Neutral Citation: [2023] UKFTT 721 (TC)

Case Number: TC 08911

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2021/11434

HIGH INCOME CHILD BENEFIT CHARGE – discovery assessments in respect of HICBC liability – penalties for failure to notify liability –whether notification of liability to HICBC to HMRC Child Benefit Office is effective notification for s7 TMA purposes – retrospective effect of amendments to s29 TMA 1970 relating to discovery assessments - whether penalties are criminal for purposes of Article 6, European Convention of Human Rights – whether Article 7 in respect of retrospective criminal liabilities engaged – reasonable excuse – whether reasonable for taxpayer to believe that notification to Child Benefit Office is notification for s7 purposes – s29 Taxes Management Act 1970

Heard on: 15 June 2023
Judgment date: 16 August 2023

Before

TRIBUNAL JUDGE ALEKSANDER
LESLIE BROWN

Between

DANIEL SIMMONITE

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Steven Simmonite of SKS (GB) Limited

For the Respondents: Anika Aziz, litigator, of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. The form of the hearing was V (video) using the HMCTS video hearing service. The hearing was attended by the Appellant, the witnesses, and the representatives. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

2. The Appellant was represented by his father. Because of the risk of confusion, in this decision we have not referred to the representatives of the parties by name, and references in this decision to "Mr Simmonite" are to the Appellant, and not his representative.

3. This is an appeal against the following assessments:

Date	Tax Year	Description	Amount
8 April 2021	2015/16	Discovery Assessment	£763.00
8 April 2021	2016/17	Discovery Assessment	£1078.00
8 April 2021	2017/18	Discovery Assessment	£331.00
8 April 2021	2015/16	Sch 41 Penalty	£152.60
8 April 2021	2016/17	Sch 41 Penalty	£215.20
8 April 2021	2017/18	Sch 41 Penalty	£66.20

4. In addition, interest is chargeable.

5. The discovery assessments are made under s29 Taxes Management Act 1970 ("TMA") in respect of the Mr Simmonite's liability to the High Income Child Benefit Charge ("HICBC"). and penalties were charged under Schedule 41, Finance Act 2008 ("Schedule 41") on the basis that he failed to notify HMRC of his liability to HICBC in accordance with his obligations under s7 TMA.

6. The assessments to HICBC and penalties were dated 8 April 2021. Mr Simmonite requested a review, and the review conclusion letter dated 22 October 2021 upheld the liability to HICBC and penalties.

7. Mr Simmonite now appeals against both his liability to HICBC and penalties.

8. Witness statements were submitted from Mr Simmonite, Hannah Simmonite (his wife), Usman Rafiq, a caseworker in HMRC's Campaigns & Projects Team, and Jacqueline White a Senior HMRC Officer working in the Campaigns & Projects Team. Their statements were taken as read as evidence in chief. Mr Rafiq and Ms White were both cross-examined, but Mr and Ms Simmonite were not. The electronic documents to which we were referred were a documents bundle of 252 pages, and HMRC's generic bundle relating to High Income Child Benefit Charge appeals of 808 pages.

BACKGROUND FACTS

9. The background facts are largely undisputed, and we find that they are as follows:

10. Mr Simmonite is an employee whose salary is subject to withholding of tax under PAYE. Mr Simmonite was never asked by HMRC to file self-assessment tax returns for the periods under appeal, although he filed self-assessment returns for 2018/19 and 2019/20.

11. Mr and Mrs Simmonite's first child was born in June 2015, and Mrs Simmonite claimed child benefit shortly thereafter.

12. We were shown a copy of the Child Benefit claim form used from April 2014 which it was accepted was the version that would have been used by Mrs Simmonite to claim Child

Benefit in June 2015. The front page was headed "Changes to Child Benefit payments" and stated:

> This information **only** applies if you or your partner have an individual income of more than £50,000 a year.
>
> From 7 January 2013, if either you or your partner have an individual income of more than £50,000 a year then you (or your partner) will have to pay a High Income Child Benefit Charge on some or all of the Child Benefit you receive.

13. The second page of the Child Benefit claim form contained the same information about the change to HICBC where the person claiming Child Benefit or their partner earned more than £50,000. However, before the section of the form containing the information about liability to HICBC it stated (in bold in the original):

> **The information below only applies to you if your or your partner's individual income is more than £50,000 a year. If it does not apply, please go straight to page 2 and fill in this claim form.**

14. The evidence of both Mr and Mrs Simmonite was that they were aware that there was an earnings limit to claiming child benefit, although – by implication – they were not aware that it was £50,000.

