Neutral Citation: [2023] UKFTT 00538 (TC)

Case Number: TC08841

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video

Appeal reference: TC/2022/11882

HIGH INCOME CHILD BENEFIT CHARGE – tax and penalty assessments – whether a protected assessment – yes – whether, pending determination of Wilkes there is nevertheless a reasonable excuse – yes – appeal against penalty allowed – appeal against assessment stayed

Heard on: 17 May 2023
Judgment date: 22 June 2023

Before

TRIBUNAL JUDGE AMANDA BROWN KC
MR DUNCAN MCBRIDE

Between

PATRICK ASHE

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Ashe

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

DECISION

INTRODUCTION

1. With the consent of the parties, the form of the hearing was Video using the Tribunal video hearing system. A face-to-face hearing was not held because it was expedient not to do so. We were provided with a court bundle and a substantial generic bundle which contained much information about the "advertising campaign" conducted by HMRC in relation to the High Income Child Benefit Charge ("**HICBC**").

2. 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.

BACKGROUND

3. This appeal concerns the HICBC. Me Ashe ("**Appellant**") has been assessed to HICBC for tax years 2015/16 to 2018/19 inclusive, together with a penalty for failing to notify chargeability under section 7 Taxes Management Act 1970 ("**TMA**"). The penalty has been assessed pursuant to Schedule 41 Finance Act 2008 ("**Schedule 41**"). The tax assessments are for the sum of £4,327. The penalties are calculated by reference to the potential lost revenue which is the subject of the assessment and on the basis that the behaviour resulting in the failure to notify was not deliberate and the disclosure was unprompted. The penalties for all tax years have been assessed at 10%. The amount of the penalties in total is £325.40.

THE LAW

4. There was no dispute between the parties as to the relevant legislation which is summarised below.

5. 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) their adjusted net income for the year is greater than £50,000;

(2) their partner's ("partner" is defined in section 681G) adjusted net income is less than theirs, and

(3) they or their partner received child benefit in the relevant tax year.

6. The assessments to HICBC 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.

7. Following the decision in *Wilkes* the provisions of section 97 Finance Act 2022 ("**Section 97"**) 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 s97 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.

8. 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 as a consequence 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.

9. Paragraph 1 Schedule 41 provides that a person who has not been sent a tax return is liable to a penalty if he fails to comply with section 7 TMA. Para 6 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 in the majority of HICBC cases including this one), the penalty is 30% of the "potential lost revenue" ; but paras 12 and 13 provide for a reduction in that percentage 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.

10. 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 they have a reasonable excuse for the failure.

EVIDENCE AND FACTS

11. On the basis of the bundle of documents and the evidence given by the Appellant, Mr Jake Milligan and Ms Jackie White (both officers of HMRC). We make the following findings of fact:

(1) The Appellant's wife had been in receipt of Child Benefit from 14 March 2005 following the birth of her first son. She had a second son on 30 April 2007. Neither child was the Appellant's son, and he was not married to their mother at the time. The Appellant began co-habiting with the children's mother on 7 May 2013 and they subsequently married in 2018 but are now divorced.

(2) The Appellant and his partner/wife maintained entirely separate finances and, at the time they began co-habiting he was unaware that she received child benefit in respect of the boys.

(3) In 2012, prior to the introduction of the HICBC, HMRC issued a number of press releases which detailed the introduction of the charge and advised high income Child Benefit parents to register for self-assessment. Similar press releases came out in 2014. There is considerable information about the charge on HMRC's website.

(4) We find on the evidence that the Appellant was unaware of HICBC as a consequence of any of this HMRC activity.

(5) Throughout the period relevant to this appeal and for a considerable period prior to it the Appellant was employed, he had no sources of income other than that received from his employer. The income tax due from him was collected through PAYE. Prior to the tax year 2015/16 the Appellant's net adjusted income was below £50,000.

