Neutral Citation: [2023] UKFTT 00390 (TC)

Case Number: TC08804

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video

Appeal reference: TC/2022/00955

INCOME TAX - High Income Child Benefit Charge – discovery assessments under section 29 Taxes Management Act 1970 – whether assessments made within time limits – reasonable care – reasonable excuse – appeal allowed in part

Heard on: 1 March 2023
Judgment date: 25 April 2023

Before

TRIBUNAL JUDGE GREG SINFIELD
TRIBUNAL MEMBER LESLIE HOWARD

Between

TOBY HEXTALL

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: The Appellant in person

For the Respondents: Phil Jones, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. This appeal concerns the High Income Child Benefit Charge ('HICBC'). The HICBC was introduced with effect from 7 January 2013. The 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 the 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 section 7 of the Taxes Management Act 1970 ('TMA').

2. The Appellant, Mr Toby Hextall, is the father of a daughter who was born in December 2014 and his wife received Child Benefit from 5 January 2015. Mr Hextall was not liable to pay the HICBC at that point as his annual income was less than £50,000. He first became liable to pay the HICBC in the tax year 2015-16 when his income exceeded £50,000. As an employee, Mr Hextall had not been required to make a self-assessment tax return ('SATR') and did not file any SATR when he became liable to pay the HICBC during 2015-16 or for the next three years.

3. On 13 May 2021, the Respondents ('HMRC') issued discovery assessments made under section 29 TMA to collect unpaid HICBC for the tax years 2015-16, 2016-17 and 2017-18 from Mr Hextall. The total amount at issue in this case is £2,459 plus interest. Mr Hextall appealed against the discovery assessments.

4. For reasons set out below, we have decided to allow Mr Hextall's appeal against the assessments for the tax years 2015-16 and 2016-17 for £307 and £1076 respectively and to refuse his appeal against the assessment of £1076 in relation to the tax year 2017-18.

HEARING AND EVIDENCE

5. With the consent of the parties, the hearing was held by video using the Tribunal video hearing system. The video hearing was attended by Mr Hextall and, for HMRC, Mr Phil Jones, a member of HMRC's Solicitor's Office and Legal Services. Two HMRC witnesses, Officer Rinkal Shergill and Officer Steven Thomas, were also present by video.

6. 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.

7. The documents to which we were referred were a document bundle of 84 pages and a "Generic Bundle" of 808 pages, including legislation, case law authorities and other materials, provided by HMRC and an Appellant's document bundle of 61 pages. Separately, we had a statement of case of 13 pages containing Mr Jones's written submissions on behalf of HMRC.

8. As stated above, we were provided with an Appellant's document bundle which contained the documents on which Mr Hextall relied including two witness statements: one from Mr Hextall and another from his wife, Mrs Eva Hextall. We refer to Mr and Mrs Hextall's evidence, which we accept, later in this decision.

9. HMRC's document bundle contained two witness statements: one from Officer Shergill and another from Officer Thomas.

10. Officer Shergill's evidence describes how she dealt with Mr Hextall when he telephoned HMRC on 27 December 2019 and his other interactions with HMRC which Officer Shergill ascertained from departmental notes and records. We incorporate the material parts of Officer Shergill's evidence in our findings of fact below.

11. In summary, Officer Thomas's evidence described the extensive Government campaign in 2012 and 2013 to raise awareness of the 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 Hextall were not parents or about to become parents and we consider that it is unlikely that they paid any attention to the campaign. Officer Thomas also described the 'briefing' that was issued by HMRC in November 2012 to over a million higher rate taxpayers but, of course, neither Mr Hextall nor Mrs Hextall fell into that category at the time. He also described the use of 'nudge' letters where HMRC identify that a Child Benefit claimant earns in excess of £50,000 or lives in the same house as someone who earns in excess of £50,000. As it was entirely generic and focused mainly on attempts by HMRC to publicise the HICBC to higher rate taxpayers in 2012 and 2013 and Mr and Mrs Hextall were neither parents nor higher rate taxpayers at that time, we did not find Officer Thomas's evidence of any material assistance in this case.

12. At the hearing, the evidence set out in the witness statements stood as evidence in chief and none of the witnesses was cross-examined. Mr Hextall both gave evidence and made submissions at the hearing.

