TC06410

Appeal number: TC/2017/04622

INCOME TAX – High income child benefit charge (HICBC) – penalties for failure to notify where HICBC received by taxpayer not within self-assessment – whether failure to notify – whether any potential lost revenue (PLR) – whether s 29 assessments producing PLR valid – appeal allowed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

JAMES ROBERTSON **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS
SUSAN STOTT FCA

Sitting in public at the County Court, York on 14 February 2018

The appellant in person

Mrs Rosalind Oliver, Solicitor's Office and Legal Services HM Revenue and Customs, for the Respondents

DECISION

1. This was an appeal by Mr James Robertson ("the appellant") against an assessment made by the respondents ("HMRC") charging him penalties totalling £528 for his failure to notify HMRC of his chargeability to tax for the three years 2012-13, 2013-14 and 2014-15.

Facts

2. We had a bundle of papers prepared by HMRC which included the appellant's notice of appeal, HMRC's Statement of Case and the correspondence between the parties.

3. We also heard evidence from the appellant.

4. From this documentary and oral evidence we make the following findings of fact. Unless otherwise indicated the facts were not in dispute.

5. For many years before 6 April 2012 and in the three tax years in question the appellant's wife was in receipt of child benefit.

6. HMRC said that they issued "awareness letters" in the autumn of 2012 to all taxpayers then apparently in receipt of earnings in excess of £50,000. The appellant said that neither he nor his wife received such a letter. We did not have a copy of the awareness letter, either of the ones allegedly sent to the appellant or his wife or a specimen copy.

7. A screenshot of an entry of Contact History Details from the record for the appellant on HMRC's NPS PAYE computer system shows:

> Name: Mr J W Robertson
>
> "Contactor reference" NE033447
>
> Contact direction: Outbound
>
> Date of contact 17/08/2013
>
> Document type: SA 252
>
> Document Type Date: 2013

8. Other documents in the bundle show that the appellant is Mr J W Robertson and that his National Insurance number is the same as the "Contactor reference" (even though in this case it was HMRC which was the contactor and the appellant the contactee).

9. A copy of an SA 252 dated 08/13 in the bundle shows that it is a letter which informs recipients who have had any changes to their income in the last year or if they were affected by recent changes to Child Benefit for people on higher incomes that they *might* need to complete a Self Assessment Return. [Tribunal's emphasis].

10. As to changes to child benefit, a term set out in bold and bigger font than the rest of the form, the SA 252 informs recipients that they may be liable to pay the high income child benefit charge ("HICBC") which came into effect on 7 January 2013, and that the conditions for liability are that they have income of over £50,000 a year in 2013-14 or had it in 2012-13; either "you or your partner" received any child benefit after 7 January 2013 and their income is higher than their partner's.

11. It added that if the partner receiving child benefit stopped payments before 7 January 2013 the HICBC did not apply. It gave a website address at which the recipient of the SA 252 could check if it applied to them.

12. It went on that if the HICBC did apply to the recipient, then "**you must register for self-assessment for the 2012-13 tax year by 5 October 2013**" [emboldening is HMRC's], "so that you can declare the child benefit you received, pay the tax charge on time and avoid a late payment penalty". It gave details of how to opt out of child benefit and avoid a charge in later years.

13. The appellant denied vehemently that either he or his wife had received either the awareness letter or the SA 252. He said that he and his wife, who is a primary school teacher, keep full records of their dealings with Government Departments and when HMRC first wrote to him about the HICBC he checked his files. Although they found correspondence sent to his wife about child benefit dating from 2008 this was the only mention of the benefit they had had.

14. The only evidence HMRC produced about the two documents, the awareness letter and the SA 252, was the screenshot of issue of "outbound" contact for the SA 252. We think that on the basis of this document it is more likely than not that the SA 252 was issued and addressed to the appellant's correct address (details of which were in the bundle). But an SA 252 is not a document issued by virtue of any Act of Parliament, so the statutory presumption about service in s 7 Interpretation Act 1978 is not relevant here.

15. We found the appellant to be a patently honest witness. Even bearing in mind that more than four years had elapsed since the SA 252 was issued, we find that it is more likely than not that the appellant did not receive the two documents. We think it is likely that had the appellant been made aware of the changes to child benefit he would have considered all the facts so that he and his wife could decide whether to disclaim child benefit, a point which he made forcefully in his complaint to HMRC (see §34)

16. HMRC did not produce any evidence that the appellant's wife had been issued with an SA 252.

17. The appellant was not issued with a notice to file a tax return and self-assessment for any of the three tax years in question. His tax affairs were dealt with entirely through PAYE, as were his wife's.

