Neutral Citation: [2024] UKFTT 00193 (TC)

Case Number: TC09099

FIRST-TIER TRIBUNAL
TAX CHAMBER

In public by remote video hearing

Appeal reference: TC/2023/00111

INCOME TAX – High Income Child Benefit Charge – liability for the charge? – yes – appeal against charge dismissed - penalty for failure to notify – appeal against penalty allowed

Heard on: 27 February 2024
Judgment date: 7 March 2024

Before

TRIBUNAL JUDGE NIGEL POPPLEWELL
MR IAN PERRY

Between

RABINA KAJLA

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: In person

For the Respondents: Sophia Taj litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. This appeal concerns the High Income Child Benefit Charge ("**HICBC**"). The appellant has been assessed ("**the assessments**") to HICBC for the tax years 2018/2019 and 2019/2020, together with a penalty ("**the penalty**") for failing to notify chargeability under section 7 Taxes Management Act 1970 ("**TMA**"). The penalty has been assessed ("**the penalty assessment**") pursuant to Schedule 41 Finance Act 2008 ("**Schedule 41**"). The assessments amount in total to £2,181. The penalty assessment is for £257.40.

THE LAW

2. There was no dispute between the parties as to the relevant legislation which we summarise below.

3. 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 adjusted net income for the year is greater than £50,000.
(2) His partner's ("partner" is defined in section 681G) adjusted net income is less than his.
(3) He or his partner are entitled to child benefit.

4. The assessments have been raised pursuant to HMRC's discovery assessment powers as provided in s29 TMA. Accordingly, HMRC bear the burden of establishing that they have discovered that an amount of income which ought to have been assessed to income tax has not been so assessed. In the case of *HMRC v Jason Wilkes* [2020] UKUT 0150 (TCC) ("***Wilkes***") the UT determined that HMRC had no power to make a discovery assessment in respect of the HICBC on the basis that the child benefit was not an amount of income which should have been assessed to income tax. The HICBC is a free-standing charge to tax.

5. Following the decision in *Wilkes* the provisions of section 97 Finance Act 2022 were enacted such that section 29 TMA was amended providing for a discovery assessment to be issued where "an amount of income tax … ought to have been assessed but has not been assessed" thereby providing for HICBC to be assessed by way of discovery assessment. Whilst the provision is generally only prospective section 97 also provides that where a discovery assessment has been made to collect HICBC prior to tax year 2021/22 the provision is retrospective unless 1) pursuant to section 97(5) a notice of appeal was given to HMRC in respect of the assessment prior to 30 June 2021 and the *Wilkes* basis of challenge was asserted in that appeal on a date prior to 30 June 2021; or 2) pursuant to section 97(6) a notice of appeal was given to HMRC in respect of the assessment prior to 30 June 2021, the appeal was the subject of a temporary pause which occurred prior to 27 October 2021 and "it is reasonable to conclude that the temporary pausing of the appeal occurred (wholly or partly) on the basis that [the *Wilkes* issue] is, or might be, relevant to the determination of the appeal". The appeals which are subject to the retrospective statutory amendment are defined as "protected appeals". In this regard the protection offered is to HMRC and not the taxpayer.

6. By virtue of section 34(1) TMA, HMRC may raise a HICBC discovery assessment at any time within 4 years of the end of the tax year to which it relates. They also have the power, in consequence of section 36(1A) TMA, to raise the assessment within a period of 20 years of the year of assessment where the loss of tax arises because of a failure to notify liability to a charge to tax under section 7 TMA. That section provides that if a person is chargeable to income tax, they must notify HMRC of that fact within 6 months after the end of the tax year. But if their income consists of PAYE income and they have no chargeable

gains they are not required to notify their chargeability to income tax unless they are liable to the HICBC. In consequence of the provisions of section 118(2) TMA, the 20-year assessment provisions do not apply where the taxpayer establishes a reasonable excuse for the failure to notify their liability under section 7. However, HMRC will always have a period of 4 years in which to make a discovery assessment for a protected assessment.

7. 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.

8. 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. Paragraph 6 Schedule 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"; but paragraphs 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.