FINDINGS OF FACT

13. On the basis of the witness statements and documents produced in evidence and the evidence given by Mr Hextall at hearing, we find the material facts to be as follows.

14. Mr and Mrs Hextall became the parents of a baby girl on 31 December 2014. Mrs Hextall was given a leaflet with her hospital bounty pack after giving birth. The leaflet explained what Child Benefit was and that she was eligible to claim it. Mrs Hextall applied for Child Benefit on 5 January 2015.

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

16. The word "ONLY" on the front page of the Child Benefit claim form was in bold on the original.

17. The second page of the Child Benefit claim form contained the same information about the change to the 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 the 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."

18. Mr Hextall's evidence was that, as both his and his wife's incomes were below £50,000 at the time, they did not read that part of the form but simply completed, signed and submitted the form.

19. In March 2015, Mr Hextall started a new job with an annual salary of £48,000.

20. In June 2015, Mr Hextall received a pay rise which took his salary to £52,000. His salary increased again in January 2016 to £62,000. His income continued to be above the HICBC threshold in the 2016-17 and 2017-18 tax years.

21. Mr Hextall said that his wife received the Child Benefit payments and they had no reason to discuss them at any point during the relevant tax years. Mrs Hextall's evidence, which we accept, was that she did not receive any emails or letters checking that they were entitled to receive Child Benefit during the time that she claimed it. She believed that they were entitled to claim Child Benefit until they were told otherwise.

22. Mr Hextall was a PAYE taxpayer throughout the relevant tax years and was never asked by HMRC to file a Self-Assessment Tax Return.

23. On 14 November 2019, HMRC issued a 'nudge' letter to Mr Hextall advising him to check whether he was liable to the HICBC.

24. On 13 December 2019, HMRC issued a 'final reminder' letter to Mr Hextall, reminding him to check whether he was liable to the HICBC.

25. On 18 December 2019, Mr Hextall telephoned HMRC to request further information following the letters. HMRC's note of the telephone call states that Mr Hextall explained that he had not heard of the HICBC before. He told HMRC that his child was born in 2014 and his wife claimed the Child Benefit and he did not have anything to do with it. HMRC explained to Mr Hextall that he needed to work out and disclose the amount he owed for the years in question. He said that he would provide the calculations to HMRC before 10 January 2020.

26. At that point, Mr Hextall stopped the Child Benefit.

27. On 27 December 2019, Mr Hextall contacted HMRC by telephone. The call was handled by Officer Shergill. Mr Hextall told Officer Shergill that his earnings in tax year 2014-15 were below £50,000 so no liability to the HICBC arose when his daughter was born but his income exceeded the threshold in tax years 2015-16 to 2017-18 and he was liable to pay the HICBC in those years. Officer Shergill considered whether Mr Hextall had a reasonable excuse for not notifying his liability to make a return and declaring the HICBC. Officer Shergill concluded that Mr Hextall did not have a reasonable excuse because his daughter was born after the HICBC was introduced in 2013 and should have been notified in a bounty pack.

28. On 2 January 2020, Mr Hextall filed a Self Assessment Tax return for the tax year 2018-19.

29. On 23 January 2020, HMRC contacted Mr Hextall and confirmed that the disclosure of his calculations of his liability to the HICBC had been accepted and no penalty would be charged.

30. On 13 May 2021, HMRC issued assessments based on the amounts shown in the table below:

Tax Year	Adjusted Net Income	Child Benefit received	HICBC due
2015/16	£52,951	£307	£307
2016/17	£61,081	£1,076	£1,076
2017/18	£80,665	£1,076	£1,076
		Total	£2,459

31. On 7 June 2021, Mr Hextall submitted an appeal to HMRC against the HICBC assessments shown above. The matters of fact and reasons for the appeal are referred to below in our considerations.

32. On 23 June 2021, HMRC replied with their view of the matter, upholding the decisions and inviting Mr Hextall to request a statutory review or appeal to the Tribunal. In the letter, HMRC said:

> "The time limits for HMRC to raise assessments for loss of tax due to failure to notify is 4 years from the end of the year of assessment if the person has a reasonable excuse. If the person has no reasonable excuse HMRC can raise assessments for up to 20 years from the end of the year of assessment."