18. On 1 February 2017 HMRC's office entitled "Indv and Small Business Compliance Campaigns and Projects" wrote to the appellant. The letter was not

apparently signed and revealed the name of no individual officer, but was signed off "ITSA Enquiry Team".

19. The letter started by saying "[o]ur records indicate that the recent changes to Child Benefit for people on higher incomes may apply to you and you did not register to receive a Self Assessment tax return for the tax years ended 5 April 2013, 2014 and 2015."

20. After explaining the HICBC, the letter set out a table of what the appellant had to pay. It had a column headed "Estimated income including any employer taxable benefits", one with the number of children the appellant had, one with the amount of "child benefit received" and one with the "Amount of High Income Child benefit due" (*sic*) which seems to be the amount of the charge.

21. The total of the amounts of the HICBC for the three years in question was £2,755.

22. Under the heading "What you need to do now" it said:

> "If you do not agree with the information on which we have based this calculation please go to [a website page on the gov.uk website "child-benefit-tax-calculator"].
>
> Please phone us on the number at the top of this letter to tell us if you have to pay the Charge. **Please phone by 3 March 2017**" [HMRC's emboldening]

23. Later it said "if you prefer to let us know in writing why you do not have to pay the charge" the appellant should use the address on the letter.

24. Then in bold it said "If you do not contact us by 3 March 2017, we will send you assessments made under Section 29 of the Taxes Management Act 1970 for the tax we think you owe and register you for Self Assessment tax returns." It went on (but not in bold) "This means you will need to complete a tax return for the tax year ended 5 April 2016."

25. Under the heading "Interest and Penalties" (in bold) the letter said:

> "If you are due to pay any additional tax for the years ended 5 April 2013, 2014 and 2015, you will need to pay this within 30 days of the date of our assessments otherwise we may charge you a late payment penalty. We will also charge you interest, on a daily basis, on any tax that you pay later than it was originally due.
>
> If you have to pay the Charge, you should have told us by 5 October following the end of the relevant tax year. If you did not do this, we may charge you penalties because you have failed to notify us."

26. The next section is headed "Helping us with this check", although there is no previous indication that the letter relates to a check of anything. The letter then pointed the recipient to HMRC's website so that the appellant could if he wished download a factsheet about the Human Rights Act and penalties and one for "Penalties for Failure to Notify".

27. On 7 February 2017, the day after the appellant said he received HMRC's letter, he wrote in reply. He pointed out that the "aforementioned letter is the first time I have been made aware of such a charge and my liability to pay it."

28. After stating that he had worked for the same company continuously for 11 years and tax was collected through PAYE with no notification that he should complete a tax return, he said he would have expected some notification from HMRC in 2012 or early 2013 at the latest. Being told four years later is unreasonable.

29. He then asked detailed questions about what HMRC say he owed and how to pay it, asked what adjustment HMRC would make to his tax code for 2016-17, and whether he should submit returns and from when.

30. On 27 February 2017 HMRC replied, still anonymously. They gave background to the introduction of the HICBC saying the change was widely publicised in the media and was detailed on their website.

31. They said that awareness letters were issued from November 2012, but the writer did not have access to the child benefit computer system so could not tell when the letter was issued. The charge could, they said, only be collected through the self-assessment system, not through child benefits, so that the liable partner "would have to declare some or all of the Child Benefit they were entitled to receive as a tax charge through the Self-Assessment process"

32. The letter repeated the figures that showed a total amount due of £2,755. As to the issue of a tax code, the letter said the only way to collect the HICBC for the earlier years is through an assessment, and that it cannot be collected though a tax code. They added

> "Collection of a Self-Assessment tax bill through your tax code can only be done under certain circumstances."

The criteria from the HMRC website were said to be attached for the appellant to review for 2016-17.

33. A revised deadline of 13 March for replying was given, failing which assessments would be issued.

34. On 7 March 2017 the appellant replied to the letter received by him on 2 March 2017. He explained that he was lodging a formal complaint because he had not been given an opportunity to decide whether or not to continue receiving child benefit. He also provided copies of his P800s, including gift aid donations to be deducted showing slightly different figures for his income to those used by HMRC in their letters.

