HMRC that he was liable to the HICBC were imposed under FA 2008, Sch 41. Para 20 of that Schedule provides that liability to a penalty:

> "does not arise in relation to an act or failure…if [the person] satisfies HMRC or (on appeal) the First-tier Tribunal that there is a reasonable excuse for the act or failure."

45. Mr Lee appealed against the penalties on the basis that he had a reasonable excuse. We first set out the legal principles, and then apply those principles to Mr Lee.

The law on reasonable excuse

46. In *Perrin v HMRC* [2018] UKUT 156 ("*Perrin*") at [81] the Upper Tribunal ("UT") set out a recommended process for this Tribunal to use when considering whether a person has a reasonable excuse:

> "(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, the Tribunal 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 Tribunal, 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. In doing so, the Tribunal 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."

47. At [82] of *Perrin* the UT said:

> "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…"

Application of the law to Mr Lee

48. The first step in *Perrin* is to establish the facts which Mr Lee considers form his reasonable excuse. Mr Lee and Ms A said that:

(1) Mr Lee did not know anything about Ms A's income or finances, and in particular, did not know she was receiving Child Benefit.

(2) Ms A understood that Child Benefit was a universal benefit and neither she nor Mr Lee knew anything about the change to the law which had introduced HICBC.

(3) When they received the letter of 18 December 2019, they thought it related to Child Benefit.

(4) When Ms A called HMRC she was told to cancel the Child Benefit; they understood that by cancelling that entitlement, Ms A had done all that was required..

(5) They remained unaware of Mr Lee's HICBC liability until HMRC's letter of 24 March 2021. Mr Lee then immediately called HMRC and the assessments then followed.

49. The second step is to decide which of those facts are proven. We have found as facts that the points set out in the previous paragraph are true; they are therefore proven.

50. In relation to the third step, Ms Halfpenny submitted that the reasonable taxpayer in Mr Lee's position:

(1) would have been aware of the HICBC from the publicity HMRC had issued before the time of its introduction;

(2) would have understood from the guidance attached to the SA returns that HICBC existed and how it worked;

(3) would have understood from the nudge letter that he was liable to HICBC;

(4) although that letter did not explain what the HICBC was, the reasonable taxpayer would have "carried out his own research" by looking on HMRC's website.

51. In our judgment, it was objectively reasonable for a taxpayer in Mr Lee's position to be unaware of the HICBC until he received HMRC's letter of 24 March 2021, and also objectively reasonable for him to be ignorant of this change to the law, because (taking the points in the same order as set out above):

(1) Neither Mr Lee nor Ms A saw HMRC's publicity.

(2) At the time Mr Lee was completing SA returns, his earnings were below the £50,000 threshold. The Bundle included a copy of the SA return and related guidance notes for the tax year 2012-13. The relevant part of the return says, in bold "only fill in this section if your income was over £50,000…". As we have already found, the guidance notes run to over 30 pages of closely typed text. The reasonable taxpayer in Mr Lee's position would not have read pages of guidance about areas of the tax system which did not apply to him.

(3) As Ms Halfpenny agreed, the nudge letter did not explain what the HICBC was. Ms A called HMRC on receipt, and HMRC did not explain the difference between Child Benefit and HICBC; neither was Ms A told that there could be a historic issue for previous years. She instead understood from that call that by cancelling the Child Benefit she had done all that was required.

(4) Ms A told Mr Lee about the call and its outcome. The reasonable person in his position would not have considered that, in addition to his partner calling HMRC and (as he thought) resolving the issue, he had to carry out his own internet research.

(5) In addition HMRC did not send the second nudge letter, which would have alerted Mr Lee and Ms A that further action was nevertheless required.

52. In relation to the fourth step in *Perrin,* Ms Halfpenny accepted that Mr Lee had acted as soon as he received the letter of 24 March 2021, and thus without unreasonable delay.

Conclusion on the penalties

53. For the reasons set out above, Mr Lee has a reasonable excuse for the penalties.

THE ASSESSMENTS

54. We first summarise the legislation and then apply it to Mr Lee's case.

The legislation

55. Taxes Management Act 1970 ("TMA"), s 7 provides that a person who is outside self-assessment must notify his liability to HMRC by 5 October following the tax year in question. TMA s 29 gives HMRC the power to raise assessments if they discover that a person has not notified his liability as required by TMA s 7.

56. However, HMRC are only able to raise assessments if they do so within the time limits set by Parliament. TMA s 34 provides that the ordinary time limit is four years after the end of the tax year in question. TMA s 36(1) allows HMRC to assess for six years if the taxpayer was "careless". A taxpayer who has a reasonable excuse is not "careless".

