Neutral Citation: [2023] UKFTT 709 (TC)

Case Number: TC 08900

FIRST-TIER TRIBUNAL
TAX CHAMBER

Location: Decided on the papers

Appeal reference: TC/2022/12836

INCOME TAX – High Income Child Benefit Charge – previous failure to notify chargeability – notice to file issued under s 8 of the Taxes Management Act 1970 - late payment penalty - whether HMRC correctly issued the penalty in accordance with the legislation – whether a reasonable excuse has been established by the Appellant – Appeal dismissed

Heard on: 2 May 2023
Judgment date: 11 August 2023

Before

JUDGE NATSAI MANYARARA

Between

GILAD KALCHHEIM

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

The Tribunal determined the appeal on 2 May 2023, 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 (with enclosures) and HMRC's Statement of Case (with enclosures).

DECISION

INTRODUCTION

1. The Appellant (Mr Gilad Kalchheim) is appealing against a penalty that HMRC charged under Schedule 56 of the Finance Act 2009 ("Schedule 56"), for the late payment of tax in respect of the tax year ending on 5 April 2021. The penalty was a 30-day late payment penalty, in the sum of £135. The tax liability arose as a result of the High-Income Child Benefit Charge ('HICBC').

THE PARTIES' WRITTEN ARGUMENTS

HMRC's Statement of Case

2. HMRC's case can be summarised as follows:

(1) Under s 7 of the Taxes Management Act 1970 ('TMA'), the time-limit for notifying chargeability to income tax is six months from the end of the tax year in which the liability arises. The Appellant failed to notify his chargeability to income tax within the time-limit. The Appellant was given three months and seven days to complete a self-assessment tax return, without incurring a penalty.

(2) The 'filing date' for the Appellant to file the 2021 tax return was 7 July 2022. The Appellant filed the tax return online, on 30 March 2022. Therefore, there are no late filing penalties. The penalty charged is a late payment penalty.

(3) The due date for payment of income tax liability is established by s 59B TMA. For taxpayers who do not fall within any of the exceptions within s 59B, s 59B (4) provides that the due date for payment is on, or before, 31 January following the year of assessment.

(4) The penalty date, as defined at para 1(4) of Schedule 56, in respect of income tax or capital gains tax payable under s 59B TMA is the 31st day following the due date for payment.

(5) A period of 30 days is allowed before a late-payment penalty is imposed to allow time to make payment. The penalty date was 2 February 2022

(6) The Appellant filed the tax return electronically, whereby tax liability was calculated automatically. Records show that the Appellant was due to pay £2,717 in respect of the year ending 5 April 2021. The due date for payment of tax was 31 January 2022.

(7) The Appellant only paid his tax liability on 26 April 2022. In accordance with s 59B (4), the Appellant was 85 days late in paying his outstanding tax liability.

(8) As the Appellant had failed to notify his chargeability to income tax, the payment due date remained unchanged at the statutory due date for the year ended 5 April 2021 (i.e., 31 January 2022).

Appellant's Grounds of Appeal

3. The Appellant's grounds for appealing against the penalties can be summarised as follows:

(1) He was never self-employed, but always an employee, so the company he was employed by dealt with his tax.

(2) He received a letter from HMRC, dated 13 December 2021, informing him that he had to pay the HICBC. This was the first time he became aware of the HICBC.

(3) He immediately registered for self-assessment in January 2022 but did not hear from HMRC for a month. He also called HMRC prior to the deadline and had to register again. HMRC informed him that there was information missing from his application and so he filled in a new registration form, which included the missing information. He quickly received an approval and submitted his self-assessment.

(4) He could not submit his tax return on time because HMRC did not make it available to him by the deadline.

(5) He would like to be reimbursed for the penalty (with interest), and for any additional expenses incurred to be refunded.

4. Neither party has requested an oral hearing.

APPLICABLE LAW

5. Section 681B of the Income Tax (Earnings and Pensions) Act 2003 ('ITEPA') provides for the HICBC, and sets out the conditions that must be met before a taxpayer is liable for it, 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.

[...]
(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."

6. Section 681C ITEPA sets out how the amount of the HICBC is determined, relevantly as follows:

"(1) The amount of the high income child benefit charge to which a person ("P") is liable for a tax year is the appropriate percentage of the total of—
(a) any amounts in relation to which condition A is met, and
(b) any amounts in relation to which condition B is met. For conditions A and B, see section 681B.
(2) "The appropriate percentage" is—
(a) 100%, or
(b) if less, the percentage determined by the formula— ((ANI − L)/X)%
Where—

ANI is P's adjusted net income for the tax year; L is £50,000;
X is £100."