9. 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.

THE EVIDENCE AND THE FACTS

10. We were provided with a bundle of documents which was specific to this appeal as well as a substantial generic bundle which contained much information about the "advertising campaign" conducted by HMRC in relation to the HICBC. Evidence on behalf of HMRC was given by Officer Steven Thomas and Officer Nasar Mahmood both of whom tendered witness statements which were taken as read. Neither officer therefore gave oral evidence. The appellant gave oral evidence on her own behalf. From this evidence we find as follows:

(1) The appellant has claimed child benefit for three children in January 1997, June 2005, and July 2012. On making these claims, the claim form made no mention of the HICBC. At that time, and up to and including the tax year 2019/2020, the appellant was an employee and was not required to, nor did she, complete a self-assessment tax return. She received no notices to do so.

(2) In 2012, prior to the introduction of the HICBC, HMRC issued several 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. 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.

(3) The appellant's adjusted net income for the years under assessment, as evidenced by her PAYE records, exceeded £50,000 in each of those tax years . She accepts this.

(4) On 2 December 2019, HMRC issued a "nudge" letter ("**the nudge letter**"). That letter was addressed to the appellant at her home address. The appellant's evidence is that she did not receive that letter. HMRC have no record of the letter being returned undelivered.

(5) The nudge letter explained that HMRC wanted to help the taxpayer to understand whether she needed to pay the HICBC. It explained the financial circumstances in which a taxpayer might be liable to pay the charge, what to do next, and that if a taxpayer is not sure if he or she needed to pay the charge, the taxpayer should phone HMRC for assistance.

(6) On 22 February 2021 Officer Mahmood selected the appellant for a compliance check. He interrogated data provided by the Child Benefit Office. He checked HMRC's PAYE records. He checked the self-assessment system. He reviewed the appellant's P14's. He calculated the appellant's adjusted net income for the tax years in question and confirmed that it exceeded £50,000. He authorised the issue of an opening letter. We find as a fact that on that date Officer Mahmood discovered that the appellant had a liability to HICBC for the tax years 2018/2019 and 2019/2020.
(7) That opening letter was dated 23 February 2021("**the opening letter**") and was addressed to the same address as the nudge letter. HMRC explained that their records showed that the appellant was liable to the HICBC and that they considered that she was liable to a charge of £2,181 for the tax years in question. It also explained why late payment penalties and interest might be due.
(8) In a letter to HMRC dated 26 February 2021, the appellant told HMRC that she was not aware of the HICBC. She had always been employed by a company and therefore did not think that she needed to complete a self-assessment return but accepted that from 6 August 2018 her salary had exceeded £50,000.
(9) On 18 March 2021, HMRC wrote to the appellant setting out the amount of child benefit she had received in the tax years in question.
(10) On 25 March 2021, the appellant contacted HMRC by telephone. Penalties were discussed. The appellant advised that she had stopped claiming child benefit in February 2021 after receiving the opening letter.
(11) On 8 April 2021 HMRC issued the assessments. The assessments are for the HICBC itself and not for income tax.
(12) On 9 April 2021, HMRC issued the penalty assessment, against which the appellant appealed on 22 April 2021. In that letter she states that she had submitted an appeal against the original decision on 7 April 2021 and 14 April 2021 and was "waiting an outcome on this." It was HMRC's understanding that the appellant had in fact appealed to the tribunal rather than to HMRC. The tribunal had returned her appeal with the advice that the appeal should be made to HMRC.
(13) A note of a telephone conversation between the appellant and HMRC on 2 July 2021 records the appellant telling HMRC that she had sent in an appeal and provided a reference 2021/01141 which had been submitted in March 2021.
(14) On 28 September 2021 HMRC told the appellant that they had paused work on her case due to *Wilkes*.
(15) In a letter dated 25 January 2022, the appellant told HMRC that she had received a letter from them dated 10 January 2022 along with previous letters relating to the assessments, and that she had appealed against the decision on 7 April 2021 and 14 April 2021. She had not received any response to these appeals which she understood was still pending. HMRC's ongoing correspondence was causing her considerable anxiety.
(16) HMRC have treated this letter of 25 January 2022 as a formal appeal against the assessments and make no objection that it is late.
(17) HMRC have no record of letters to them from the appellant dated 7 April 2021 and 14 April 2021.
(18) In a letter dated 20 October 2022, HMRC confirmed that the pause on the appellant's case had been lifted.
(19) On the same date HMRC issued their view of the matter letter in respect of the appeals against both the assessments and the penalty assessment. They explained why they considered that the assessments and the penalty assessment were justified. They offered the appellant a statutory review.
(20) In a letter dated 26 October 2022, the appellant confirmed that she wished to appeal against the decisions to issue the assessments and the penalty assessment; she had not