57. TMA s 36(1A) gives HMRC a 20 year time limit if a taxpayer has failed to notify a liability (such as to the HICBC). However, TMA s 118(2) reads:

> "For the purposes of this Act,…where a person had a reasonable excuse for not doing anything required to be done he shall be deemed not to have failed to do it unless the excuse ceased and, after the excuse ceased, he shall be deemed not to have failed to do it if he did it without unreasonable delay after the excuse had ceased."

58. A taxpayer who has a reasonable excuse for his failure to notify is therefore deemed (treated as) having met that obligation, in other words he is treated as if he had complied with his obligation to notify.

Application to Mr Lee

59. For the reasons already set out, we have found that Mr Lee had a reasonable excuse for his failure to notify his liability to the HICBC. This means that:

(1) he was "deemed" not to have breached the notification requirement at TMA s 7, so the 20 year time limit does not apply; and

(2) he was not careless, so the 6 year time limit does not apply

60. HMRC can therefore only rely on the ordinary four year time limit; they cannot rely on the longer time limits given by TMA s 36.

61. As a result, the assessments for the tax years 2016-17 and 2017-18 were invalid, because they were issued on 10 May 2022, more than four years after the end of those years.

62. Ms Halfpenny accepted this was the position, and she also agreed that the following passage from the Statement of Case (which she did not draft) was incorrect:

> "The Respondents submit that there is simply no 'reasonable excuse' or other provision, such as 'special circumstances', in the legislation for amending or cancelling assessments issued under section 29 TMA 1970."

63. The two earlier assessments are therefore cancelled, leaving those for 2018-19 and 2019-20 in place.

EXTRA STATUTORY CONCESSION A19

64. It was part of Mr Lee's case that HMRC should have cancelled his liability because of ESC A19. This is headed "Giving up tax where there are Revenue delays in using information" and it reads:

> "Arrears of income tax or capital gains tax may be given up if they result from HMRC's failure to make proper and timely use of information supplied by:
>
> - a taxpayer about his or her own income, gains or personal circumstances
> - an employer, where the information affects a taxpayer's coding; or
> - the Department for Work and Pensions, about a taxpayer's State retirement, disability or widow's pension.
>
> Tax will normally be given up only where the taxpayer:

- could reasonably have believed that his or her tax affairs were in order, and
- was notified of the arrears more than 12 months after the end of the tax year in which HMRC received the information indicating that more tax was due…"

65. The final part of the concession relates to arrears notified less than 12 months after the end of the tax year, and so is not relevant to Mr Lee.

Ms A's submissions on behalf of Mr Lee

66. Ms A said that all the conditions for this ESC to apply were met: HMRC had failed to make proper and timely use of (a) the Child Benefit information and (b) the earnings information, and there was no good reason why they had failed to use that information during the relevant years to inform Mr Lee that he was liable to the HICBC.

HMRC's written response

67. On 16 June 2021, HMRC responded in writing to that submission, saying:

> "In your letter you have asked for a review of the claim for ESC A19 made on 2 May 2021.
>
> We cannot accept this claim as ESC A19 is a concession. It was introduced to deal with Pay As You Earn (PAYE) issues where all information is provided by a person, their employer or the DWP (in relation to benefit payments received) but HMRC does not make proper and timely use of the information to collect the correct amount of PAYE tax due.
>
> The concession does not cover your circumstances in relation to HICBC. Our website explains why at www.gov.uk/hmrc-internal-manuals/paye-manual/paye95045. It states that 'where information affecting personal tax liability is alleged to have been provided to unconnected parts of HMRC… then the request under the concession will be refused.' Child Benefit claims are administered in an unconnected part of HMRC and so ESC A19 does not apply.
>
> This is not a decision that you can appeal against. Nor can you ask a Tribunal to overturn the decision."

68. The HMRC guidance to which reference was made in that letter reads as follows (the underlined phrase was omitted from the letter):

> "Where information affecting personal tax liability is alleged to have been provided to unconnected parts of HMRC, or in such a form or manner that HMRC could not reasonably have acted upon it, then the request under the concession should be refused."

The hearing

69. Ms Halfpenny accepted in the hearing that:

(1) Contrary to what was said in HMRC's letter, ESC A19 does not relate only to PAYE. This is clear from the first sentence, which says "Arrears of income tax or capital gains tax…" Not only does the ESC not refer to PAYE, capital gains tax is not collected in that way.

(2) In the light of the evidence of HMRC's witnesses, HMRC's tax area plainly had access to the Child Benefit information and were using it. It was thus not an "unconnected part of HMRC" but a "connected part of HMRC".

(3) The letter from HMRC failed to tell Mr Lee that he could make a formal complaint and if dissatisfied with the outcome, could forward the complaint to the Adjudicator.