7. The requirement to notify chargeability to income tax is set out at s 7 TMA:

"**Section 7 - Notice of liability to income tax and capital gains tax**

(1) Every person who—

(a) is chargeable to income tax or capital gains tax for any year of assessment, and

(b) has not received a notice under section 8 of this Act requiring a return for that year of his total income and chargeable gains, shall, subject to subsection (3) below, within six months from the end of that year, give notice to an officer of the Board that he is so chargeable.

(2) In the case of [persons who are] chargeable as mentioned in subsection (1) above as [the relevant trustees] of a settlement, that subsection shall have effect as if the reference to a notice under section 8 of this Act were a reference to a notice under section 8A of this Act."

8. A notice to file is dealt with at s 8 TMA:

"**Section 8 - Personal return.**

(1) For the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, and the amount payable by him by way of income tax for that year, he may be required by a notice given to him by an officer of the Board—

(a) to make and deliver to the officer .., a return containing such information as may reasonably be required in pursuance of the notice, and

(b) to deliver with the return such accounts, statements and documents, relating to information contained in the return, as may reasonably be so required."

9. And payment of income tax liability is dealt with as follows:

"59B Payment of income tax and capital gains tax: assessments other than simple assessments

(1) Subject to subsection (2) below, the difference between—

(a) the amount of income tax and capital gains tax contained in a person's self-assessment under section 9 of this Act for any year of assessment, and

(b) the aggregate of any payments on account made by him in respect of that year (whether under section 59A of this Act or under Schedule 2 to the Finance Act 2019 or otherwise) and any income tax which in respect of that year has been deducted at source, shall be payable by him or (as the case may be) repayable to him as mentioned in subsection (3) or (4) below but nothing in this subsection shall require the repayment of any income tax treated as deducted or paid by virtue of section ... 246D(1) ... of the principal Act, section 626 of ITEPA 2003 or section 399(2) ... or 530(1) of ITTOIA 2005.

(2) The following, namely—

(a) any amount which, in the year of assessment, is deducted at source under PAYE regulations in respect of a previous year, and

(b) any amount which, in respect of the year of assessment, is to be deducted at source under PAYE regulationsin a subsequent year, ... shall be respectively deducted from and added to the aggregate mentioned in subsection (1)(b) above.

…

(3) In a case where the person—

(a) gave the notice required by section 7 of this Act within six months from the end of the year of assessment, but

(b) was not given notice under section 8 or 8A of this Act until after the 31st October next following that year, the difference shall be payable or repayable at the end of the period of three months beginning with the day on which the notice under section 8 or 8A was given.

(4) In any other case, the difference shall be payable or repayable on or before the 31st January next following the year of assessment.

[Emphasis added]

DISCUSSION

10. This is an appeal by the Appellant against a late payment penalty charged for the late payment of income tax arising as a result of the HICBC. The issues under appeal are firstly, whether HMRC were correct to issue the penalty in accordance with legislation and, secondly, whether or not the Appellant has established a reasonable excuse for the defaults which have occurred. In this regard, HMRC bear the initial burden of demonstrating that the penalty is due. Once this is discharged, the burden of proof is upon the Appellant to demonstrate that there is a reasonable excuse.

11. Two further questions arise in determining this appeal. They are: if the Appellant is in default of an obligation imposed by statute: (a) what was the period of default? and (b) did the Appellant have a reasonable excuse throughout the period?

12. The above matters are to be considered in light of all the circumstances of the case.

Findings of fact

13. From the papers before me, I make the following findings of fact:

(1) On 2 February 2021, the Appellant signed up to receive paperless communication. He then received an awareness letter from HMRC on 13 December 2021, in relation to the HICBC.

(2) He attempted to register for self-assessment in January 2022. He was informed that there was information missing from his form. He immediately completed a new form, which was accepted. He subsequently successfully registered for self-assessment on 22 March 2022.

(3) A notice to file for the tax year ending on 5 April 2021 was issued to the Appellant on 31 March 2022, via the postal service. The filing date for this return was 7 July 2022, for a paper return or an electronic return.

(4) The Appellant's tax return for this year was received on 30 March 2022, given that he had successfully registered for self-assessment prior to the date when the notice to file was issued.

(5) The tax return was filed electronically, whereby the tax liability was calculated automatically. The Appellant's tax liability was £2,717.

(6) As payment was not made by the legislative due date, HMRC issued a notice of penalty assessment on 14 April 2022, for the 30-day late payment penalty.

(7) The penalty was in the sum of £135, representing 5% of the outstanding tax liability that was due at the time.

