[2020] UKFTT 339 (TC)

TC07819

INCOME TAX – high income child benefit charge – ignorance of the law – appellant abroad when HICBC introduced – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER **Appeal number: TC/2019/06416**

BETWEEN

GRAHAM COOKE **Appellant**

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: JUDGE ALASTAIR J RANKIN
MEMBER CHRISTOPHER JENKINS

The Tribunal determined the appeal on 18 August 2020 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 dated 24 September 2019 (with enclosures), HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 20 January 2020, the Appellant's Reply dated 9 February 2020, his further letter dated 8 May 2020, HMRC's Notice dated 12 May 2020, the Appellant's letter dated 17 May 2020, the Directions issued by Judge Amanda Brown released on 2 June 2020, the Appellant's letter dated 5 June 2020, HMRC's updated Statement of Case submitted on 15 June 2020 (though dated 2 December 2019) and the Appellant's response dated 15 June 2020.

DECISION

1. The Tribunal decided that the appeal should be dismissed.

FINDINGS OF FACT

2. Mr Cooke is appealing against the following income tax assessments all issued on 17 May 2019:

2.1 a discovery assessment for the 2015/16 tax year for £1,823.00;
2.2 a discovery assessment for the 2016/17 tax year for £1,788.00; and
2.3 a closure notice for the 2017/18 tax year for £1,788.00.

3. HMRC initially wrote to Mr Cooke on 24 December 2018 offering help to understand whether he needed to pay the High Income Child Benefit Charge (HICBC). HMRC wrote again on 21 January a letter headed "Final reminder".

4. On 18 March 2019 HMRC wrote to Mr Cooke issuing a section 9A enquiry opening letter in connection with the 2017/18 tax year. HMRC informed Mr Cooke that if the information received from the Child Benefit Office was correct he would have to pay additional tax of £1,788.00.

5. Mr Cooke replied by letter dated 23 March 2019 stating that he believed his tax return for the year ending 5 April 2018 was correct "with the obvious exception of the Child Benefit claimed". He continued by saying that he was not aware of HICBC but confirmed that HMRC's specific details appeared to be correct.

6. HMRC replied by two letters dated 5 April 2019 noting that Mr Cooke had agreed to his liability for 2017/18 and informing him that they were extending their check into his returns for 2015/16 and 2016/17 and may extend their check further.

7. Mr Cooke replied by letter dated 12 April 2019 informing HMRC that it was "very likely the same situation existed for these two years". Further correspondence ensued with Mr Cooke informing HMRC on a form dated 5 May 2019:

"- I was unaware of the High Income Child Benefit charge
- Child Benefit was paid to my wife into a different bank account
- The Tax Return form sent to me by HMRC was incorrect and made no mention of either Child Benefit or the High Income Charge
- I believed I did not require any specialist advice
- I was in Afghanistan when the High Income Child Benefit Charge was introduced
- I have always taken 'Reasonable Care' with my Self Assessment Returns with no previous issues
- While an 'Unprompted Disclosure' in this case is virtually impossible, my subsequent open and honest behaviour with respect to 'Quality of Disclosure' could be taken into account
- Any penalty could qualify for a 'Penalty Suspension'."

8. It appears HMRC was going to charge penalties but due to Mr Cooke's co-operation they decided not to do so. However on 17 May 2019 HMRC issued the closure notice for 2017/18 and the tax assessments for 2015/16 and 2016/17.

9. Mr Cooke wrote to HMRC on 21 May 2019 thanking them for not imposing any penalties but noting that he was still left facing a demand for three years' worth of additional tax charges totalling £5,613.20 (presumably including interest of £214.20). Mr Cooke continued that he

believed that HMRC mistakes contributed to this situation and that he was not solely liable. He continued:

" - I have one job, working for the same Government that runs HMRC and pays Child Benefit.
- I have higher rate Income Tax deducted at source through PAYE and my salary is a matter of public record.
- I have no other income – jobs, pensions, directorships, property, shares, dividends or inheritance.
- I have never claimed any other State benefit or income.
- Consequently, given what I thought was a relatively simple tax situation, I believed I had no need for specialist accountancy or legal advice.
- I have never previously had any issues with any tax return or any penalties for late payment.
- On several occasions since 2013 HMRC has asked to stop my SA Tax Return completely. From my records I see that I wrote to HMRC on 29 August 2016, formally asking to continue SA. This letter was unanswered.
- An HMRC letter dated 26 June 2018 acknowledges this failure but states my SA account was re-opened, at my request, on 16 August 2017 – nearly a year later with no explanation. Despite HMRC having tried to stop my SA, this letter also lists the criteria for completion of SA returns – which includes receiving Child Benefit!
- Presumably, if HMRC wishes had prevailed, no SA returns would have meant we would all STILL be unaware of the failure to pay High Income Child Benefit Charge? It therefore appears I am being punished both for my SA openness and HMRC failures.
- I presume the decision not to penalise me is also an acknowledgment of the 'special circumstances' that exist with respect to my case – military records will show that I was in Afghanistan when the High Income Child Benefit Charge was introduced in 2013. Adding 3 years interest to a charge HMRC have acknowledged I was unaware of appears unfair.
- As I was subject to (but unaware of) this Charge, I now understand that I should have been sent Full Tax Returns by HMRC. As far as I am aware, I have only ever been sent 'Short' SA forms.
- From my copy of my 2018 'Short' SA form I note there is no specific box/entry for Child Benefit income or mention of the High Income Child Benefit Charge.
- I have, again, been incorrectly sent another 'Short' SA form (with no explanatory notes) for the Tax Year ending 5 April 2019.
- Our Child Benefit has always been paid automatically into a separate bank account (Barclays) in my wife's name. This may be verified through HMRC records. This was at HMRC suggestion, as a way of protecting her state pension as a stay at home mother. At no stage were we informed there was a Charge on my single income and there was no reference to it on my 'Short' SA forms. Given the current situation I would contend this was bad advice from HMRC."

10. HMRC replied on 4 July 2019 saying that in order for the assessments to be amended or removed Mr Cooke should supply evidence of the following:

- That he was not the higher earner in the household for the tax years detailed
- That he was not earning over £50,000 for the tax years detailed
- That he was not living within a household in receipt of Child Benefit for the tax years

11. Mr Cooke wrote again to HMRC on 16 July 2019 complaining about the delay in replying to his letter, the fact that this delay was causing further interest to accrue and formally requesting a review.

12. On 20 September 2019 HMRC issued a review conclusion letter which upheld HMRC's two assessments and the closure notice. Mr Cooke lodged his appeal to this Tribunal on 24 September 2019.

13. The onus is on Mr Cooke to show that the closure notice is incorrect. The initial onus is on HMRC to show that they have discovered a loss of tax. Once this has been proved the onus reverts to Mr Cooke to provide evidence to either reduce or set aside HMRC's assessments. The standard of proof is the ordinary civil standard on the balance of probabilities.

14. HICBC came into effect on 7 January 2013. Leading up to the introduction of HICBC there was an extensive publicity campaign to raise awareness. Although Mr Cooke was serving in Afghanistan when HICBC was introduced he has not informed the Tribunal where his wife, who was the recipient of the child benefit, was living at that time. As well as the extensive publicity HMRC's website provided full details through its Child Benefit Helpline. There was also a calculator on which Mr Cooke could verify whether he had to pay all or some of the child benefit as a tax charge.

LEGISLATION

15. Section 23 of the Income Tax Act 2007 sets out how to calculate a taxpayer's adjusted net income:

> "23 The calculation of income tax liability
>
> To find the liability of a person ("the taxpayer") to income tax for a tax year, take the following steps.
>
> *Step 1* Identify the amounts of income on which the taxpayer is charged to income tax for the tax year.
>
> The sum of those amounts is "total income".
>
> Each of those amounts is a "component" of total income.
>
> *Step 2* Deduct from the components the amount of any relief under a provision listed in relation to the taxpayer in section 24 to which the taxpayer is entitled for the tax year.
>
> The sum of the amounts of the components left after this step is "net income".
>
> *Step 3* Deduct from the amounts of the components left after Step 2 any allowances to which the taxpayer is entitled for the tax year under Chapter 2 of Part 3 of this Act or ... (individuals: personal allowance and blind person's allowance).
>
> *Step 4* Calculate tax at each applicable rate on the amounts of the components left after Step 3.
>
> *Step 5* Add together the amounts of tax calculated at Step 4.
>
> *Step 6* Deduct from the amount of tax calculated at Step 5 any tax reductions to which the taxpayer is entitled for the tax year under a provision listed in relation to the taxpayer in section 26.
>
> *Step 7* Add to the amount of tax left after Step 6 any amounts of tax for which the taxpayer is liable for the tax year under any provision listed in relation to the taxpayer in section 30.
>
> The result is the taxpayer's liability to income tax for the tax year."