70. However, Ms Halfpenny also submitted that this Tribunal had no jurisdiction to decide whether or not ESC applied. Thus, Mr Lee and Ms A's only route of challenge was via the HMRC complaints system. She added that it would be appropriate for the relevant information to be provided to Mr Lee and Ms A so they knew how to do this.

The Tribunal's view

71. We fully understand Ms A's submissions on the relevance of ESC A19. However, Ms Halfpenny is correct that the Tribunal has no jurisdiction to resolve disputes over extra-statutory concessions. That this is correct was put beyond doubt by the Court of Appeal in *Trustees v BT Pension Scheme v HMRC* [201] EWCA Civ 713, see in particular paragraph 143.

72. HMRC's refusal to apply a concession can only be challenged either:

(1) at the High Court by a process called judicial review. However, such an application must be made very soon after HMRC issue their refusal letter. It is now too late for Mr Lee and Ms A to take that route. Judicial review is also expensive; or

(2) by making a complaint to HMRC (see https://www.gov.uk/complain-about-hmrc) and if still dissatisfied, escalating the complaint to the Adjudicator (https://www.gov.uk/guidance/contact-the-adjudicators-office).

PARENTAGE

73. Mr Lee and Ms A submitted that most of the Child Benefit had been paid for her elder child, who was not Mr Lee's son; in addition, the son's father remained responsible for paying child maintenance. In their submission, the financial consequences of Ms A's receipt Child Benefit should not be visited on Mr Lee.

74. In order to decide this issue, it is necessary to consider the HICBC legislation.

The HICBC legislation

75. The HICBC was imposed by s 681B of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA"), and provides as follows:

> "(1) A person ("P") is liable to a charge to income tax for a tax year if
>
> (a) P's adjusted net income for the year exceeds 50,000, and
>
> (b) one or both of conditions A and B are met.
>
> (2) The charge is to be known as a "high income child benefit charge".
>
> (3) Condition A is that
>
> (a) P is entitled to an amount in respect of child benefit for a week in the tax year, and
>
> (b) there is no other person who is a partner of P throughout the week and has an adjusted net income for the year which exceeds that of P.
>
> (4) Condition B is that
>
> (a) a person ("Q") other than P is entitled to an amount in respect of child benefit for a week in the tax year,
>
> (b) Q is a partner of P throughout the week, and
>
> (c) P has an adjusted net income for the year which exceeds that of Q."

76. The meaning of "partner" is given by ITEPA s 681G[1] and is as follows:

> "(1) For the purposes of this Chapter a person is a "partner" of another person at any time if either condition A or condition B is met at that time.
>
> (2) Condition A is that the persons are married to, or civil partners of, each other and are neither
>
> (a) separated under a court order, nor
>
> (b) separated in circumstances in which the separation is likely to be permanent.
>
> (3) Condition B is that the persons are not married to, or civil partners of, each other but are living together as if they were a married couple or civil partners."

Application to Mr Lee

77. ITEPA s 681B says that a person ("P") is liable to the HICBC if he is within Condition A and/or Condition B. In that section, Mr Lee is "P", the person in question.

78. In all of the relevant years, Condition B of ITEPA s 681B was met because

(1) Ms A was "a person other than P" who was entitled to Child Benefit, so she meets the definition of "Q";

(2) Ms A is Mr Lee's partner as defined in s 681G, because they were living together as if they were a married couple.

(3) Mr Lee's ANI exceeds Ms A's.

79. The law does not provide any exemption where one of the couple is not the parent of the child for whom Child Benefit is being paid, and there is likewise no exemption where the parent of that child is liable to pay child support.

80. As a result, the fact that Mr Lee was not the father of Ms A's first son does not mean that he is not liable for the HICBC, or reduce its amount.

OVERALL CONCLUSION AND APPEAL RIGHTS

81. For the reasons explained above:

(1) Mr Lee's appeal against the penalties of £1,164.20 is allowed and they are cancelled.

(2) His appeals against the assessments for 2016-17 and 2017-18 are allowed and those assessments are cancelled.

(3) His appeals against the assessments for 2018-19 and 2019-20 are refused.

82. The amount due from Mr Lee is thus reduced from £7,442.20 to £2,702.

Appeal rights

83. 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.

84. 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

[1] This section was amended part way through the tax year 2019-20 by the Civil Partnership (Opposite-sex Couples) Regulations, SI 2019/1458 reg 25(1), (5) with effect from 2 December 2019, but the amendment does not change the substance of the provision as it applies to opposite-sex couples as is the case here.

from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

ANNE REDSTON
TRIBUNAL JUDGE

Release Date: 18th JULY 2023