33. On 6 August 2021, Mr Hextall telephoned HMRC and said that he would request an independent review in response to the decision letter of 23 June 2021. During the call, Mr Hextall mentioned the case of *HMRC v Jason Wilkes* [2021] UKUT 150 ('*Wilkes UT*'), which had been released one week after the decision letter on 30 June 2021. HMRC told Mr Hextall to submit the request for the review in writing.

34. On the 23 September 2021, HMRC received a formal request for an independent review from Mr Hextall.

35. On 4 October 2021, HMRC told Mr Hextall that, although made outside the 30-day statutory period, his request for an independent review had been accepted.

36. In a review decision letter of 18 November 2021, HMRC confirmed their decision in the letter of 23 June 2021. In relation to time limits, HMRC said:

> "The ordinary time limit to make tax assessments is four years from the last day of the year of assessment (s.34(1) TMA 1970). The assessing time-limit is extended to 20 years from the last day of the year of assessment in cases where there has been a failure to notify and there was no reasonable excuse for that failure (s.36(1A)(b) TMA 1970.
>
> In this case, the caseworker has concluded that you did not have a reasonable excuse for failing to comply with your obligations under s.7 TMA 1970. However, no penalties were charged on this occasion. The assessments for the above tax years were issued on 13 May 2021 and therefore have been raised within the time limit of 20 years under s.36(1 A)(b) TMA 1970."

37. On 15 December 2021, Mr Hextall lodged an in-time appeal with the Tribunal. In his notice of appeal, Mr Hextall's grounds of appeal were as follows:

> "I was not within the self assessment regime up to and including the three tax years in question (2015/16, 2016/17, 2017/18) and during those tax years I was an employee being paid PAYE. There was nothing that put me on notice that the HICBC had been introduced when my salary increased, and that I would therefore be affected by it.
>
> My wife was the recipient of the benefit, something that she signed up to at the birth of our first child. A whirlwind time for any new parent, with many moving parts and concerns. We did not receive a single piece of correspondence or communication in relation to the Child Benefit we had signed up to - not even a confirmation or yearly statement - quite an extraordinary level of fiscal negligence considering the government was routinely paying money into my wife's account. This is at odds with how the government monitors and tracks many of its other taxes and concerns, e.g Income Tax code notices and the 30 free hours childcare (where I was routinely asked to reverify my salary each term).

> I had no reason (as we had received zero communication) to be alerted of the HICBC that came into effect shortly after receiving the benefit when my salary increased above the threshold.
>
> My first alert to an HICBC issue was when I received a reminder letter in December 2019 - some 4 years later. And in contacting HMRC promptly asked them to cease the benefit payments. Something I would have done four years earlier had I been alerted or contacted at that stage.
>
> The child benefit itself is not taxable, and the high income child benefit charge is not income.
>
> Therefore, even if I had been aware of the HICBC I owed, I would have had no reason to believe I would need to submit a Self-Assessment tax return. Especially with no written correspondence to explain this.
>
> And without any correspondence to either myself, or my wife, in relation to the child benefit she was receiving - we would have no way of even knowing where to start in the process of either ceasing or paying the charge.
>
> In essence - sheer negligence, and lack of due diligence and care, has silently allowed multiple years of debt to be unknowingly accumulated by our family, and then out of the blue HMRC notified me some 4 years later for the HICBC. We have been taken advantage of by a broken and negligent system."

38. The notice of appeal also asks the appellant to briefly say what outcome they would like from the appeal. In response, Mr Hextall wrote:

> "The disputed backdated £2,459 should be unpayable. Based on HMRC's negligence of care and lack of due diligence that directly led to substantial sums to unknowingly be built up over the 4 years in question.
>
> The ruling should be overturned not only due to not being in the self assessment tax system or receiving any correspondence or direct guidance on paying. The HICBC is also invalid as it was obtained via a discovery assessment. This is an invalid use of the powers of a discovery assessment. Ref. Wilkes [2020] TC 07740"

LEGISLATION

39. 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."

40. Subsections (2) and (3) of section 29 TMA only apply where the taxpayer has made and delivered a return and cannot apply in this case as Mr Hextall did not make a Self Assessment Tax Return in the years assessed.

41. In relation to assessments under section 29 TMA to collect the HICBC, a series of decisions relating to an appeal brought by Mr Jason Wilkes (by the FTT in *Jason Wilkes v*

HMRC [2020] UKFTT 256 (TC) ('*Wilkes FTT*'), upheld by the Upper Tribunal in *Wilkes UT* and confirmed by the Court of Appeal in *HMRC v Wilkes* [2022] EWCA Civ 1612 ('*Wilkes CA*')) held that the 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 CA* at [29]). Accordingly, the HICBC could not be assessed under section 29(1)(a) TMA.