received the "educational letter" dated 2 December 2019; she stated that had she received that letter she would have ensured that she would have taken the relevant steps in stopping child benefit payments in 2019; she cancelled her child benefit at the earliest opportunity following HMRC's letter of 23 February 2021.

(21) On 5 December 2022 the appellant lodged an appeal with the tribunal.

(22) The appellant's oral evidence was that she had not received the nudge letter. She was therefore not aware of her liability to the HICBC until she received the opening letter. She accepted that she had received the other correspondence referred to above but observed that she had responded by telephone or by letter to all of these items of correspondence. Had she received the nudge letter, she would have responded to it. She is employed in the HR team of a global organisation. She started in 2018. This was one of the reasons that her income exceeded the ANI threshold. She is an employment lawyer and supplies advice on employment related matters relating to grievance, restructuring, and disciplinary procedures. Generally, this advice relates to day-to-day people issues that crop up across the UK and in Ireland. She is therefore conscious of the importance of responding to correspondence, and had she received the nudge letter, she would have made sure that firstly she understood what it meant (as she had when she received the opening letter when she interrogated the Internet to understand more about the HICBC), and secondly would have responded to it as she did to all the other correspondence.

DISCUSSION

Burden of proof

11. The burden of establishing that HMRC has issued and properly served a valid in time assessment for both the HICBC and the penalty rests with HMRC (as they accept). They have to establish the validity of those assessments to the civil standard of proof namely the balance of probabilities. If those assessments are valid, then the burden switches to the appellant to show that the assessments to the charge over charge and/or she has a reasonable excuse or there are special circumstances which exonerate her from the liability to the penalty.

The assessments

12. We are satisfied that Officer Mahmood made a discovery that the appellant was liable to the HICBC but, in accordance with *Wilkes*, this is not a discovery of income which ought to have been assessed to income tax which had not been so assessed.

13. In order to satisfy us that HMRC have made a valid discovery assessment, they must demonstrate either that the appeal against the assessments was made and notified to HMRC after 30 June 2021 or, if made before that date, it is a relevant protected assessment.

14. HMRC's primary contention on this point is that any appeal which the appellant claims to have made on 7 April 2021 or 14 April 2021 was not made to them, but was made to the tribunal. Thus, no notice of appeal was given to them before 30 June 2021. They consider that the first time that the appellant appealed to HMRC was her letter of 25 January 2022. This post dates 30 June 2021 so the relevant protected assessment provisions do not apply.

15. We agree with them that if, indeed, that letter of 25 January 2022 was the first time that the appellant had notified an appeal to HMRC, it postdates the cut-off date and thus there is no question of HMRC needing the relevant protected assessment safe harbour. The retrospective legislation applies.

16. As far as the appellant's appeals (and we do not doubt that she made them) on 7 April 2021 and 14 April 2021 are concerned, there is no evidence that these were made to HMRC. It seems that they were made to the tribunal. The relevant protected assessment provisions therefore are not needed by HMRC since they only apply where an appeal notice "was given to HMRC on or before 30 June 2021". Since the notice was given to the tribunal there is no need for HMRC to establish that the assessments were protected.

