[2021] UKFTT 0263 (TC)

TC08209

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

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2020/01009

BETWEEN

MATTHEW FRANCIS **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 7 March 2020, HMRC's statement of case dated 25 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**"). Mr Matthew Francis ("**the Appellant**") has been assessed to HICBC for tax years 2012/13 to 20115/16, together with a penalty (the "**penalty**") for failing to notify chargeability under section 7 Taxes Management Act 1970 ("**TMA**") issued on 8 February 2018. The penalty has been assessed pursuant to Schedule 41 Finance Act 2008 ("**Schedule 41**"). The tax assessments for the four years in question amount to £8,601. The penalty was issued in respect of the four tax years amounts to £1,720.20.

2. The Appellant has not appealed the tax assessments and, as a consequence, must be deemed to have accepted them. However, he has appealed against the penalties. The Appellant has paid the tax assessments.

THE LAW

3. There was no dispute between the parties as to the relevant legislation which is summarised 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 partner had been in receipt of Child Benefit from October 1998. 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) HMRC's records show that on 17 August 2013 they issued what is known as an SA252 letter to the Appellant at the address held on file for him at that time. The SA252 advised the Appellant to check if he was liable to the HICBC and to register for self-assessment if he met the relevant criteria. The Appellant has no record of having received the SA252.

(4) 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.

(5) In the relevant tax years, the Appellant was an employee working for London Underground and subject only to PAYE tax.

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

(i) 2012/13 – £58,597

(ii) 2014/15 – £58,399

(iii) 2015/16 – £60,311

(iv) 2016/17 – £61,297

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

(8) On 5 February 2018 HMRC issued a "nudge" letter to the Appellant advising him to check whether he was liable to the charge.

(9) Following receipt of the nudge letter, on 7 February 20218, the Appellant telephoned HMRC and confirmed his liability to HICBC and made full disclosure of the relevant information to facilitate the assessments.

(10) On 8 February 2018 HMRC issued tax assessments for the charge for the tax years 2012/13 – 2016/17.

(11) Also on 8 February 2018 HMRC issued a notice of penalty assessment to the Appellant for failing to notify chargeability. The penalty was calculated at 20% of the amount of the HICBC for that tax year, on the basis of non-deliberate and prompted behaviour. The penalty range for that behaviour is 10%-30%.

(12) HMRC received an appeal from the Appellant on 2 March 2018 HMRC initially rejected the appeal on the basis that there were no valid grounds of appeal. However, subsequently they accepted there were valid grounds and offered the Appellant a review. The review conclusion upheld the penalty assessments.

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. The basis of the Appellant's appeal is set out initially in his appeal to HMRC on 3 Match 2018 and subsequently in his request for a review and notice of appeal to the Tribunal.

12. The Appellant contends:

(1) He had been employed throughout and subject to tax deducted at source. In each year he was subject to small underpayment of tax charges which were collected through his tax code which had been communicated to him directly; however, there had never been any communication that the HICBC applied to him and that tax was thereby accruing.

(2) Through the relevant tax years claims to child benefit had changed (as the children left full time education) because of the Appellant/his partner has positively notified the relevant changes. Communications with the Child Benefit Agency had not alerted them to the HICBC.

(3) The Appellant states that he is acutely aware of the need to take tax seriously and that had he received the SA252 letter of 17 August 2013 he would both have acted upon it and retained it. Publicly available evidence indicates, in the Appellant's submission that 1 in 60 items of post are lost each year substantiating that he did not receive the SA252 letter.

(4) The time between introduction of the HICBC and the nudge letter was unreasonable. As was the case in February 2018, disclosure would have been immediate had he been notified that he was subject to the charge sooner.

(5) The Appellant registered for self assessment immediately, paid the tax due (using a loan from his father) and stopped the receipt of child benefit immediately.

(6) The information and communications with HMRC regarding self assessment and the requirement to notify have been inconsistent and confusing making the process difficult to comply with.

(7) The Appellant also references the case of *Robertson v HMRC* [2018] UKFTT 0158 and asserts that the tax assessments are invalid such that the penalties have no foundation (it is important to note, for the benefit of the Appellant, who may now, in any event be aware, the judgment of the FTT in *Robertson* on the question of the validity of the discovery assessment was revered in the UT [2019] UKUT 0202).

(8) Interest has been charged on the penalties and the tax, the Appellant accepts that interest is due on the tax but contests its application to the penalties.

13. 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 2012/13 – 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.

14. 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.

15. 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 February 2018 by which time he had been in breach of his obligations for 4.5 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.

16. 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.

17. 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.

18. 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.

19. In reliance on *HMRC v Rogers & Shaw* [2019] UKUT 0406 HMRC contend, in respect of the SA252 they must provide some evidence that the letter was sent and that it was sent to the correct address. They contend that if the SA252 had been returned to them the system would show it as not having been issued. However, they further advance that there was no statutory requirement to issue the SA252 and, as such, the Appellant cannot found a reasonable excuse on not having received the letter as accepted by the Tribunal in *Robertson*).

20. 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.

21. As regards the interest on the penalties HMRC rely on the Upper Tribunal judgment in *HMRC v Gretton* [2012] UKUT 261 which confirmed that there is no discretion on the part of the Tribunal to do anything other that uphold the interest charge.

DISCUSSION

22. The Tribunal finds that the penalty assessment dated 8 February 2020 has been properly and accurately calculated in accordance with the correct legal principles and was served on the Appellant.

23. 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.

24. 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.

25. Applying those principles to the findings of fact as set out above the Tribunal considers that the Appellant has not established a reasonable excuse.

26. The Appellant may not have been aware of the HICBC but the test is not whether he was or was not aware, it is whether the reasonable taxpayer, observant of his obligations should have been aware. Absolutely no criticism is levelled at the Appellant but the Tribunal. Indeed the Tribunal agrees that however extensive the campaign of promotion embarked upon by HMRC in 2012 the failure to actively involve the Child Benefit Agency in notifying recipients of child benefit that a spouse or partner may become liable to a tax charge almost beggars belief. However, a long line of Tribunal judges before me have considered the same arguments on which to found a reasonable excuse and have refused it. Unless I consider those judgments to be wrong or that the facts in this appeal to be materially different, I should follow the conclusions reached.

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

28. 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

29. 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: 13 JULY 2021