15. Mr Simmonite was paid a basic salary, which could be enhanced by performance related bonuses. His employer provided Mr Simmonite with an analysis of his basic salary and bonuses for the period from 2015 to 2017, and HMRC's determination of his adjusted net income, which are as follows:

Dates	Basic Salary	Bonus	Total	Other benefits	HMRC adjusted net income
April 2015		£5000			
July 2015		£3000			
Jan-Dec 2015 totals	**£42,000**	**£8000**	**£50,000**	Car/mortgage	**£59,779.46**
Oct 2016		£4000			
Jan-Dec 2016 totals	**£45,000**	**£4000**	**£49,000**	Car/mortgage	**£73,859.21**
Jan 2017		£3000			
April 2017		£9000			
Jan-Dec 2017 totals	**£46,000**	**£12,000**	**£58,000**	Car/mortgage	**£76,124.83**

16. The amount of Mr Simmonite's adjusted net income for HICBC purposes is not disputed.

17. Mr Simmonite does not understand why there is a substantial discrepancy between the amount of adjusted net income and the amount of his gross pay. He considers that some of the discrepancy may arise as a consequence of the fact that tax is determined by reference to tax years, and his pay is determined by reference to calendar years. We note that adjusted net income will also include benefits in kind.

18. Ms White's witness statement described the extensive Government campaign in 2012 and 2013 to raise awareness of HICBC and its consequences using advertisements, television adverts and letters/mail shots to customers who would be affected. Of course, at that time, Mr and Mrs Simmonite were not parents nor about to become parents and we consider that it is unlikely that they paid any attention to the campaign. Ms White also described the 'briefing' that was issued by HMRC in November 2012 to over a million higher rate taxpayers. As her evidence was entirely generic and focused mainly on attempts by HMRC to publicise HICBC to higher rate taxpayers in 2012 and 2013 and Mr and Mrs Simmonite were neither parents nor

higher rate taxpayers at that time, we did not find Mrs White's evidence about these campaigns of any material assistance in this case.

19. Possibly because Mr Simmonite was not a higher-rate taxpayer at these times, or because their first child was born before HICBC was introduced, neither he nor Mrs Simmonite received any of the letters mentioned in Ms White's evidence.

20. In August 2017, HICBC was being discussed by one of Mr Simmonite's colleagues at work. He then realised that because of the receipt of bonuses in 2015, 2016 and 2017, his income may have exceeded the £50,000 threshold. He asked his employer for an analysis of his income for these periods, and they confirmed that he had earned in excess of £50,000 in each of the tax years.

21. Mr Simmonite told Mrs Simmonite that because he was earning more than £50,000, they were no longer entitled to child benefit. Mrs Simmonite called HMRC's Child Benefit Office towards the end of August 2017 and told them to stop payment because her husband was earning more than £50,000. Mrs Simmonite's unchallenged evidence (which we believe) is that the officer to whom she spoke did not tell her that she or her husband needed to notify anyone else at HMRC about Mr Simmonite's liability to HICBC.

22. In November 2019, Mr and Mrs Simmonite moved home. They arranged with Royal Mail for their post to be forwarded from their old to their new home for nine months.

23. HMRC's records show that Mr Simmonite was sent a "nudge" letter. The copy of the letter included in the bundle shows that the letter was dated 20 December 2019. Notwithstanding that HMRC's records included in the bundle also show that his change of address had been recorded on 25 November 2019, the letter was sent to his old address. Mr Simmonite's unchallenged evidence (which we believe) is that he did not receive this letter.

24. On 18 February 2021, HMRC's computer system allocated Mr Simmonite's case to Mr Rafiq. Mr Rafiq reviewed HMRC's records. These showed that although Mr Simmonite had apparently been sent the "nudge" letter mentioned above, he had not been sent any of the targeted compliance letters. The records indicated that Mrs Simmonite had claimed Child Benefit and that Mr Simmonite's adjusted net income for 2015/16 to 2017/18 inclusive exceeded £50,000. Mr Rafiq's witness statement included the following paragraphs:

> **ChB Records**
>
> What action, if any, did you take to check the Appellant had claimed Child Benefit?
>
> I checked the datasheet that I was provided with by the department and as a result I found the appellant had one child however I also checked TBS which showed 2 children.
>
> When was this action taken?
>
> This action was taken before I checked the PAYE of the appellant.
>
> What data/ information did you take into account for the purposes of HICBC calculator?
>
> The data I had to consider was how many children they are claiming for, when did they start claiming the CHB as well as checking for any opt out dates for any children.
>
> Did the data/ information indicate a partner?
>
> The claimant on file was the partner and the details of taxpayer were held as partner.