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

(7) HMRC's record indicates that the Appellant was issued with what is known as an SA252 letter on 17 August 2013. Both HMRC witnesses were questioned as to why the Appellant might have been selected to receive the SA252 as at that date. Neither witness was aware of the criteria on which the SA252s were issued. The Appellant contends questions whether one was ever issued to him as, as of 17 August 2013, his income was considerably below £50,00, his partner had only just moved in with him and they were not then married. He further contends that if the SA252 was sent he never received it. Having carefully considered all of the evidence available to us we consider, on the balance of probabilities the letter was never sent and HMRC's record is in error. We have considered the evidence in the Generic Bundle regarding the program of communication undertaken by HMRC. On 17 August 2013 the Appellant's earning were sufficiently under the £50,000 threshold that there was little or no immediate risk that he was or would shortly become liable to the charge. HMRC's program of awareness raising was aimed at those most at risk and that did not include the Appellant. Even were we wrong, and a letter was sent we accept the Appellant's evidence that he did not receive it. As set out at below the conduct of the general conduct of Appellant in regard to the HICBC would indicate that had he received it he would have sought to immediately establish whether he was liable to the charge. The fact that he did not, on the balance of probabilities, indicates that he did not receive the SA252.

(8) On 7 January 2021 HMRC issued a "nudge" letter to the Appellant advising him to check whether he was liable to the charge. On the evidence we find that this was the first point at which the Appellant was aware of HICBC and his potential liability to it.

(9) Upon receipt of that letter the Appellant enquired of his wife whether she was in receipt of child benefit, and she confirmed that she was. On 13 January 2021 he contacted HMRC confirming a liability for tax years 2015/16 to 2018/19 inclusive.

(10) Mrs Ashe ceased claiming child benefit following the conversation with the Appellant.

(11) Such disclosure constituted a "discovery" on HMRC's behalf that an amount of income tax had not been declared. In accordance with the judgment in *Wilkes* it was not a discover that there was an amount of income which had not been assessed to tax.

(12) Correspondence ensued regarding the quantum of the liability and on 1 May 2021 HMRC issued tax assessments for the HICBC for the tax years 2015/16 – 2018/19 inclusive. On 20 May 2021 the Appellant appealed the tax assessments to HMRC. It is right to note that the grounds notified in the appeal did not include a contention that HMRC had not made a discovery or were not entitled to make discovery assessments on the basis that contended for in *Wilkes*.

(13) HMRC issued a view of the matter letter confirming the assessments on 2 June 2021 and informing the Appellant of his right to request a review or appeal within 30 days. The Appellant responded to this letter on 21 June 2021 stating that he intended to

request a review of the decision but confirming that he wanted to take legal advice before doing so. He requested an extension of 3 months in order to request the review and a copy of the letter dated 2 June 2021. HMRC apparently confirmed that a pause had been put on "all compliance activities" until 2 October 2021 and that HMRC would "contact [him] regarding this case on or after that date". The email also noted that "you may still need to do certain things to make sure you meet important or legal deadlines" but went on to reference the need to make a payment on account to avoid late payment penalties. This email confirmation was included in the bundle but the date on which it was sent was redacted – it was sent to the correct email address for the Appellant.

(14) Between 21 and 30 June 2021 the Appellant sought to contact HMRC by telephone. In evidence he explained that when calling HMRC's HICBC team there was a recorded message indicating that all HICBC appeals were on hold. The HMRC officers understood that there was such a message but did not know its precise terms.

(15) On 30 June 2021 the Appellant wrote a further email to HMRC expressing his concern that he had not had a response to his 21 June 2023 email but was receiving letters from the debt management team which he considered unacceptable given that his assessment was under appeal. HMRC's self-assessment record shows that the Appellant called on 30 June 2021. The note of the call records "TP … stated that he is requesting an independent review through a tribunal. … TP disputes that he owes the outstanding SA balance." The note does not record what was said to the Appellant however, the Appellant's evidence which we accept was that he was told that because of Wilkes all appeals were on hold and that HMRC would contact him when they have decided the next steps. The Appellant also explained that he made further calls to HMRC's HICBC line but upon hearing the same recorded message that all appeals were on hold he did not wait to speak to an advisor. On the basis of these messages we find that the Appellant understood that his appeal was suspended and that he needed to wait to hear from HMRC before there was any need to progress the matter.