42. Section 29 TMA 1970 was amended by the Finance Act 2022 ('FA 2022'). Section 97 amended section 29(1)(a) to read "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 section 97 FA 2022 reversed the decisions in the *Wilkes* cases and allowed HMRC to make discovery assessments, subject to the usual conditions, in relation to the HICBC and some other things.

43. The new wording had retrospective effect but that was subject to an exception for discovery assessments in respect of the 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."

44. In summary, the retrospective changes made by section 97 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 the *Wilkes* cases and that issue was raised by a party or the FTT before that date or the appeal was subject to a temporary pause on or before 27 October 2021 because of that issue.

45. It was not suggested that there was any "temporary pause" in this case of the type described section 97(6)(b) and so the only exception to the general retrospective effect of the section that is potentially applicable is that contained in section 97(5). Accordingly, we must consider:

(1) whether Mr Hextall notified his appeal to HMRC on or before 30 June 2021;

(2) whether the question raised in the *Wilkes* cases was an issue in the appeal; and

(3) whether that issue was raised (whether by Mr Hextall or the Tribunal) on or before 30 June 2021.

46. There is no dispute that Mr Hextall notified his appeal to HMRC by email on 7 June 2021. The grounds for the appeal put forward by Mr Hextall raised various issues such as lack of fairness and clarity/process and the absence of any correspondence and due diligence on the part of HMRC. The grounds of appeal did not specifically challenge the validity of the assessments on the basis that they did not relate to "the discovery of income which ought to have been assessed to income tax but which had not been so assessed". However, on the facts of the case, that was clearly an issue in the appeal and HMRC understood it to be in issue as, in their letter of 23 June 2021, HMRC asserted that:

"HMRC have the power to raise a discovery assessment under Section 29 of the Taxes Management Act 1970.

…

Our current view of the matter is that the assessment amounts, issued for the tax years ending 5 April 2016, 2017 and 2018 have been raised correctly and are due and payable."

47. The remaining condition in section 97(5) is whether the issue identified in the *Wilkes* cases was raised on or before 30 June 2021. It is not clear to us what the draftsman meant by "raised" in section 97(5)(b). It cannot simply mean that the issue arose, ie fell to be decided, in the appeal as that is the subject of section 97(5)(a). We consider that the words that follow "raised" in parenthesis "whether by the appellant or in a decision given by the tribunal" show that the issue must be one that has been specifically identified by a party or the FTT in those

proceedings. It is not necessary, in our view, for the party or the Tribunal to mention *Wilkes FTT* or *Wilkes UT* specifically. The issue may be raised by describing the issue or the *Wilkes* cases in general terms. The reference must be such, however, as to make clear that the point to be considered is whether the assessments under appeal were invalid on the ground that there could not have been a discovery under section 29(1)(a) TMA because the HICBC was not income which ought to have been assessed to income tax.

48. At the hearing, Mr Hextall submitted that the phrase "silent taxable benefit" (in quotes in the original) on the second page of his email of 7 June 2021 raised that issue in the *Wilkes* cases. He said that he put those words in quotation marks because he thought the assessments did not fit into any ordinary tax process although he did not express it at the time in legal wording or refer to section 97 FA 2022. To put those words in context, the paragraph in which they occur was as follows:

> "It is on the above grounds I am appealing against paying any of the amount outlined on the grounds of unfairness, lack of clarity/process, no correspondence and due diligence. Preying on vulnerable new parents in the PAYE system with this 'silent taxable benefit' shows great lack of due care and amounts to outright negligence of duty."

49. In our view, the words "silent taxable benefit" cannot be construed as saying that the discovery assessments related to the HICBC which was not income which ought to have been assessed to income tax. Having reviewed the correspondence and communications as described by us above, we cannot find any reference to the issue of whether the assessments were invalid on the ground that the HICBC was not income which ought to have been assessed to income tax and so could not be the subject of a discovery under section 29(1)(a) TMA as then worded. The first mention of *Wilkes FTT* was in Mr Hextall's telephone call to HMRC on 6 August 2021 when HMRC recorded him as referring to what was obviously intended to be *Wilkes UT* (although the name was misspelt). That reference was, unfortunately for Mr Hextall, one month and one week too late.