25. In response to questions under cross-examination, Ms White's evidence was that there was only limited sharing of information by the Child Benefit Office with the rest of HMRC. The Child Benefit Office would have shared limited data with HMRC's risk assessment unit, which was then passed onto the Campaigns and Projects Team. Only information relevant to the needs of the Campaigns and Projects Team was provided by the Child Benefit Office, and the Campaigns and Projects Team did not have direct access to the data held by the Child Benefit Office.

26. Mr Rafiq issued an "opening letter" to Mr Simmonite on 18 February 2021 in respect of HICBC for the tax years 2015/16 to 2019/20. Mr Simmonite telephoned HMRC on 1 March 2021 and explained that Mrs Simmonite had ceased claiming child benefit in August 2017. In consequence, a second opening letter was issued by another officer on 1 March 2021 for the tax years 2015/16 to 2017/18. Mr Simmonite called HMRC in response to the second letter and explained that they had cancelled claiming child benefit as soon as he had become aware of HICBC and that:

> I guess I was ignorant of it I didn't realise it was a thing.

27. The HMRC officer told Mr Simmonite that a letter explaining HICBC had been sent to him on 20 December 2019, and Mr Simmonite responded saying that he had not received it.

28. On 8 April 2021 HMRC raised assessments for HICBC and penalties. Mr Simmonite's behaviour was considered by HMRC to be "non-deliberate", and that any disclosure of his liability to HICBC was prompted, as he had made to attempt to notify HMRC of his liability prior to the February 2021 letter. Under paragraph 6 of Schedule 41, the minimum level of penalty for non-deliberate prompted disclosure (where the disclosure was made more than 12 months after the tax was due) is 20% of the potential lost revenue (in this case HICBC liability). A 20% penalty was assessed.

29. On 23 April 2021 Mr Simmonite submitted an appeal to the HMRC against the assessments and penalties.

30. On 29 April 2021 the HMRC replied to the appeal letter, providing their view of the matter, upholding the decisions, and inviting the Mr Simmonite to request a statutory review or appeal to the Tribunal. The offer of a review was accepted. The review decision letter, upholding the assessments to HICBC and penalties, was issued on 22 October 2021. It is against that review decision that Mr Simmonite now appeals.

THE LAW

31. HICBC was introduced with effect from 7 January 2013. HICBC is imposed on individuals who have an adjusted net income of more than £50,000 in a tax year where that individual or their partner or spouse is in receipt of Child Benefit. Where liability to HICBC arises in any tax year, the individual who is subject to the charge must notify HMRC of their liability to income tax pursuant to s7 TMA.

32. Until the Finance Act 2022 ("FA 2022") came into force on 24 February 2022, section 29(1)(a) TMA 1970 provided, as far as relevant to this appeal, that:

> 29(1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment—
>
> (a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or
>
> […]

> the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.

33. Subsections (2) and (3) of section 29 TMA only apply where the taxpayer has made and delivered a return and do apply in this case as Mr Simmonite did not make a self-assessment tax return in the years assessed.

34. The ability of HMRC to raise assessments under s29 TMA is subject to time limits set out in section 36(1A) as follows:

> 36(1A) An assessment on a person in a case involving a loss of income tax or capital gains tax–
>
> […]
>
> (b) attributable to a failure by the person to comply with an obligation under section 7,
>
> […]
>
> may be made at any time not more than 20 years after the end of the year of assessment to which it relates (subject to any provision of the Taxes Acts allowing a longer period).

35. Section 7 TMA sets out the requirement for persons who are chargeable to income tax to give notice to HMRC that they are liable to income tax within 6 months of the end of the relevant tax year.

36. In relation to assessments under section 29 TMA to collect HICBC a series of decisions relating to an appeal brought by Jason Wilkes (ultimately confirmed by the Court of Appeal in *HMRC v Wilkes* [2022] EWCA Civ 1612 ("*Wilkes*")) held that HICBC was "neither 'income' nor even charged on income" nor was it "income which ought to have been assessed to income tax" or an "amount which ought to have been assessed to income tax" (see *Wilkes* at [29]). Accordingly, HICBC could not be assessed under section 29(1)(a) TMA.