(8) As the Appellant had signed up to receive paperless communication, the notice of penalty assessment was issued to the secure mailbox in the Appellant's online Personal Tax Account ('PTA') and an email alert was sent to his verified email address. The PTA message (SA370) was read by the Appellant on the same date.

(9) On 26 April 2022, the Appellant submitted an appeal to HMRC and paid the outstanding tax liability.

(10) Following further exchanges of correspondence, on 9 December 2022 the Appellant lodged an appeal with the Tribunal.

Consideration

14. It is trite law that no penalty can arise in any case where the taxpayer is not in default of an obligation imposed by statute. In *Perrin v R & C Commrs* [2018] BTC 513 ('*Perrin*'), at [69], the Upper Tribunal explained the shifting burden of proof as follows:

> "Before any question of reasonable excuse comes into play, it is important to remember that the initial burden lies on HMRC to establish that events have occurred as a result of which a

> penalty is, prima facie, due. A mere assertion of the occurrence of the relevant events in a statement of case is not sufficient. Evidence is required and unless sufficient evidence is provided to prove the relevant facts on a balance of probabilities, the penalty must be cancelled without any question of "reasonable excuse" becoming relevant."

15. The factual prerequisite is, therefore, that HMRC have the initial burden of proof: see also *Burgess & Brimheath v HMRC* [2015] UKUT 578 (TCC), in the context of a discovery assessment. The standard of proof is the civil standard; that of a balance of probabilities.

Q. Is the Appellant in default of an obligation imposed by statute?

16. The HICBC was considered by Parliament in several debates and the measures were announced by the Chancellor in the 2012 budget. There was an extensive publicity campaign to raise awareness, leading up to the introduction of the HICBC. The HICBC came into effect by virtue of Schedule 1 of the Finance Act 2012 ('FA 2012'), which amended Chapter 8, Part 10 ITEPA. From 7 January 2013, if an individual had an Adjusted Net Income ('ANI') in excess of £50,000 a year and either that individual, or his/her partner, received any Child Benefit payments, then the partner with the higher income had to pay the HICBC. The HICBC arises under s 681B ITEPA and the obligation to notify liability to the HICBC is provided for under s 7 TMA. The time-limit for notifying chargeability income is six months from the end of the tax year in which the liability arises. The six-month time-limit ensures that a taxpayer can be sent a tax return in sufficient time to complete the tax return within the normal cycle for the year.

17. Sub-sections (1A) and (1B) of s 7 TMA ensure that the requirement to notify only applies to persons who are not already required to submit a return pursuant to the provisions of s 8 TMA. Moreover, the provisions of sub-section (3) and (4) of s. 7 mean that a person whose income is dealt with under the PAYE regime will not be required to notify under s 7 TMA. However, s 7(3) TMA was amended by para. 2 of Schedule 1 to FA 2012 to provide that a taxpayer is required to notify their liability to the HICBC under s 7 TMA in the same way as they were required to notify any other liability to income tax. The impact of this amendment is that even if a taxpayer's income is dealt with under the PAYE regime, if they are liable to the HICBC, they will always be required to notify under s 7 TMA, unless they are required by HMRC to make and deliver a return under s 8 TMA.

18. For each £100 in excess of £50,000, a 1% tax liability arises, calculated on the amount of Child Benefit received. Where a taxpayer's ANI reaches £60,000, the result is that 100% of the Child Benefit received becomes liable to a tax charge. The change in the law meant that taxpayers had a statutory obligation to notify chargeability to tax. The charge is calculated on a sliding scale. The effect is to impose a tax charge equal to 100% of the amount of the Child Benefit if the higher-earning partner has adjusted net income of £60,000 or more per annum. If the higher-earning partner earns between £50,000 and £60,000 per annum, the tax charge is equal to 1% of the amount of the Child Benefit for each £100 of income over £50,000. In effect, the HICBC claws back Child Benefit by imposing a tax charge on the higher-earning partner, and does so in full if the level of income is at least £60,000, or on a sliding scale if it is between £50,000 and £60,000.

19. Section 681G ITEPA defines "partner" for the purposes of s 681B(4) ITEPA. In essence, a couple must be either married or in a civil partnership (unless separated), or they must be living together as if they were a married couple or civil partners. Section 681H provides that "adjusted net income" is determined under s 58 of the Income Tax Act 2007 ('ITA 2007'). Section 58 is set out with certain other provisions in the Schedule to this decision

20. The Appellant does not suggest that his partner was not in receipt of the HICBC during the 2021 tax year. The time-limit for notifying chargeability income is six months from the end of the tax year in which the liability arises. Notification for the chargeability on the Appellant's income from the HICBC should have been received from the Appellant on, or before, 31 October 2021. The six-month time-limit ensures that a taxpayer can be sent a tax return in sufficient time to complete the tax return within the normal cycle for the year.