(16) By letter dated 5 October 2021 HMRC finally responded formally to the emails of 21 and 30 June 2021 with an apology for the delay and providing a copy of the letter of 2 June 2021 as requested by the Appellant.

(17) The self-assessment notes for the Appellant show as of 7 October 2021 "the taxpayer appealed the HICBC and FTN penalties on SAFE. Assessments and penalties stood over. No reply to our VOM. Holding letter issued as HICBC appeals on hold". We note that at that time there were in fact no penalties.

(18) On 8 October 2021 HMRC issued a further letter which stated as follows:

> "We sent you discovery assessments for the tax you owe. …
>
> There has been a recent decision of the Upper Tribunal in [*Wilkes*]. The Tribunal found against HMRC's use of discovery assessments to claim amounts of HICBC … HMRC do not agree with this decision …
>
> …
>
> Failure to notify penalties are unaffected by the Wilkes decision …
>
> **What happens next**
>
> We are working to understand if this tribunal decision will affect your case.
>
> We have paused the assessment and penalties in your case.
>
> …
>
> We will contact you again when we have more information. …"

(19) The Appellant heard nothing further from HMRC until 13 May 2022 when they wrote to him indicating that as he had not requested a review within 30 days of the letter of 2 June 2021 (failing even to acknowledge their subsequent confirmation of a 3-month extension to 2 October 2021 or any further correspondence or communication) he appeal was treated as settled. The Appellant responded on 17 May 2022 clearly stating that he had understood that his appeal had remained open but on hold and that he had been awaiting communication from HMRC. The email clearly states that it is his understanding that discovery assessments may not be used to recover HICBC. HMRC's response to this email was to assert that in consequence of Section 97 the Appellant's assessments were protected assessments since he had not indicated reliance on Wilkes prior to 30 June 2021. They reaffirmed that they were entitled to treat the appeal as settled absence a formal request for review having been made by 2 October 2021, we note however, that they do so in part by reference to their letter of 5 October 2021 enclosing the copy of their 2 June 2021 view of the matter letter.

(20) Penalty assessments were raised on 30 May 2021. As set out above the penalties were calculated at 10% of the value of the tax assessments for all years.

(21) By letter dated 17 June HMRC advised that any late request for review needed to be made in writing and that an appeal against the penalties may be made no later than 29 June 2022. The Appellant appealed the penalties on 21 June 2022 and requested an out of time review of the tax assessments on 22 June 2022. HMRC refused to accept the out of time request for review and confirmed the penalties.

(22) When the Appellant lodged his notice of appeal with the Tribunal on 13 July 2022 he indicated the appeal was in time. We find that he was incorrect to do so as regards the tax appeals however, HMRC have not, by their statement of case, sought to object to the appeal against the tax assessments on the basis that they were made out of time only on the basis that there is no basis for the appeal as the assessments are protected assessments for the purposes of Section 97.

BURDEN OF PROOF

12. The burden of establishing that valid in time assessments for both the tax and the penalty in the correct amount lies with HMRC. The standard of proof is the balance of probabilities.

13. If HMRC can establish this then the burden shifts to the Appellant who must then establish that the tax is overstated and, in respect of the periods exceeding 4 years and in respect of the penalties, that she has a reasonable excuse for failure to notify her liability to HICBC. In respect of the penalties, if she can show that there are special circumstances the penalties may cancelled. The standard of proof is the same namely the balance of probabilities.

STATUS OF THE TAX ASSESSMENTS AS PROTECTED ASSESSMENT

14. As set out above Section 97 provides that a HICBC discovery assessment shall be a protected assessment save in two situations:

(1) Where the appeal was made to HMRC prior to 30 June 2021 and the *Wilkes* issue was raised in the appeal prior to that date; or

(2) Where an appeal was made to HMRC prior to 30 June 2021, the appeal was temporarily paused before 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".