37. Section 29(1)(a) TMA 1970 was amended by s97 FA 2022 to read as follows:

> that an amount of income tax or capital gains tax ought to have been assessed but has not been assessed

The change in wording introduced by s97 FA 2022 reversed the decisions in *Wilkes* and allowed HMRC to make discovery assessments, subject to the usual conditions, in relation to HICBC and some other things.

38. The new wording has retrospective effect but that is subject to an exception for discovery assessments in respect of HICBC in relation to which notice of appeal had been given to HMRC on or before 30 June 2021 which met certain conditions. The relevant provisions in section 97 are as follows:

> (3) The amendments made by this section—
>
> (a) have effect in relation to the tax year 2021-22 and subsequent tax years, and
>
> (b) also have effect in relation to the tax year 2020-21 and earlier tax years but only if the discovery assessment is a relevant protected assessment (see subsections (4) to (6)).
>
> (4) A discovery assessment is a relevant protected assessment if it is in respect of an amount of tax chargeable under—

(a) Chapter 8 of Part 10 of ITEPA 2003 (high income child benefit charge),

[…]

(5) But a discovery assessment is not a relevant protected assessment if it is subject to an appeal notice of which was given to HMRC on or before 30 June 2021 where—

(a) an issue in the appeal is that the assessment is invalid as a result of its not relating to the discovery of income which ought to have been assessed to income tax but which had not been so assessed, and

(b) the issue was raised on or before 30 June 2021 (whether by the appellant or in a decision given by the tribunal).

(6) In addition, a discovery assessment is not a relevant protected assessment if—

(a) it is subject to an appeal notice of which was given to HMRC on or before 30 June 2021,

(b) the appeal is subject to a temporary pause which occurred before 27 October 2021, and

(c) it is reasonable to conclude that the temporary pausing of the appeal occurred (wholly or partly) on the basis that an issue of a kind mentioned in subsection (5)(a) is, or might be, relevant to the determination of the appeal.

(7) For the purposes of this section the cases where notice of an appeal was given to HMRC on or before 30 June 2021 include a case where—

(a) notice of an appeal is given after that date as a result of section 49 of TMA 1970, but

(b) a request in writing was made to HMRC on or before that date seeking HMRC's agreement to the notice being given after the relevant time limit (within the meaning of that section).

(8) For the purposes of this section an appeal is subject to a temporary pause which occurred before 27 October 2021 if—

(a) the appeal has been stayed by the tribunal before that date,

(b) the parties to the appeal have agreed before that date to stay the appeal, or

(c) HMRC have notified the appellant ("A") before that date that they are suspending work on the appeal pending the determination of another appeal the details of which have been notified to A.

39. In summary, the retrospective changes made by s97 FA 2022 do not apply to an appeal that was made on or before 30 June 2021 which concerned the issue identified in the decisions in *Wilkes* and that issue was raised by a party or this Tribunal before that date or the appeal was subject to a temporary pause on or before 27 October 2021 because of that issue.

THE ASSESSMENT TO HICBC

40. Mr Simmonite notified his appeal to HMRC on 23 April 2021 and directions issued on 15 December 2021 stayed this appeal behind *Wilkes*. This appeal was not, therefore, subject to "a temporary pause" within s97(6)(b). However, the appeal was notified to HMRC before 30 June 2021, so we need to consider whether the exception in s97(5) applies. For this to apply:

(1) the question raised in the *Wilkes* cases must be an issue in the appeal; and

(2) that issue must have been raised (whether by Mr Simmonite or the Tribunal) on or before 30 June 2021.

41. Mr Simmonite's grounds of appeal do raise the *Wilkes* point, but this is first mentioned in his representative's letter to HMRC of 12 July 2021. As this is after 30 June 2021 (the date mentioned in s97(5)(b)) the requirements of s97(5) are not met. We find that Mr Simmonite does not escape the retrospective effect of s97 FA 2022.

42. Section 29 requires that a "discovery" of a loss of income tax must be made by an HMRC officer. Mr Simmonite submits that any discovery made by Mr Rafiq must have been made on the basis of information in the possession of HMRC. This information must include the records of HMRC's Child Benefit Office, which would show the payments of child benefit made to Mrs Simmonite. Mr Rafiq, in the course of his evidence, acknowledged that he checked a "datasheet" which showed the child benefit payments made to Mrs Simmonite. Mr Simmonite submits that HMRC chose to wait until 18 February 2021 to review information that had been in their possession for over 3½ years, and that Mr Rafiq "discovered" something that had already been disclosed and in HMRC's possession since 2017.