21. The Appellant was then issued with an awareness letter in relation to the HICBC in December 2021. As the Appellant had not notified his liability to income tax by the statutory deadline, a notice to file was issued by HMRC on 31 March 2022, after the Appellant had registered for self-assessment and filed his tax return. The filing date for this tax return was 7 July 2022. A notice to file under s 8 TMA creates a legal obligation to file a tax return. The 'filing date' is determined by s 8(1G) TMA. If a notice to file in respect of Year 1 is given after 31 October in Year 2, a tax return must be delivered during the period of three months, beginning on the date of the notice. HMRC's computer system allows a concessionary period of seven days (in addition). The Appellant was given the statutory time period of three months to complete the tax return without incurring a penalty. However, as the Appellant failed to notify HMRC of the untaxed income within the time-limit, the payment due date remained the same (i.e., 31 January 2022).

22. The Appellant's tax return was received before the statutory deadline as the Appellant had registered for self-assessment on 22 March 2022. The due date for payment of income tax liability is established by s 59B TMA. The date for making payment is 31 January. Schedule 56 makes provision for the imposition by HMRC of penalties on taxpayers for the late payment of tax. Where a person fails to make payment on, or before, the penalty date, a penalty may be assessed under para 3 of Schedule 56.

23. The penalty provisions are contained in Schedule 56. These are applied where a person does not pay their tax liability by the due date. Under para 3(2) of Schedule 56, a penalty of 5% of the outstanding tax liability is chargeable if a person fails to make payment of ta by the penalty date. Under para. 3(3) of Schedule 56, a penalty of 5% of the outstanding tax liability is charged if a person fails to make payment within five months of the penalty date, and under para. 3(4), a further penalty of 5% of the outstanding tax liability is charged if a person fails to pay tax within eleven months of the penalty date.

24. Despite filing his tax return electronically (on 30 March 2022) prior to the filing deadline of 7 July 2022, the Appellant only made payment of the outstanding tax liability on 26 April 2022. This was after the due date for payment of income tax for the tax year ending on 5 April

2021. I have concluded that payment of tax for the 2021 tax year was made on 26 April 2022. It should have been made by 31 January 2022. Subject to considerations of 'reasonable excuse' and 'special circumstances' set out below, the penalties imposed are due and have been calculated correctly.

Q. Has the Appellant established a reasonable excuse for the defaults which have occurred?

25. There is no statutory definition of 'reasonable excuse'. Whether or not a person had a reasonable excuse is an objective test and is a matter to be considered in the light of all of the circumstances of the particular case: *Rowland v R & C Comrs* (2006) Sp C 548 ('*Rowland*'), at [18]. The test I adopt in determining whether the Appellant has a reasonable excuse is that set out in *The Clean Car Co. Ltd. v C&E Commissioners* [1991] VATTR 234 ("*Clean Car*"), in which Judge Medd QC said this:

> "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?"

26. Although *Clean Car* was a VAT case, it is generally accepted that the same principles apply to a claim of reasonable excuse in direct tax cases.

27. In *Perrin*, the Upper Tribunal explained that the experience and knowledge of the particular taxpayer should be taken into account in considering whether a reasonable excuse has been established. The Upper Tribunal concluded that for an honestly held belief to constitute a reasonable excuse, it must also be objectively reasonable for that belief to be held. The word '*reasonable*' imports the concept of objectivity, whilst the words '*the taxpayer*' recognise that the objective test should be applied to the circumstances of the actual (rather than the hypothetical) taxpayer. The standard by which this falls to be judged is that of a prudent and reasonable taxpayer, exercising reasonable foresight and due diligence, in the position of the taxpayer in question and having proper regard for their responsibilities under the Tax Acts: *Collis v HMRC* [2011] UKFTT 588 (TC) ('*Collis*').

28. The decision depends upon the particular circumstances in which the failure occurred. Where the person had a reasonable excuse for the failure but the excuse ceased, the person is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased. I proceed by firstly determining whether facts exist, which when judged objectively, amount to a reasonable excuse for the default and, accordingly, give rise to a valid defence. In this regard, I have assessed whether the facts put forward and any belief held by the Appellant are sufficient to amount to a reasonable excuse.