16. Section 9A Taxes Management Act 1970 provides:

"9A Notice of enquiry

(1) An officer of the Board may enquire into a return under section 8 or 8A of this Act if he gives notice of his intention to do so ("notice of enquiry")—

(a) to the person whose return it is ("the taxpayer"),

(b) within the time allowed.

(2) The time allowed is—

(a) if the return was delivered on or before the filing date, up to the end of the period of twelve months after the day on which the return was delivered;"

17. Section 28A Taxes Management Act 1970 provides:

"28A Completion of enquiry into personal or trustee return

(1)This section applies in relation to an enquiry under section 9A(1) of this Act.

(1A) Any matter to which the enquiry relates is completed when an officer of Revenue and Customs informs the taxpayer by notice (a "partial closure notice") that the officer has completed his enquiries into that matter."

18. Section 29 Taxes Management Act 1970 deal with discovery assessments:

29 Assessment where loss of tax discovered.

(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

(b) that an assessment to tax is or has become insufficient, or

(c) that any relief which has been given is or has become excessive,

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.

(2) Where—

(a) the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, and

(b) the situation mentioned in subsection (1) above is attributable to an error or mistake in the return as to the basis on which his liability ought to have been computed,

the taxpayer shall not be assessed under that subsection in respect of the year of assessment there mentioned if the return was in fact made on the basis or in accordance with the practice generally prevailing at the time when it was made.

(3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above—

(a) in respect of the year of assessment mentioned in that subsection; and

(b)... in the same capacity as that in which he made and delivered the return,

unless one of the two conditions mentioned below is fulfilled.

(4) The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf.

(5) The second condition is that at the time when an officer of the Board—

(a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment; or

(b) in a case where a notice of enquiry into the return was given—

(i) issued a partial closure notice as regards a matter to which the situation mentioned in subsection (1) above relates, or

(ii) if no such partial closure notice was issued, issued a final closure notice,

the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above.

19. Section 8 of the Finance Act 2012 introduced HICBC

8 High income child benefit charge

Schedule 1 contains provision for and in connection with a high income child benefit charge.

20. Schedule 1 commences as follows:

SCHEDULE 1

HIGH INCOME CHILD BENEFIT CHARGE

The high income child benefit charge

In Part 10 of ITEPA 2003 (social security benefits), after Chapter 7 insert—

"CHAPTER 8 HIGH INCOME CHILD BENEFIT CHARGE

681B High income child benefit charge

(1) A person ("P") is liable to a charge to income tax for a tax year if—

(a) P's adjusted net income for the year exceeds £50,000, and

(b) one or both of conditions A and B are met.

(2) The charge is to be known as a "high income child benefit charge".

(3) Condition A is that—

(a) P is entitled to an amount in respect of child benefit for a week in the tax year, and

(b) there is no other person who is a partner of P throughout the week and has an adjusted net income for the year which exceeds that of P.

(4) Condition B is that—

(a) a person ("Q") other than P is entitled to an amount in respect of child benefit for a week in the tax year,

(b) Q is a partner of P throughout the week, and

(c) P has an adjusted net income for the year which exceeds that of Q.

681C The amount of the charge

(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."

DISCUSSION

21. Judge McGregor in *Mrs Gaimin Nonyane v The Commissioners for Her Majesty's Revenue & Customs* [2017] UKFTT 11 (TC) said at paragraph 28

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

22. In *Hesketh & Anor* [2017] UKFTT 871 (TC), an appeal concerning late filing penalties, Judge Barbara Mosedale said at paragraph 82:

"So it follows that ignorance of the law cannot have been intended by Parliament (in general at least) to amount to a reasonable excuse for not complying with it. *Neal* recognised an exception for complex, uncertain law but (in line with Parliament's intent) if such exception exists at all, it must be a rare exception."