43. The decision of the Supreme Court in *HMRC v Tooth* [2021] UKSC 17 discusses whether discoveries can become "stale" because, amongst other things, information in the possession of HMRC is not utilised promptly. The decision of the Supreme Court was that the fact that information has become stale does not prevent a discovery assessment under s29. We find that the fact that HMRC might have sat on relevant information for 3½ years does not prevent them raising a discovery assessment.

44. The time limit of 20 years under s36(1A) only applies if Mr Simmonite failed to notify HMRC of his liability to HICBC. In essence, Mr Simmonite submits that Mrs Simmonite's telephone call to HMRC's child benefit office in August 2017 effectively notified HMRC of Mr Simmonite's liability to HICBC.

45. Whilst we can understand why Mr and Mrs Simmonite might have a genuine belief that notification to HMRC's Child Benefit Office satisfied any obligation they might have to notify HMRC, we find that – as a matter of strict law – it did not. The notification made on the phone by Mrs Simmonite to the Child Benefit Office was to stop payment of child benefit. We find that Mrs Simmonite told the officer to whom she spoke that she stopped her claim because of a liability to HICBC. However, we find that notification to the Child Benefit Office cannot be treated as notification to HMRC for the purposes of s7 TMA. HMRC undertakes a wide range of functions, some of which do not relate to the assessment and collection of tax (such as the administration of child benefit, SMP and SSP, and childcare payments). Given this wide range of functions, we find that notification under s7 can only be treated as effective if made to the correct department within HMRC. Further, s7 TMA requires notification to be made within 6 months of the end of the relevant tax year. Thus, notification of Mr Simmonite's liability to HICBC for 2015/16 would need to have been made no later than 5 October 2016. And finally, the notification made by Mrs Simmonite to the Child Benefit Office did not explain that Mr Simmonite had a liability to HICBC not only for 2017/18, but also for the two preceding tax years.

46. We find that Mrs Simmonite's telephone call to the Child Benefit Office did not notify HMRC of Mr Simmonite's liability to HICBC for the purposes of s7.

47. There is no dispute that Mr Simmonite was within the scope of HICBC, and no submissions were made that the amount of Mr Simmonite's liability to HICBC was calculated incorrectly. We find that Mr Simmonite is liable to HICBC in the amounts assessed. We also find that the assessment to HICBC complied with the requirements of s29 TMA. As Mr

Simmonite had not notified HMRC of his liability to HICBC, we find that the 20-year time limit in s36(1A) applies, and the assessments were made in time.

PENALTIES

48. Paragraph 1, Schedule 48 imposes a penalty in the circumstances listed in that paragraph. These include the failure to give notification under s7 TMA. For the reasons already given, we find that Mr Simmonite did not notify HMRC of his liability to HICBC.

49. Paragraph 5 sets out the "degrees of culpability" – namely "deliberate and concealed" and "deliberate and not concealed". Paragraph 6 then sets out the standard penalty for the different degrees of culpability as follows:

> (a) for a deliberate and concealed act or failure, 100% of the potential lost revenue,
>
> (b) for a deliberate but not concealed act or failure, 70% of the potential lost revenue, and
>
> (c) for any other case, 30% of the potential lost revenue.

HMRC levied penalties on the basis that Mr Simmonite's degree of culpability was "non-deliberate", in other words it falls within paragraph (c) and the standard penalty is 30% of the potential lost revenue. In the circumstances of this case, there is no dispute that the potential lost revenue is Mr Simmonite's liability to HICBC.

50. Paragraph 13 provides for a reduction in the amount of the penalty where the taxpayer has provided disclosure to HMRC. HMRC have given Mr Simmonite the benefit of the maximum reduction allowed under that provision and have reduced the penalty to 20% of HICBC liability.

51. Following the hearing and during the course of the preparation of this decision, we considered whether the European Convention of Human Rights might have relevance to this appeal. Article 6 addresses the right to a fair trial, and the case law of the European Court of Human Rights is that tax penalties in certain circumstances would be treated as "criminal" for the purposes of the Convention.