29. In essence, the Appellant submits that: (i) he was never self-employed, but always an employee, so the company he was employed by dealt with his tax; (ii) he received a letter from

HMRC, dated 13 December 2021, informing him that he had to pay the HICBC. This was the first time he became aware of the HICBC; (iii) he immediately registered for self-assessment in January 2022 but did not hear from HMRC for a month. He also called HMRC prior to the deadline and had to register again. HMRC informed him that there was information missing from his application and so he filled in a new registration form, which included the missing information. He quickly received an approval and submitted his self-assessment; and (iv) he could not submit his tax return on time because HMRC did not make it available to him by the deadline.

30. Having considered all of the documentary evidence, I find that the Appellant has not established a reasonable excuse. I give my reasons for so finding:

31. Firstly, I have found that the Appellant did not notify his liability to the HICBC by the statutory deadline of 31 October 2021. I have considered that s 7 TMA required him to do so within six months of the end of the tax year when the liability arises. The Appellant does not deny that his partner had been in receipt of Child Benefit for the relevant period, or that his income exceeded the threshold for liability to tax in respect of the HICBC. He was liable to pay the HICBC via self-assessment. This is despite the fact that he was always an employee under Pay-As-You-Earn ('PAYE'). No penalties have, however, been raised for a failure to notify and this matter is not in issue between the parties.

32. Secondly, the Appellant does not deny having received the awareness letter from HMRC on 13 December 2021, in relation to the HICBC. The letters issued to customers affected by the changes to Child Benefit, such as the Appellant, explained how the HICBC was to take effect from 7 January 2013; and that the new charge would apply when a taxpayer's (or their partner's) income exceeds £50,000. Those affected would then have needed to decide whether to keep receiving Child Benefit and pay the tax due through self-assessment, or to stop receiving Child Benefit and not pay the new charge. The Appellant was able to register for self-assessment before the notice to file was issued and he filed his tax return in a timely manner. I will return to the issue of the problems that the Appellant says he was facing in relation to registering for self-assessment later.

33. Thirdly, whilst the Appellant submits that HMRC failed to make the tax return available to him on time, I find that HMRC were under no obligation to send a tax return until the Appellant had furnished them with the information concerning his liability to tax as a result of the HICBC. I further find that HMRC would not have had any way of knowing that the HICBC applied to the Appellant given that he had failed to notify his liability. The Appellant only registered for self-assessment on 22 March 2022 after receipt of the awareness letter on 13 December 2021. As the Appellant had failed to notify his liability to the HICBC, HMRC issued a notice to file on 31 March 2022. The Appellant was given three months to file his tax return and the filing deadline was 7 July 2022 (for either a paper or electronic return). This is in accordance with the legislation. I, therefore, find that HMRC gave the Appellant sufficient time to file his tax return. In any event, the Appellant filed his tax return on 30 March 2022, before the notice to file was issued and before the filing deadline. Late filing is not, therefore, in issue between the parties.

34. Fourthly, in relation to the Appellant's general awareness of the HICBC over and above the awareness letter, I have borne in mind the comments of the tribunal in *Hesketh & Anor v HMRC* [2018] TC 06266 ('*Hesketh*'), where Judge Mosedale held that Parliament intended all of its laws to be complied with, and that ignorance of the law was not an excuse. The onus is upon an appellant to ensure that they properly understand their obligations under the law. In *Spring Capital v HMRC* [2015] UKFTT 8 (TC), at [48], Judge Mosedale said this:

> "Ignorance of the law cannot, as a matter of policy, ever amount to a reasonable excuse for failing to observe the law. This is because otherwise the law would favour those who chose to remain in ignorance of it above those persons who chose to acquaint themselves with the law in order to abide by it."

35. Similarly, in *Lau v HMRC* [2018] UKFTT 230 (TC) ('*Lau*'), Judge Anne Scott held, at [37] to [38], that:

> "Parliament cannot have intended ignorance of the law to be a reasonable excuse because Parliament must have enacted the law with the intention that it would be obeyed. In all these circumstances, ignorance of the law simply cannot amount to a reasonable excuse."

36. In *Gilbert v HMRC* [2018] UKFTT 437 (TC), at [38] and [40], Judge Helier said this:

> "38. … It seems to me that in construing what was intended by Parliament as being capable of being a reasonable excuse the question is what conduct Parliament intended to penalise in relation to a transgression of the law. The answer to that is that it did not intend to penalise behaviour in which the conduct of the taxpayer was reasonable in the circumstances even if that resulted in a breach of the law. But what is reasonable must be judged against 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"
>
> …
>
> 40. In relation to a breach of the law the answer to the question: "what caused the taxpayer's ignorance of the change in the law?" will affect whether he or she acted reasonably In some cases that cause may well afford a reasonable excuse: for example if the taxpayer had been in a coma, or was advised by HMRC or another reputable source that the law would not or was unlikely to change in a relevant period, or if the taxpayer did not have the mental capacity to understand the possibility of a change in the law; in other circumstances the cause of that ignorance may be unlikely to found a reasonable excuse: for example a simple assumption that there would be no change or a decision to do nothing unless asked to do something by HMRC. In the first set of examples it might be said that the taxpayer acted reasonably having regard to his circumstances and the need for compliance, in the second the reverse."