15. HMRC contend that the Appellant's appeal is a protected appeal because it does not meet either of the requirements set out in paragraph 14 above. They contend that there was, in

substance, no live appeal by 2 October 2021 because the time limit in which to request a review or notify an appeal had expired, this was so despite an extension of the time limit to that date. They contend that the letter of 8 October 2021 was sent in error and is not capable of putting on hold an appeal which did not exist.

16. We do not accept those submissions and we find that the tax assessments issued to the Appellant are not protected assessments. The Appellant had clearly indicated that he continued to dispute the assessments and that he intended to request a review. We have been provided with a copy of an email which was purportedly sent to him which states that all compliance activities associated with the assessment had been put on hold but that he was still required to make payment of the assessment or risk late payment penalties. Whether or not that email was actually received, we find that the same information was communicated to him by telephone on 30 June 2021. We consider that any reasonable taxpayer would have concluded that their appeal was alive and that to the extent that there was a time limit to do something that time limit had been suspended whilst HMRC considered their position (or more properly waited for parliament to "fix" the position for them and override the conclusion of the Upper Tribunal in *Wilkes*.

17. That understanding was compounded firstly by the recorded message on the HICBC helpline. In the absence of any information from HMRC to the contrary or any challenge by HMRC by way of cross examination of the Appellant we accept the Appellant's recollection that the recorded message reassured him that there was nothing he needed to do vis a vis his appeal until he received further communication from HMRC. His understanding was further reinforced by the letters from HMRC of 5 and 8 October 2021. In our view, had HMRC considered a request for review to have fallen out of time at that point the letter should have referenced that fact, particularly bearing in mind that the letter was a response to a request made on 21 and 30 June 2021 i.e. more than 3 months previously. The letter of 8 October 2021, certainly when viewed by reference to the chronological context in which it was written could only reasonably have been read by the Appellant as a confirmation that he needed to do nothing further whilst HMRC considered their position.

18. The provisions of Section 97(6) require three conditions to be met: 1) that an appeal was made to HMRC prior to 30 June 2021; 2) that there was a pause of that appeal prior to 27 October 2021; and 3) that the *Wilkes* issue was, or might have been, wholly or partly in issue in the appeal. The Appellant did submit his appeal before 30 June 2021 and for the reasons set out above we consider that the appeal remained live, the effect of HMRC's communications to the Appellant were that he justifiably considered that the time limit in which to request a review or bring an appeal had been suspended beyond the original three months. The effect of the voice messaging, certainly when taken with the letter of 8 October 2021 was that there was a temporary pause of the appeal prior to 27 October 2021. The reason for that pause, as explained in the voice message and as set out in the letter of 8 October 2021 was that *Wilkes* might have been relevant in the appeal.

19. Accordingly, the assessment is not a protected appeal and, to the extent that the tax appeals are not allowed by the terms of this judgment (see below) the appeal is stayed pending the outcome of the *Wilkes* litigation.

ASSESSMENT TIME LIMITS

20. In accordance with the provisions of s34 TMA HMRC always have 4 years from the end of the tax year in question in which to raise income tax assessments. The assessments under appeal are for tax years ended 5 April 2016, 2017, 2018 and 2019 and were raised on 1 May 2021. As such the assessments for tax years 2017/18 and 2018/19 were raised within 4 years. However, the assessments for tax years 2015/16 and 2016/17 were not.

21. The assessments for those earlier years are valid pursuant to section 36(1A) TMA provided that the Appellant does not have a reasonable excuse for failing to notify his liability to HICBC.

22. HMRC do not consider that the Appellant has a reasonable excuse for failing to notify chargeability. They contend that whilst they are not obliged to notify every person of every change to legislation that might affect them and that individuals need to take steps to understand the law and how it applies in their circumstances, in this case they sent a SA252 to the Appellant who was therefore on notice of the risk that he may have become liable to the HICBC. In any event, and irrespective of whether the Appellant received or recollects receiving the SA252 such that he was as a matter of fact ignorant of the requirement to notify his liability to HICBC they do not consider that ignorance of the law comprises a reasonable excuse. They cite a variety of extracts from case law to justify this, including paragraph [81] and [82] from the Upper Tribunal decision in *Christine Perrin v HMRC* [2018] UKUT 156 ("***Perrin***").