50. Although Mr Hextall cannot escape the retrospective effect of section 97 FA 2022, that is not the end of the matter. The ability of HMRC to raise assessments under section 29 TMA is subject to time limits set out in sections 34 and 36 as follows:

> "34(1) Subject to the following provisions of this Act, and to any other provisions of the Taxes Acts allowing a longer period in any particular class of case, an assessment to income tax or capital gains tax may be made at any time not more than 4 years after the end of the year of assessment to which it relates.
>
> 34(2) An objection to the making of any assessment on the ground that the time limit for making it has expired shall only be made on an appeal against the assessment.
>
> …
>
> 36(1) An assessment on a person in a case involving a loss of income tax or capital gains tax brought about carelessly by the person may be made at any time not more than 6 years after the end of the year of assessment to which it relates (subject to subsection (1A) and any other provision of the Taxes Acts allowing a longer period).
>
> 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)."

51. 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.

52. Section 118(2) TMA:

> "118(2) For the purposes of this Act, … where a person had a reasonable excuse for not doing anything required to be done he shall be deemed not to have failed to do it unless the excuse ceased and, after the excuse ceased, he shall be deemed not to have failed to do it if he did it without unreasonable delay after the excuse had ceased."

53. Section 118(5) TMA:

> "118(5) For the purposes of this Act a loss of tax or a situation is brought about carelessly by a person if the person fails to take reasonable care to avoid bringing about that loss or situation."

54. In summary, the time limit for HMRC to raise assessments under section 29 TMA for loss of tax is four years after the end of the year of assessment to which it relates unless the loss was brought about carelessly, in which case the time limit is six years, or the loss is attributable to a failure to notify liability to income tax under section 7 TMA, in which case the time limit for making an assessment is 20 years. However, HMRC cannot rely on the extended six year time limit under section 36(1) unless the person had failed to take reasonable care to avoid the loss and are not able to rely on the 20 year time limit under section 36(1A) if the person had a reasonable excuse for not notifying their liability to income tax.

MEANING OF REASONABLE CARE

55. HMRC's guidance on careless inaccuracy in Compliance Handbook CH81120 states:

> "Every person must take reasonable care, but 'reasonable care' cannot be identified without consideration of the particular person's abilities and circumstances. HMRC recognises the wide range of abilities and circumstances of those persons completing returns or claims.
>
> So whilst each person has a responsibility to take reasonable care, what is necessary for each person to discharge that responsibility has to be viewed in the light of that person's abilities and circumstances.
>
> For example, we do not expect the same level of knowledge or expertise from a self-employed unrepresented individual as we do from a large multinational company. We would expect a higher degree of care to be taken over large and complex matters than simple straightforward ones."

56. At CH81140, HMRC acknowledge that:

> "People do make mistakes. We do not expect perfection. We are simply seeking to establish whether the person has taken the care and attention that could be expected from a reasonable person taking reasonable care in similar circumstances, taking into account the ability and circumstances of the person in question …"

57. In *HMRC v Hicks* [2020] UKUT 12 (TCC), the Upper Tribunal held at [120] that:

> "Whether acts or omissions are careless involves a factual assessment having regard to all the relevant circumstances of the case. There are many decided cases as to what amounts to carelessness in relation to the completion of a self-assessment tax return. The cases indicate that the conduct of the individual taxpayer is to be assessed by reference to a prudent and reasonable taxpayer in his position: see, for example, *Atherton v HMRC* [2019] STC 575 (Fancourt J and Judge Scott) at [37]."

MEANING OF REASONABLE EXCUSE

58. 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."

59. The Upper Tribunal in *Perrin* then made a further observation, which is relevant to this case, 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.

60. 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."

61. The situation in in *The Clean Car Co* was that the appellant company had wrongly claimed input tax on the basis of an architect's certificate rather than an invoice which was only produced in the following VAT period. The consequence was that the company became liable to a serious misdeclaration penalty. The company appealed against the penalty on the ground that it had a reasonable excuse for the error, based upon a genuine belief that recovery of the input tax was permissible in the earlier period and the hospitalisation of the managing director's daughter over the relevant period for a very serious disease. The Upper Tribunal in *Perrin*, having quoted the passage from *The Clean Car Co* above, 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."