37. In *Cenlon Finance Co. Ltd v Ellwood* (1962) 40 TC 176, Lord Denning said this:

> "…it is a mistake to say that everyone is presumed to know the law. The true proposition is that no one is to be excused from doing his duty by pleading that he did not know the law."

38. As also held by Clauston J in *Holland v German Property Administrator* [1936] 3 All ER 6, at p 12:

> "the eyes of the court are to be bandaged by the application of the maxim as to ignoratia legis."

39. It is, therefore, trite law that ignorance of the law cannot come to the defence of a violation of the law: see also *Qualaphram Ltd v HMRC* [2016] UKFTT 100 (TC), at [121]. I have found that the HICBC was widely publicised.

40. Fifthly, in respect of whether HMRC are under any obligation to notify taxpayers potentially affected by the HICBC, whilst not binding on me, I find that following decisions of the First-tier Tribunal ('FtT') to be persuasive:

41. In *Johnstone v HMRC* [2018] UKFTT 0689 (TC) ('*Johnstone*'), Judge Poon summarised the judicial position in respect of whether HMRC have a duty to notify all taxpayers potentially affected by the HICBC, at [49]:

> "The first proposition is simply not arguable for the following reasons:
>
> (1) HMRC do not have a statutory duty to notify all taxpayers potentially affected by HICBC. By statutory duty, we mean a duty that is provided by Parliament and laid down by statute. For example, HMRC have a statutory duty to issue a notice of assessment for any tax liability to be enforceable.
>
> (2) What initiatives or measures HMRC had taken to raise awareness of HICBC were matters of internal policy decisions, over which this Tribunal has no jurisdiction.
>
> (3) The cohort of taxpayers likely to be affected by HICBC is not readily identifiable from the information held by HMRC, especially when the recipient of the child benefit and the taxpayer liable to HICBC are not the same person, as is the case here.
>
> (4) The 'Child Benefit' is not a means-tested benefit, and as such, the Child Benefit Agency does not hold data to enable any identification of the recipients that may be affected by HICBC…"

[Emphasis added both above and below]

42. Similarly, in *Nonyane v HMRC* [2017] UKFTT 0011 (TC) ('*Nonyane*'), Judge McGregor concluded, at [28], that:

> "I agree with HMRC's submissions that it is not obliged to notify all customers of changes in the law."

43. In *Lau*, at [33], Judge Anne Scott reached the same conclusion. *Lau, Robertson, Johnston, Nonayne* and *Hesketh* are all cited by HMRC as authority for the proposition that there is no obligation on HMRC to notify a taxpayer of new legislation. I agree with that proposition. In the appeal before me, the Appellant had, in any event, received the awareness letter.

44. Furthermore, I am satisfied that HMRC's website provided full details of the HICBC. HMRC's website also has a calculator on which taxpayers can verify whether they have to pay some, or all, of the Child Benefit as a tax charge if their ANI is over £50,000 per annum. A bounty pack was also given to all parents of a new born after 2012-13, containing a flyer about Child Benefit, where the HICBC was explained. To claim Child Benefit, a person would have to fill out the Child Benefit claim form and send it to the Child Benefit Office for processing. The forms include multiple warnings about the HICBC (at p 2 of the notes accompanying the claim form). It was not until April 2018 that Child Benefit could be claimed by telephone (in certain circumstances). If a taxpayer chose to claim Child Benefit, they would have to notify liability to the HICBC.

45. I, therefore, hold that case law has established that the HICBC was a widely publicised initiative. In *Robertson*, the Upper Tribunal (Judge Poole and Judge Thomas Scott) considered an argument by the appellant (in that appeal) to the effect that the awareness letters had not been received. Judge Scott held, at [98], that:

> "[98] As to whether the appellant had a reasonable excuse, while we accept his evidence that neither he nor his wife received any awareness letters or SA 252s in 2012 or 2013, we do not think this is enough to establish a reasonable excuse. Unlike some tax changes this one was very high profile and was widely discussed in all sorts of media…."