52. Article 7(1) of the Convention (No punishment without law) provides as follows:

> 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

53. We asked the parties to file their written submissions on the potential relevance of Articles 6 and 7 of the Convention to this appeal, and in particular to the retrospective effect of the amendments made to s29. Our decision takes account of these written submissions.

54. It is not disputed that the imposition of penalties in the circumstances of this appeal is "criminal" for the purposes of the Convention.

55. However, "ordinary" liabilities to tax are not criminal. We find that the liability to HICBC is such an ordinary tax liability. The amendments made to s29 address the ability of HMRC to make a "discovery assessment" in order to collect HICBC, and we agree that the provisions of Article 7 are not engaged in relation to the retrospective amendments to s29 to allow HMRC to collect ordinary tax liabilities such as HICBC.

56. However, can penalties be imposed on the basis of a retrospective amendment to s29? Mr Simmonite submits that the effect of the amendments to s29 gives HMRC not only retrospective power to assess HICBC, but also a retrospective power to levy penalties.

57. HMRC submit that Mr Simmonite's obligation to notify his liability to HICBC under s7 TMA was not imposed retrospectively. At all relevant times the law required Mr Simmonite to notify his liability to HICBC within 6 months of the end of the relevant tax year. His failure to do so, submit HMRC, gives rise to a penalty under Schedule 48, irrespective of whether HMRC had power to raise a discovery assessment for HICBC liability.

58. We agree with HMRC – there was no retrospective imposition of an obligation on Mr Simmonite to notify his liability to HICBC under s7. Even if s29 had not been amended by FA 2022, Mr Simmonite would still have had an obligation to notify HMRC of his HICBC liability under s7 TMA. And it is his failure to comply with his s7 obligation that gives rise to penalties in this case.

59. We find that Article 7 of the Convention is not engaged, and HMRC are not prevented from imposing penalties for breach of s7 TMA obligations.

REASONABLE EXCUSE

60. Paragraph 20 of Schedule 41 provides that a penalty will not arise in circumstances where the taxpayer has a reasonable excuse for his default.

61. The Upper Tribunal considered the correct test for reasonable excuse in *Perrin v HMRC* [2018] UKUT 156 (TCC). At [75], the Upper Tribunal concluded that the FTT in that case had correctly stated that "to be a reasonable excuse, the excuse must not only be genuine, but also objectively reasonable when the circumstances and attributes of the actual taxpayer are taken into account." The Upper Tribunal set out helpful guidance as to how the FTT should approach the issue of reasonable excuse at [81] of *Perrin* as follows:

> When considering a "reasonable excuse" defence, therefore, in our view the FTT can usefully approach matters in the following way:
>
> (1) First, establish what facts the taxpayer asserts give rise to a reasonable excuse (this may include the belief, acts or omissions of the taxpayer or any other person, the taxpayer's own experience or relevant attributes, the situation of the taxpayer at any relevant time and any other relevant external facts).
>
> (2) Second, decide which of those facts are proven.
>
> (3) Third, decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default and the time when that objectively reasonable excuse ceased. In doing so, it should take into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times. It might assist the FTT, in this context, to ask itself the question "was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?"
>
> (4) Fourth, having decided when any reasonable excuse ceased, decide whether the taxpayer remedied the failure without unreasonable delay after that time (unless, exceptionally, the failure was remedied before the reasonable excuse ceased). In doing so, the FTT should again decide the matter objectively, but taking into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times."

62. The Upper Tribunal in *Perrin* then made the following further observation at [82]:

> 82. 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. *The Clean Car Co* itself provides an example of such a situation.

63. The reference to *The Clean Car Co* in [82] of Perrin is to the decision of the VAT Tribunal in *The Clean Car Co Ltd v Custom and Excise Commissioners* [1991] VATTR 234. In that case, HH Judge Medd QC held:

> […] 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 in at the relevant time, a reasonable thing to do? Put in another way which does not I think alter the sense of the question: was what the taxpayer did not an unreasonable thing for a trader of the sort I have envisaged, in the position the taxpayer found himself, to do? ... It seems to me that Parliament in passing this legislation must have intended that the question of whether a particular trader had a reasonable excuse should be judged by the standards of reasonableness which one would expect to be exhibited by a taxpayer who had a responsible attitude to his duties as a taxpayer, but who in other respects shared such attributes of the particular appellant as the tribunal considered relevant to the situation being considered. Thus though such a taxpayer would give a reasonable priority to complying with his duties in regard to tax and would conscientiously seek to ensure that his returns were accurate and made timeously, his age and experience, his health or the incidence of some particular difficulty or misfortune and, doubtless, many other facts, may all have a bearing on whether, in acting as he did, he acted reasonably and so had a reasonable excuse.