62. 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 which 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."

63. He continued (at 135-6):

> "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."

BURDEN OF PROOF

64. Unlike in a penalty case, where the burden of proof is on HMRC to establish that a penalty may be imposed and thus that the taxpayer has failed to take reasonable care, in this case, which involves a challenge to an assessment, the burden of proving that he had taken reasonable care or had a reasonable excuse lies with Mr Hextall. The standard of proof is the balance of probabilities.

SUBMISSIONS

65. Mr Hextall's evidence in relation to reasonable care and reasonable excuse was that the Child Benefit claim form stated that the information on the HICBC only applied if the claimant or their partner had an individual annual income of more than £50,000 which did not apply to them so they skipped straight to the next page without reading it in January 2015. He received a salary increase which took his annual income above £50,000 in June 2015. Mr Hextall said that his salary increased again in the following year, going above £60,000.

66. Mr Hextall stated that, his wife having made a claim for Child Benefit, neither of them received any further communications from HMRC about Child Benefit or the HICBC until the 'nudge' letter in 2019. He contrasted this with the annual communications about 30 free hours of childcare.

67. Mr Hextall submitted that he did not believe that there had been any carelessness on his part. HMRC did not send out any letters so there was nothing to alert him to the fact that he was liable to the HICBC. He contended that he took reasonable care in the circumstances based on the information that he had. He submitted that, on the basis that he had taken reasonable care, the first two years of assessments were out of time.

68. HMRC's case in relation to the validity of the assessments was that all Child Benefit claim forms used since October 2012 have contained sufficient information about the HICBC to enable a person who took reasonable care to read them and understand whether they were liable to the charge and, if so, notify their liability to HMRC.

69. Mr Jones adopted the HMRC internal manual guidance on careless inaccuracy at Compliance Handbook CH81140 which defined 'careless' as a failure to take reasonable care. It further defined 'reasonable care' as the behaviour of a prudent and reasonable person in the position of the person in question. Mr Jones submitted that very little was required for a taxpayer to be regarded as having been careless.

DISCUSSION

70. It is convenient to set out first what is not in issue in this case. Mr Hextall accepted that his earnings exceeded the £50,000 threshold during the tax year 2015-16. It was accepted by HMRC and Mr Hextall that HMRC had never given Mr Hextall notice to file a Self-Assessment Tax Return under section 8 TMA 1970 for the tax years 2015-16, 2016-17 and 2017-18 and that he had not made a voluntary Self-Assessment Tax Return or notified his chargeability to income tax under section 7 TMA for those years. Mr Hextall did not challenge the fact that Officer Shergill discovered an amount of income tax that ought to have been assessed but had not been assessed. It follows that Mr Hextall was liable to pay the HICBC in the years and amounts assessed.

71. The only issue remaining in this appeal is whether the discovery assessments made on 13 May 2021 under section 29 TMA for the tax years 2015-16, 2016-17 and 2017-18 were made within the applicable time limits. The ordinary time limit under section 34(1) TMA is four years but this can be extended to six and 20 years by sections 36(1) and (1A) respectively.

72. In this case, the assessment for 2017-18 was made on 13 May 2021which was within four years of the end of the tax year assessed. As there is no other ground on which it could be held to be invalid, the assessment for 2017-18 must stand good (section 50(6) TMA) and the appeal in relation to it must be dismissed.

73. However, the assessments in relation to the 2015-16 and 2016-17 tax years were made more than four years but within six years after the end of those tax years. Accordingly, the assessments for tax years 2015-16 and 2016-17 were invalid unless Mr Hextall had failed to take reasonable care to avoid not paying the HICBC (section 36(1) TMA) or did not have a reasonable excuse for failing to notify HMRC that he was liable to pay the HICBC (section 36(1A) TMA).

74. Bearing in mind the facts found above and the submissions of the parties, we do not see that there is any meaningful distinction between the two criteria of 'reasonable care' and 'reasonable excuse'. In considering whether Mr Hextall was careless, we assess his conduct by reference to what would be expected of a prudent and reasonable taxpayer in the same position as Mr Hextall, ie taking into account Mr Hextall's ability and circumstances. In relation to reasonable excuse, we must consider whether Mr Hextall had an excuse that is objectively reasonable taking into account Mr Hextall's attributes and circumstances. It seems to us that if Mr Hextall satisfies us that he took reasonable care then he will also have a reasonable excuse in the circumstances of this case and vice versa.