46. Similarly, in *McDonagh v HMRC* [2020] UKFTT 0421, Judge Connell said this, at [54]:

> "54. Whilst it is clear that there is no legal obligation to do so, HMRC took considerable steps to raise awareness of the HICBC. Between October and December 2012, HMRC issued numerous high profile press releases. HMRC say that around 1 million letters were sent in November 2012 to recipients of child benefit, explaining that the HICBC was due to take effect on 7 January 2013. The releases specifically drew attention to recipients of child benefit that the HICBC would impact those earning more than £50,000 per annum. A further reminder was issued through another nationwide press release in March 2013. Another advertising campaign ran from 10 - 17 March 2013. By September 2013, 400,000 people with income above £50,000pa had opted out of receiving child benefit payments. Further press releases were issued in December 2013 and January 2014."

47. In *Katib v HMRC* [2019] UKUT 189 (TCC) ('*Katib*'), the Upper Tribunal concluded that the lack of experience of the appellant and the hardship that is likely to be suffered was not sufficient to displace the responsibility on the appellant to adhere to time limits. The differences in fact in *Katib* and the appeal before me does not, however, negate the principle established

in relation to the need for statutory time limits to be adhered to, and the duty placed upon taxpayers to adhere to statutory duties.

48. Sixthly, the Appellant signed up or paperless communication on 2 February 2021. In order to sign up for paperless contact, the Appellant is required to (i) confirm their email address; (ii) indicate that communications are to be provided electronically; (iii) agree to terms and conditions; and (iv) set their preference and click the 'Continue' button. The "Go paperless with HMRC" screen clearly states that the communications sent electronically include statutory notices, decisions, estimates and reminders. When an online communication has been made to a taxpayer's online PTA, an email will also be sent to their verified email address, notifying them that information has been delivered to their secure mailbox. If the email is not delivered successfully, HMRC will be notified. If a second attempt to send the email fails, the taxpayer will be de-registered from paperless contact and any future correspondence will be issued on paper. All email alerts were successfully delivered to the Appellant.

49. Section 103 of the Finance Act 2020 confirms that any function capable of being done by an officer may be done by HMRC whether by means of using a computer, or otherwise.

50. HMRC's Terms & Conditions in relation to paperless communications include the following clauses:

> *"…*
>
> ***Registration***
>
> *…*
>
> *2.2 If you register on the GOV.UK website the details you provide will be passed to the Government Gateway for verification (on behalf of HMRC…*
>
> *2.3 Your email address, if provided, may be used by the Government Gateway to communicate with you and to forward messages.*
>
> *…*
>
> ***Secure mailbox***
>
> *…*
>
> *7.2 <u>You should regularly check your mailbox and delete old messages</u>. Read messages that have been on the system for up to three months from delivery will be archived and removed from your mailbox. Unread messages that have been on the system for up to 12 months from delivery will be archived and removed from your mailbox.*
>
> *7.3 If you opt to receive statutory notices, decisions, estimates and reminders relating to your tax affairs and tax credits, which may include <u>a notice to file a tax return</u>, renew your tax credits, make a payment or information about other related matters electronically <u>then these will be delivered to a separate secure online mailbox</u>.*
>
> *…*

Statutory notices, decisions, estimates and reminders relating to your tax affairs and tax credits

8.1 Some online services may be used, or may make use of the secure online mailbox, to issue statutory notices, decisions, estimates and reminders relating to your tax affairs and tax credits. You van view these securely on the GOV.UK website."

51. The penalty notice was sent to the Appellant's PTA and the Appellant read the PTA message almost immediately. The Appellant does not argue that there were any defects in the penalty notice, and in the procedure that HMRC followed when issuing it. In any event, such arguments were considered, and rejected, by the Court of Appeal in *Donaldson v The Commissioners for HM Revenue & Customs* [2016] EWCA Civ 761. I am bound by that decision.

52. Returning to the issue concerning the difficulties that the Appellant says he was facing registering for self-assessment, I find that there is no record of calls from the Appellant to HMRC, prior to the record of the call on 31 January 2022 (which was the payment deadline). The Appellant had already received the awareness letter in December 2021. By his own written evidence, the Appellant acknowledges that there had been information missing from his attempts to register for self-assessment, and that he was able to register for self-assessment on 22 March 2022, when he had provided the missing information (his national insurance number). There were no further calls to HMRC until September 2022 (in relation to the appeal). It is unclear what further steps the Appellant took to contact HMRC and explain the difficulty that he was having.