64. The situation in *The Clean Car Co* was that the taxpayer had wrongly claimed input tax on the basis of an architect's certificate rather than a VAT invoice and became liable to a penalty as a result. The taxpayer appealed on the grounds that it had a reasonable excuse for the error, based upon a genuine belief that recovery of the input tax was permissible on the basis of the architect's certificate and the hospitalisation of the managing director's daughter. The Upper Tribunal in *Perrin*, having quoted the passage from *The Clean Car Co* above at [51], summarised the VAT Tribunal's decision at [52]:

> The tribunal therefore decided that, even though the company (through its managing director) honestly and genuinely believed it had complied with its obligations, that was not enough on its own to afford it a reasonable excuse for the failure; but also that bearing in mind the managing director's unfamiliarity with the special rules applied to building contracts by the VAT legislation at the time and his daughter's serious illness, the excuse that was being put forward did satisfy the objective requirement of reasonableness that he had propounded, and did therefore amount to a reasonable excuse in law.

65. Another situation where ignorance of the law may constitute a reasonable excuse was identified by Simon Brown J, as he then was, in *Neal v Customs and Excise Commissioners* [1988] STC 131. The Upper Tribunal referred to this decision in *Perrin*, but the case itself was not cited to us. *Neil* concerned a 19-year-old model with no experience of tax, business or law who was subject to a late registration VAT penalty. She contended that her "total basic ignorance" of the law amounted to a reasonable excuse. The Tribunal disagreed. On appeal, having referred to section 61 of Trustee Act 1925 and its predecessor legislation which provided a trustee with relief from a liability for a breach of trust if they had acted "honestly and reasonably and ought reasonably to be excused", Simon Brown J said (at 134-5):

> They clearly establish that at least some degree of ignorance of the law may well constitute an exonerating excuse for a trustee. In that context, as in the value added tax legislation, the court is not concerned with ignorance of the law being raised as a defence, let alone to excuse conduct which is intrinsically immoral; rather it is invoked so as to secure relief from penalty in the absence of *mens rea*. The analogy, contends counsel for the taxpayer, is very close in that both trustees and taxpaying traders are concerned with self-administered duties. Indeed, the argument runs, taxpaying traders are more deserving of indulgence even than trustees because their status has been forced upon them and not, as in the case of trustees, voluntarily assumed by people to whom the law ascribes some business knowledge.
>
> […]
>
> It seems to me essential to recognise a distinction between on the one hand basic ignorance of the primary law governing value added tax including the liability to register and on the other hand ignorance of aspects of law which less directly impinge upon such liability.
>
> […]
>
> In the result, whilst not accepting the wider submissions of either party, I have decided that the tribunal was right to conclude that they were bound to reject the taxpayer's argument that she could invoke her ignorance of basic value added tax law as reasonably excusing her default. That, it is plain from the context, is all that the tribunal meant when they said that 'ignorance of the law cannot be an excuse'. This case was simply not concerned with the taxpayer's ignorance other than of basic value added tax law let alone ignorance of mixed law and fact. Had it been, then in my judgment the tribunal ought certainly to take such matter into account as part of the overall facts of the case.

66. In considering whether Mr Simmonite had a reasonable excuse for his failure to notify his liability to HICBC, we must consider whether he had an excuse that is objectively reasonable taking into account his attributes and circumstances. We apply the approach set out in *Perrin* in considering whether Mr Simmonite had a reasonable excuse.

67. The relevant facts are that Mr Simmonite's income exceeded HICBC threshold in the 2015/16 tax year - in consequence of his bonuses and benefits in kind, his adjusted net income for that year exceeded £50,000. Accordingly, he should have notified HMRC by no later 5 October 2016 that he was chargeable to HICBC and thus liable to make a self-assessment tax return for 2015/16. Mr Simmonite's case is in essence that, having claimed Child Benefit at a time when he and his wife were not liable to HICBC, it was reasonable for him in all the circumstances to fail to appreciate that he had become liable to HICBC and thus also liable to notify HMRC of his chargeability to income tax when his income exceeded £50,000.