75. We apply the approach set out in *Perrin* at [58] above in considering whether Mr Hextall took reasonable care and had a reasonable excuse. We have already made our findings of fact above and now consider what facts Mr Hextall relies on as showing that he took reasonable care and had a reasonable excuse. We must then decide whether the facts are proved and are objectively capable of constituting reasonable care and a reasonable excuse. In relation to a reasonable excuse, the final stage is to determine when the excuse ended and whether the failure was remedied without unreasonable delay after that time. In fact, there is no issue in relation to the last point. Mr Hextall remedied his failure to notify when he contacted HMRC by telephone on 27 December 2019 and confirmed that his earnings exceeded the HICBC threshold in tax years 2015-16 to 2017-18. HMRC have never suggested that Mr Hextall had

unreasonably delayed remedying his failure to notify and we agree that, in the circumstances, any delay was not unreasonable.

76. The relevant facts are that Mr Hextall's income exceeded the HICBC threshold at some point in the 2015-16 tax year following his pay rises in June 2015 and January 2016 which took his annual income for that year above £50,000. Accordingly, he should have notified HMRC by no later 5 October 2016 that he was chargeable to the HICBC and thus liable to make a Self Assessment Tax Return for 2015-16. Mr Hextall's case was that, having claimed Child Benefit at a time when he and his wife were not liable to the HICBC, it was not careless of him in all the circumstances to fail to appreciate that he had become liable to the HICBC and thus also liable to notify HMRC of his chargeability to income tax when his income exceeded £50,000.

77. Mr Hextall's evidence, which was not challenged by Mr Jones and which we accept, was that he and his wife had not read those parts of the Child Benefit claim form which explained the HICBC because, at the time, they did not have annual incomes above £50,000. Having claimed Child Benefit, they did not receive any further communications from HMRC about the HICBC. The first time that Mr Hextall became aware that he was liable to pay the HICBC and to make a Self Assessment Tax Return was when HMRC issued the 'nudge' letter to him in November 2019.

78. In essence, Mr Hextall seeks to rely on 'ignorance of the law' as a reasonable excuse. On reasonable care, his case is that a prudent and reasonable taxpayer, having the same state of knowledge and in the same circumstances, would have behaved in the same way. As the Upper Tribunal pointed out 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.

79. We have not found this an easy case to decide. Mr Hextall was clearly aware at the time that Mrs Hextall first claimed Child Benefit in January 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. He said that they did not read the information because they did not earn that much. That was not unreasonable because the Child Benefit claim form stated in terms (see [17] above) that the information about the HICBC only applied if the claimant or their partner had an annual income of more than £50,000 and, if not, they should go straight to the next page and fill in the form.

80. Mr Hextall said that when his salary exceeded £50,000 in June 2015, he was not aware that he had an obligation to notify HMRC within six months of the end of that tax year of his liability to the HICBC and account for it by making a Self Assessment Tax Return. 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 the HICBC within six months of the end of that tax year or any instructions on how to make such a notification. Officer Thomas's evidence described HMRC's publicity campaigns in 2012 and 2013 to alert higher rate taxpayers to the existence of the 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 the HICBC in the event that their income rose above £50,000 after they had begun to claim Child Benefit.

81. Taking into account the lack of guidance in the Child Benefit claim form for those in Mr and Mrs Hextall'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 Hextall to have been unaware of the requirement to notify HMRC that he had become liable to the HICBC in the 2015-16 tax year. We also find that, as nothing changed in relation to Mr Hextall's awareness of his obligation to notify until HMRC sent him the 'nudge' letter in November 2019, Mr Hextall has established that he had a reasonable excuse for failing to notify and did not fail to take reasonable care in relation to the 2016-17 tax year. Accordingly, the assessments in relation to in relation to the 2015-16 and 2016-17 tax years were made out of time.

DECISION

82. For the reasons set out above, Mr Hextall's appeal against the assessment of £1076 in relation to the tax year 2017-18 is refused and his appeal against the assessments for the tax years 2015-16 and 2016-17 in the amounts of £307 and £1076 is allowed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

83. 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.

JUDGE GREG SINFIELD
CHAMBER PRESIDENT

Release date: 25th APRIL 2023