53. Lastly, in relation to the assurance that the Appellant says that he received during the phone call to HMRC on 31 January 2022, this appears to be a complaint against assurances that were given to him by an adviser during the telephone call. In *Marks & Spencer plc v Customs & Excise Comrs* [1999] STC 205, at 247, Moses J said this:

> "…in so far as the complaint is not focused upon the consequences of the statute but rather upon the conduct of the Commissioners then it is clear the Tribunal had no jurisdiction. Its jurisdiction is limited to decisions of the Commissioners and it has no jurisdiction in relation to supervision of their conduct."

54. In any event, it would appear from the transcript of the call that the Appellant was informed that there would not be any "late filing" penalties as the filing deadline was 7 July 2022. No late filing penalties have been imposed. The penalty that has been charged in this appeal is a late payment penalty.

55. The payment date in respect of income tax liability is established in statute. That date is 31 January. The date does not change if there has been a failure to notify liability to income tax and the date that tax in relation to the 2021 tax year became payable in this appeal was 31 January 2022. The Appellant had successfully registered for self-assessment prior to the penalty date. I have already found that the Appellant had filed his tax return prior to the filing deadline. The Appellant filed his tax return electronically on 30 March 2022 and would not

have incurred a late-payment penalty if he had immediately paid the outstanding tax liability at the same time. He was aware of his tax liability by that date. The Appellant's tax liability was only paid on 26 April 2022. No cogent explanation has been provided by the Appellant for the delay in paying tax.

56. In *Revenue & Customs Comrs v Hok Ltd* [2012] UKUT 363 (TCC); [2013] STC 255, the Upper Tribunal held that this Tribunal did not have power to discharge penalties on the ground that their imposition was unfair. Furthermore, in *Rotberg v Revenue & Customs Comrs* [2014] UKFTT 657 (TC), it was accepted that the tribunal's jurisdiction went only to determining how much tax was lawfully due and not the question of whether HMRC should, by reason of some act or omission on their part, be prevented from collecting tax otherwise lawfully due. In that appeal, conduct of HMRC had given rise to a legitimate expectation as to the availability of tax relief, which in turn went to the amount of tax lawfully due. The Tribunal held, at [109], that the First-tier Tribunal ('FtT') has no general supervisory jurisdiction. Applying *Aspin v Estill* [1987] STC 723, the Tribunal found, at [116], that the jurisdiction of the FtT in cases of that nature was limited to considering the application of the tax provisions themselves.

Q. Has the penalty been correctly applied and do any Special Circumstances apply?

57. Where a person appeals against the amount of a penalty, the Tribunal with the power to substitute HMRC's decision with another decision that HMRC had the power to make. There have been a number of cases on special circumstances, from which I derive the following principles:

(1) While "special circumstances" are not defined, the courts accept that for circumstances to be special they must be "exceptional, abnormal or unusual" (*Crabtree v Hinchcliffe* [1971] 3 All ER 967) or "something out of the ordinary run of events" (*Clarks of Hove Ltd v Bakers Union* [1979] 1 All ER 152).

(2) HMRC's failure to consider special circumstances (or to have reached a flawed decision that special circumstances do not apply to a taxpayer) does not mean the decision to impose the penalty, in the first place, is flawed.

(3) Special circumstances do not have to be considered before the imposition of the penalty. HMRC can consider whether special circumstances apply at any time up to, and during, the hearing of the appeal before the tribunal.

(4) The tribunal may assess whether a special circumstances decision (if any) is flawed if it is considering an appeal against the amount of a penalty assessed on a taxpayer.

58. The special circumstances must apply to the individual and not be general circumstances that apply to many taxpayers: see *Collis*, at [40] and *Bluu Solutions Ltd v Commissioners for Her Majesty's Revenue & Customs* [2015] UKFTT 95. The Tribunal may rely on special reduction, but only if HMRC's decision was 'flawed' when considered in the light of the principles applicable in proceedings for judicial review'. That is a high test. I do not consider that HMRC's decision in this case (set out in their Statement of Case) is flawed. Therefore, I have no power to interfere with HMRC's decision not to reduce the penalties imposed upon the Appellant.

59. The amount of the penalties charged is set within the legislation. Even when a taxpayer is unable to establish that he has a reasonable excuse and he remains liable for one or more penalties, HMRC have the discretion to reduce those penalties if they consider that the circumstances are such that reduction would be appropriate. HMRC have considered the Appellant's grounds of appeal found that his circumstances do not amount to special circumstances which would merit a reduction of the penalties. Accordingly, HMRC's decision not to reduce the penalties was not flawed.

60. For all of the foregoing reasons, the appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

61. 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.

NATSAI MANYARARA
TRIBUNAL JUDGE

Release date: 11 August 2023