23. The Appellant contends, by reference to the *Perrin* tests, in particular as interpreted by the Tribunal in *Bachir Mohamed Belloul v HMRC* [2020] UKFTT 312 (TC) he did not receive the SA252 and was ignorant of the requirement to notify such that it was objectively reasonable for him not to have so notified.

24. As noted by both parties the legal principles which we must consider when an Appellant submits that they haves a reasonable excuse is set out in *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:
>
> 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).
>
> Second, decide which of those facts are proven.
>
> 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?"
>
> 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."

25. 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"***) see paragraph 66.

26. The basis of the Appellant's reasonable excuse, as regards the tax assessments, is that, at the relevant time at which the liability to notify arose, and in respect of each of the tax years to which the defence might apply i.e. 2015/16 – 2016/17, he was unaware of the liability to so notify. As such there is no basis on which to extend the period for which HMRC are entitled to issue tax assessments beyond 4 years. Whilst in many areas of the law ignorance of the law is no defence in the context of a reasonable excuse, as set out in *Perrin,* it can be. In order to prove that excuse the taxpayer must show firstly that they were, as a matter of fact, ignorant of the relevant obligation and then, and more significantly, that such ignorance was objectively reasonable i.e. that a taxpayer generally, in the same position as the Appellant but otherwise alive to their taxing obligations, would similarly have failed to notify. Finally, if a reasonable excuse can be established for any period it much then be determined when it came to an end and if the Appellant then remediated the failure without undue delay.

27. It is for us to determine whether the reasonable excuse is made out on the facts and whether it is objectively reasonable for the Appellant, in all the circumstances of this case, to have been ignorant of the requirement to complete a self-assessment tax return when he was as a matter of fact liable to the HICBC, and to so fail to complete a tax return notifying his liability. If it was, did the excuse cease prior to the failure being remediated and was there an unreasonable delay between the cessation of the reasonable excuse and notification of liability.

28. On the evidence (particularly that contained in the generic bundle) it is clear that prior to the introduction of the HICBC, HMRC launched an extensive information campaign to make the general public aware of the introduction of the charge.

29. It is apparent from the information available, and the evidence given by Ms White that in November 2012 HMRC issued a briefing to over a million higher rate taxpayers about the charge. And in September 2013 self-assessment letters known as "SA 252" letters were sent to a number of higher rate taxpayers. As set out in paragraph 11(7) we have found that either the SA252 was never sent or that it was not received for the reasons stated in that paragraph.

30. We have further found (see paragraph 11(8) above) that the Appellant was unaware of the HICBC until 7 January 2021.

31. As in the vast majority of HICBC cases coming through to hearing and being decided by the Tribunal, the Appellant is essentially contending that as he was unaware of the liability to notify he could hardly be excepted to have complied with it. HMRC's response is: as income tax is now subject to self-assessment, it is not for them to notify individual taxpayers. That is plainly right, but there is then a factual assessment as to whether in the individual facts of each case whether the ignorance claimed is reasonable and whether other taxpayers in the same position would have similarly failed to notify.

32. 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 favourably 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.

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

> (1) The taxpayer was 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) child benefit payments were received (either by the taxpayer or their partner) prior to the introduction of HICBC with no children being born post the introduction of the 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) the taxpayer 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.

34. The present case meets the four criteria applied in *Jacques* and the following cases. Like Judge Popplewell, I consider that ignorance of the introduction of HICBC is, depending on the facts, capable of representing a reasonable excuse in the circumstances listed but they are, rightly, a narrow set of circumstances. What is critical is that as soon as the taxpayer has a reason to be aware that there is a risk that the HICBC may apply they must act promptly to establish definitively if the charge is payable and notify HMRC of the liability. That is, after all, precisely what the nudge letter invites the taxpayer to do.