17. Although the appellant did not put forward this submission, given that she is a litigant in person and HMRC dealt with this eventuality in their skeleton argument, we have also considered whether her letter of 22 April 2021 (which HMRC have taken as an appeal against the penalties only and not against the charge itself) could constitute an appeal against the charge. In considering this, it is our view that there is no formality required when making an appeal and "appeal" bears its ordinary meaning. Furthermore, we need to consider whether the objectively reasonable person considering the letter of 22 April 2021 would have considered it an appeal against the charge, as well as the penalty.
18. Regrettably for the appellant, we do not think we can construe it in such a way.
19. The letter opens by saying "I have received your letter dated 9 April 2021 regarding the notice of penalty assessment charges for Tax year 2019 and 2020 amounting to £257.40". This makes it clear that the letter relates to the penalties and not to the underlying charge.
20. Although the letter records the fact that she had made an appeal against the original decision on 7 April 2021 and 14 April 2021, she goes on to say that "I also wish to appeal against the penalty charges…", which clearly implies that this letter deals with an appeal against those and not against the underlying charge itself.
21. In the final paragraph of the letter the appellant indicates that "I believe I should be exempt from making this payment".
22. It is our view that the reasonably objective reader of this letter would have construed it, as HMRC have construed it; namely as an appeal against the penalty and a request that she should be exempted from paying it, rather than an appeal against the underlying charge.
23. We therefore agree with HMRC that the appellant's appeal against the assessments was notified to HMRC in her letter of 25 January 2022. Since this is after the cut-off date of 30 June 2021, there is no need for HMRC to establish that the assessments were protected.
24. We therefore find that the assessments were valid in time assessments which properly charge the appellant to HICBC in the correct amount.

Reasonable excuse

25. If the appellant can establish that she had a reasonable excuse for not notifying her liability to the HICBC, then she can be excused from her liability to the penalty.
26. The onus is on the appellant to show that, on the balance of probabilities, the facts show that she had a reasonable excuse.

27. The legal principles which we must consider when an appellant submits that she has a reasonable excuse are set out in the the Upper Tribunal decision in *Christine Perrin v HMRC* [2018] UKUT 156 ("***Perrin***"). The relevant extract is set out below:

> "81. 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.

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".

28. The test we adopt in determining whether the appellant has an objectively reasonable excuse is that set out in *The Clean Car Co Ltd v C&E Commissioners* [1991] VATTR 234, in which Judge Medd QC said:

"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?"

29. That this is the correct approach has also recently been confirmed by the Court of Appeal in *William Archer v HMRC* [2023] EWCA Civ 626 (***"Archer"***).

30. It is clear from the foregoing extract from *Perrin* that ignorance of the law can, in certain circumstances, comprise a reasonable excuse. It is a matter of judgment for us as to whether it is objectively reasonable for the appellant in the circumstances of this case to have been ignorant of the requirement to complete a self-assessment tax return in light of her liability to the HICBC.

31. In her decision in *Naila Hussain* [2023] UKFTT 00545 Judge Brown reviewed a number of HICBC cases and said this:

"37. There are a great many HICBC cases being considered by the Tribunal at present. Many are determined against the taxpayer and a handful have been determined in the taxpayer's favour. Judge Popplewell in particular appears to have determined a number of cases favorably to the taxpayer and it is on these judgments that the Appellant relies (the most recent is *Mark Goodall v HMRC* [2023] UKFTT 18 (TC)) (***"Goodall"***). In that judgment Judge Poppelwell references his prior decision in *Leigh Jacques v HMRC* [2020] UKFTT 331 (TC) in which he reviewed the extensive case list on which HMRC

rely in HICBC cases.

38. In each of the judgments Judge Poppelwell has concluded that a taxpayer is likely to have a reasonable excuse where they were:

(1) not under an obligation to complete a tax return up to the tax years prior to that in which the HICBC applied because, primarily, they were paid through PAYE and had no other income justifying a need to notify;

(2) in receipt of child benefit payments prior to the introduction of HICBC with the consequence that the application itself made no reference to HICBC (the child benefit claim form post the introduction of HICBC clearly sets out when the charge applies);

(3) had not received notification from HMRC directly at any point prior to the contact which led to the issues of the tax assessment; but

(4) acted promptly in ceasing to claim child benefit and engaged actively with resolving the historic tax liabilities as soon as HMRC did make contact.