23. Judge Mosedale continued at paragraph 93:

"… for anything to be a reasonable excuse for a failure, it must cause the failure. Yet HMRC's failure to tell the appellants about the change in the law did not *cause* their ignorance: it merely failed to change it. Mr and Mrs Hesketh were ignorant of the new filing requirement: HMRC did not write to tell them about it so they remained ignorant of it long after the due date had passed. The failure to write to them did not cause their ignorance and so it could not in law be an excuse for it."

24. Judge Anne Scott in *David Lau v The Commissioners for Her Majesty's Revenue & Customs* [2018] UKFTT 230 (TC) supported this view at paragraph 33:

"…HMRC are under no obligation to notify individual taxpayers."

25. Judge Scott added in paragraph 43:

"The decision of the Upper Tribunal in *HMRC v HOK* is binding on me and that makes it explicit at paragraph 58 that this Tribunal has no jurisdiction to discharge penalties on the ground that their imposition was unfair."

26. HMRC maintain that ultimately it is for taxpayers affected by a change to notify their liability to HMRC. HMRC sent Mr Cooke short tax returns for 2015/16 and 2016/17 which Mr Cooke completed but omitted details of the HICBC which his wife had received. HMRC also maintain that Mr Cooke was required to give notice of his liability to HICBC within six months from the end of the tax year in question.

27. Section 29(5) of the Taxes Management Act 1970 sets out the condition that must be met before HMRC may assess undeclared income after a tax return has been filed. HMRC were informed by the Child Benefit Office that Mr Cooke's wife was in receipt of child benefit. This was after he had filed his tax returns.

28. In *Christine Perrin v The Commissioners for Her Majesty's Revenue and Customs* [2018] UKUT 156 (TCC) Upper Tribunal Judges Tim Herrington and Kevin Poole stated that when considering a "reasonable excuse" defence we should approach the matter 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"

DECISION

29. HMRC opened their enquiry on 18 March 2019. This was within the timescale allowed by the legislation. HMRC issued their closure notice on 17 May 2019 in respect of the tax year 2017/18 assessing his additional tax liability under s28A TMA 1970. Having discovered that Mr Cooke's wife was in receipt of child benefit and that his annual income was in excess of £50,000.00 HMRC also issued discovery assessments for 2015/16 and 2016/17 under s29 TMA 1970. Both these assessments were made within the timescale allowed by the legislation.

30. Mr Cooke has not argued that the amount of tax assessed is wrong and we note he has now paid the tax in full. He has not informed the Tribunal where his wife was living when HICBC was introduced. The Tribunal accepts that there was considerable publicity about HICBC around the time it was introduced. Mr Cooke advised HMRC by letter dated 29 July 2017 that he only ever had one job and that he was paid through the PAYE system. At that time HMRC had no reason to believe that his wife was in receipt of child benefit and therefore sent him a short form self-assessment tax return to enable him to rectify errors in his tax deductions. If HMRC had known that his wife was in receipt of child benefit they would have sent him a full self-assessment tax return.

31. While the Tribunal has some sympathy for Mr Cooke as he was serving in Afghanistan at the time HICBC was introduced we are persuaded by the cases already quoted that HMRC had no duty to inform him of the introduction of HICBC. HMRC could have issued assessments for the tax years 2012/13, 2013/14 and 2014/15 and could have imposed penalties for his failure to include the amount of child benefit received by his wife in these tax years but has chosen not to do so.

32. We therefore dismiss the appeal. The discovery assessments for 2015/16 of £1,823.00 and for 2016/17 of £1,788.00 and the closure notice assessment for 2017/18 of £1,788.00 all remain due for payment.

33. 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.

ALASTAIR J RANKIN

TRIBUNAL JUDGE

RELEASE DATE: 18 AUGUST 2020

Note:
The reference to *Neal* in paragraph 22 is a reference to Simon Brown' J in *Neal v C & E Commrs* (1987) 3 BCV 143
The reference to *HMRC v HOK* in paragraph 25 is a reference to Mr Justice Warren and Judge Colin Bishopp's decision in the Upper Tribunal case of *The Commissioners for Her Majesty's Revenue and Customs and Hok Limited* [2012] UKUT 363 (TCC)