68. Mr and Mrs Simmonite's evidence, which was not challenged and which we accept, was that although they appreciated that there was some earnings limit to being able to claim Child

Benefit, they did not appreciate that Mr Simmonite's level of earnings from 2015/16 took him above that limit. Having claimed Child Benefit, they did not receive any further communications from HMRC about HICBC. The first time that Mr Simmonite became aware that he was liable to pay HICBC was in August 2017 from a discussion at work, and he and his wife then took prompt steps to notify HMRC's Child Benefit Office of that fact and request that the claim for Child Benefit cease.

69. Mr Simmonite's evidence that he did not receive the "nudge" letter was not challenged by HMRC, and we believe and accept his evidence.

70. In essence, Mr Simmonite seeks to rely on "ignorance of the law" as a reasonable excuse. As the Upper Tribunal states in [82] of *Perrin*, it is a matter of judgment 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.

71. We have not found this an easy case to decide. Mr Simmonite should clearly have been aware at the time that Mrs Simmonite first claimed Child Benefit in June 2015 that there was, at the very least, an important consequence that followed if either he or his wife earned more than £50,000 a year. Mr Simmonite's unchallenged evidence was that he only became aware of his liability to HICBC in August 2017, and Mrs Simmonite took steps to stop claiming Child Benefit shortly thereafter. His evidence was that he believed that Mrs Simmonite's call to the HMRC Child Benefit Office effectively notified HMRC of the fact that he was liable to HICBC. We note that there was no guidance on the April 2014 version of the Child Benefit claim form about what a claimant or their partner should do if they did not have an annual income greater than £50,000 at the time of claiming but that changed subsequently. There was no mention in the claim form of the obligation to notify HMRC of liability to HICBC within six months of the end of that tax year or any instructions on how to make such a notification. The officer to whom Mrs Simmonite spoke at the Child Benefit Office did not tell her that her husband now needed to inform the office dealing with his PAYE that he had a HICBC liability.

72. Ms White's evidence described HMRC’s publicity campaigns in 2012 and 2013 to alert higher rate taxpayers to the existence of HICBC and the consequent need to register for self-assessment. The Generic Bundle also included certain materials from such campaigns. However, we were not shown any evidence of campaigns or materials from 2015 or later which were intended to alert existing claimants of their obligations in relation to HICBC in the event that their income rose above £50,000 after they had begun to claim Child Benefit. And we have found that Mr Simmonite did not receive HMRC's "nudge" letter.

73. Taking into account the lack of guidance in the Child Benefit claim form for those in Mr and Mrs Simmonite's position and the absence of any subsequent communications, either by way of a general campaign aimed at those in their position or direct correspondence, we have concluded that it was objectively reasonable, in the circumstances of the case, for Mr Simmonite to have been unaware of the requirement to notify HMRC that he had become liable to HICBC in the 2015/16 and 2016/17 tax years.

74. We also find that Mr Simmonite only became aware of his liability to notify HMRC of his liability to HICBC when his colleagues alerted him to the £50,000 per annum limit in August 2017. Mrs Simmonite then promptly telephoned HMRC's Child Benefit Office and told them that she wanted to stop claiming Child Benefit because of her husband's HICBC liability. It was reasonable for Mr and Mrs Simmonite to believe (albeit erroneously) that telephoning HMRC's Child Benefit Office had the effect of notifying HMRC of Mr Simmonite's liability to HICBC for 2017/18 for the purposes of s7 TMA.

75. We find that Mr Simmonite has a reasonable excuse for failing to notify his liability to HICBC under s7 TMA for each of the tax years under appeal. Accordingly, we find that he has no liability to penalties.

ESC A19 AND INTEREST

76. Mr Simmonite submits that ESC A19 applies in the circumstances of this case. This is an extra-statutory concession under which HMRC may cancel arrears of tax if (a) they did not act on information in their possession, and (b) there was a delay in HMRC assessing the tax. Extra-statutory concessions are made under HMRC's powers of collection and management, which are subject to judicial review by the High Court (who can transfer such cases to the Upper Tribunal), but they are not subject to appeal to this Tribunal. We have no power to consider the application of ESC A19 to this case.

77. Interest is calculated on a statutory formula and is also not subject to appeal to this Tribunal.

CONCLUSION

78. We find that Mr Simmonite is liable to HICBC for the amounts assessed in the discovery assessments.

79. However, we find that he had a reasonable excuse for his failure to notify his liability and is therefore not liable to penalties.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

80. 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.

NICHOLAS ALEKSANDER
TRIBUNAL JUDGE

Release date: 16 August 2023