39. However, in *Goodall* Judge Popplewell also noted that where a taxpayer had received a nudge letter then the taxpayer would have no reasonable excuse but went on to decide that in that case, by reference to the evidence, to determine that no nudge letter had been received. As such, and on the facts the first point at which Mr Goodall became aware of the risk of a HICBC liability he acted without unreasonable delay".

32. We confirm that the foregoing is an accurate reflection of Judge Popplewell's view of when a taxpayer might have a reasonable excuse in HICBC penalty cases.
33. In this case it is HMRC's position that the appellant was on notice that she might be liable to HICBC as long ago as 2013 when they put details of the charge into the public domain and more recently when she was sent the nudge letter in December 2019. So, she has never been ignorant of the law generally, nor specifically since she received the nudge letter. Any reasonable excuse she had, therefore, ceased a reasonable time after that date and certainly had ceased by February 2021 as she had not acted promptly to engage with HMRC to resolve the HICBC issues.
34. It is the appellant's case that she was not on notice about the HICBC until she received the opening letter. It was only then that she understood that there was a possible liability to the charge. She checked online whether this was the case, wrote to HMRC about it, engaged fully with HMRC, accepted HMRC's figures regarding her adjusted net income and appealed against the charge on 7 April 2021 and 14 April 2021 (albeit to the tribunal rather than to HMRC).
35. As set out above, it is our view that as an employee, the appellant was not on specific notice regarding her liability to the HICBC, nor the possibility thereof regarding the financial thresholds. Nor, given that her claims were made before 2013, did the Child Benefit claim form put her on notice that she might be so liable. The question in this case therefore is whether the appellant was specifically put on notice by HMRC before the opening letter.
36. We agree with HMRC that if the appellant had received the nudge letter, then any ignorance of the law defence would have expired by the time of her subsequent engagement with HMRC in February 2021.
37. The key issue is whether we believe the appellant when she says that she did not receive the nudge letter.
38. Under section 7 of the Interpretation Act 1978 which applies to service of documents authorised or required by legislation, "service is deemed to be effected by properly

addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post".

39. Clearly the nudge letter is not a document authorised or required by legislation. But we intend to adopt the same approach towards service set out above. It seems to us common sense. If HMRC are alleging that it was sent to the appellant and thus she was on notice that someone earning more than £50,000 was liable to the HICBC if they or their partner was claiming child benefit, they need to show that they had sent it to her. If the appellant then alleges reasonable excuse on the basis that she did not receive it, she needs to establish non-receipt.

40. The appellant does not contest that HMRC sent the nudge letter to her. From the evidence we have seen it is our view that it was indeed sent to her at the correct address.

41. We now turn to receipt, and whether the appellant has established that she did not receive it. We are satisfied on the balance of probabilities that she did not.

42. In our view the appellant was a truthful and reliable witness. We accept her oral evidence that she did not receive the nudge letter. She is clearly a bright individual who shoulders considerable responsibility in her job and appreciates the importance of analysing and responding to correspondence. We have no doubt that she adopts the same approach to her personal life. It is her submission that had she received the nudge letter, she would have responded to it either by telephone or by letter, as she did to all the other correspondence which she received from HMRC. We accept this submission. It is borne out by the evidence. It is our view that had she received the nudge letter, she would have responded to it. The fact that she did not supports her assertion that she did not receive it.

43. Accordingly the appellant did not know about the HICBC nor the possibility of being subject to it until she received the opening letter on 23 February 2021. She responded to that, and fully engaged with HMRC during the following months. This is clearly the behaviour of a responsible taxpayer conscious of, and seeking to comply with, their obligation towards the tax system.

44. We find therefore that the appellant had a reasonable excuse for not notifying HMRC of her liability to the HICBC until she received the opening letter based on ignorance of the law, and thus is not liable to the penalty.

DECISION

45. We dismiss the appeal against the assessments to HICBC of £2,181 but allow the appeal against the penalty of £257.40.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

46. 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.

NIGEL POPPLEWELL
TRIBUNAL JUDGE

Release date: 07th MARCH 2024