35. Therefore, we accept that until 7 January 2021 the Appellant had a reasonable excuse. The provisions of section 118(2) TMA then require that the taxpayer must act without unreasonable delay. What represents unreasonable delay has recently been considered in *Archer* with the Court of Appeal confirming that the taxpayer is entitled to take a short period to evaluate the position before acting (in particular see paragraphs 87 – 91). The Appellant took only 6 days in which he established that his partner was in receipt of child benefit, asked her to cancel its receipt and notified HMRC of his liability to the charge. In accordance with *Archer* the Appellant acted without undue delay such that for the full period in which he failed to notify his liability to HICBC he had a reasonable excuse.

36. The consequence, in terms of the tax assessments, is that for the two tax years 2015/16 and 2016/17 HMRC were out of time to make any assessment (even if following their appeal in *Wilkes* it is determined that they have the power to issue discovery assessments at all). Accordingly, the Appellant's appeal in respect of those tax years is allowed. HMRC are unable to collect the sums of £948 and £1788 assessed for those years.

FAILURE TO NOTIFY PENALTY ASSESSMENTS

37. A taxpayer is liable pursuant so Schedule 41 where, as here, there has been a failure to notify liability to tax. The rate of penalty is prescribed by the statute and for present purposes the minimum penalty rate is 10% of the potentially lost revenue. In accordance with the judgment of the Upper Tribunal in *HMRC v Robertson* [2019] UKUT 0202 137 (TCC), "***Robertson***") HMRC need not raise a valid assessment to tax in order for it to represent potentially lost revenue. The amount of tax must be ascertained, even where it is not or cannot be assessed, and the time limit for raising the assessment is 12 months from the end of the "appeal period" for the assessment or 12 months from the date on which the amount was ascertained if not assessed (see paragraph 16 of Schedule 41). For these purposes "appeal

period" is the period in which an appeal could be brought and if an appeal is brought the period until that appeal is determined or withdrawn.

38. The Appellant has accepted that he was liable to the HICBC though, as set out above, challenges HMRC's ability to assess to collect that liability.

39. For the reasons given we have determined that they were out of time to assess for tax years 2015/16 and 2016/17. That does not preclude a penalty assessment for the reasons stated in *Robertson* but may, in our view, have an impact on the time limit in which they may issue the penalty. Paragraph 16 Schedule 41 provides for the time limit in which to assess the penalty to run by refence to whether there is or is not an assessment and where there is such an assessment by reference to any appeal against it. It appears to us to be markedly favourable to HMRC to conclude that where they raise an invalid assessment which a taxpayer must contest to establish its invalidity that the time limit for assessing the penalty runs for 12 months after it is determined that the assessment was invalid. It is though perfectly reasonable for HMRC to have 12 months from confirmation of the validity of an assessment to then raise the penalty.

40. For the reasons set out below, it is not necessary for us to determine whether the assessment to penalties for tax years 2015/16 and 2016/17 were made in time. Had we needed to do so, we would, on balance, have preferred a conclusion that they had been raised out of time on the basis that the assessments were invalid and should therefore be treated as periods which were never assessed such that the relevant time limit was 12 months from when the tax in question was ascertained. Given that HMRC purported to assess the tax liability on 1 May 2021 that is the date on which it was ascertained and as such we consider that the penalty assessments should have been raised no later than 30 April 2022. In fact they were made on 30 May 2022 with the consequence that they too are out of time.

41. Irrespective of whether the penalty assessments for 2015/16 and 2016/17 were in time we consider that the Appellant as established the reasonable excuse defence for all penalty assessments. This follows as a direct consequence of the findings as to reasonable excuse set out above in connection with the assessment time limit.

42. Accordingly, we allow the appeal in respect of the failure to notify penalties.

DECISION

43. For the reasons given:

(1) The appeal is allowed in respect of the tax assessments for tax years 2015/16 and 2016/17

(2) The appeal as regards tax years 2017/18 and 2018/19 are stayed pending the outcome in *Wilkes* which should determine their validity.

(3) The appeal is allowed in respect of the penalty assessments for all years.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

44. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

AMANDA BROWN KC
TRIBUNAL JUDGE
Release date: 22 JUNE 2023