35. He also said that the coding criteria were not attached, and asked for assurance that he would not be fined in connection with the filing of a return for 2015-16.

36. On 28 March 2017 the appellant received a reply to his complaint. The Complaints Officer referred to the SA 252 issued on 17 August 2013. The letter also

enclosed the tax code criteria and the relevant place on HMRC's website [but the details are not in our bundle]

37. On 4 April 2017 HMRC replied amending the figures of the HICBC for each year, but not providing a total. It is £2,640 (£1145 less than HMRC's original estimate. We add that we are quite unable to understand why the first letter from HMRC did not use the correct figures as they must have been available from the appellant's record on the NPS system.

38. On 10 April 2017 the appellant replied to the letter from the Complaints Officer. In this he denied receiving the SA 252, and he said his wife did not receive it either. Nor had he received an awareness letter.

39. On 12 April 2017 HMRC wrote to the appellant, this time signed off by an unnamed Compliance Officer. The letter shows the charge on the "assessments we have enclosed" made under s 29 TMA.

40. It added that the appellant would also receive notices of penalty assessments because he did not notify liability in time. It explained that the penalty is a minimum of 20% but if "a non-deliberate failure is notified within 12 months of the tax becoming unpaid the minimum can [*sic* – surely "will"] be reduced to 10%."

41. It further explained that because the appellant replied to HMRC's letter he had been given full reductions for "telling, helping and giving". Therefore the minimum of 20% would be charged.

42. The letter added that the appellant had no reasonable excuse and that HMRC did not consider there were any special circumstances that would lead them to reduce the penalty further. The penalties were £51.60, £147.20 and £329.20.

43. The bundle contains a "Behaviour Audit Trail" for the appellant. We do not think this was attached to the letter, but it was included in the bundle. It refers to an apparent telephone conversation between Marsha Gough of HMRC and the appellant. It says the appellant was asked about any health or personal circumstances. It records the appellant's answers to seven questions, the gist of the questions and answers being:

Q1 Why didn't you register for SA and complete tax returns each year?

A1 I was not aware of the legislation, and would have cancelled child benefit if I had been.

Q2 If you were uncertain about notification, what advice did you seek etc?

A2 I did not know about the HICBC then but have looked it up now.

Q3 Not asked.

Q4 is not a question asked of the appellant. What it states is the reason for Ms Gough's decision to charge a penalty at the minimum level.

Q5 Do you agree with the decision at Q4?

A5 No.

Q6 Is there a reasonable excuse or anything else we need to take into account?

A6 NA.

Q7 NA – not asked.

44. The Audit Trail report then says that the behaviour established was non-deliberate, and shows the penalty loading of 20% (because customer responded to initial letter T30 H40 G30). We interpret those letters and numbers to show the respective percentage reductions given for Telling, Helping and Giving.

45. The notice of the penalty assessment that was enclosed was dated 12 April 2017 and showed for each of the penalties the tax period (the tax year) and the penalty for that period and the total at £528.

46. Three notices of assessment to income tax were enclosed also dated 12 April 2017 showing the amount of tax for each tax year. They each said that they were issued to collect the additional tax due that "you have not previously told us about".

47. An SA statement of account shows the tax on the s 29 assessments and interest calculated by reference to a "becoming due" date of 31 January after the tax year concerned. The statement did not show the penalties.

48. On 22 April 2017 the appellant appealed against the penalty assessment. He did not appeal against the s 29 assessments.

49. On 9 May 2017 an unnamed officer responded saying they were treating his letter as an appeal "against Schedule 41 (Failure to Notify Penalty)" (*sic*). They did not accept that the appellant had a reasonable excuse for not notifying chargeability to the HICBC and the appeal could not be accepted. They proposed to "close" the appeal, and said that if the appellant did not agree with HMRC's view, he could ask for a review or go to the Tribunal.

50. On 19 May 2017 the appellant told HMRC he was notifying his appeal to the Tribunal.

51. On 2 June 2017 he notified his appeal to the Tribunal.

52. On 8 June 2017 HMRC gave their view of the matter. They told the appellant he could ask for a review or go to the Tribunal, but that if they did not hear from him by 8 July they would assume his agreement so that the appeal will be settled under s 54 TMA. We have no idea why this letter was written given that the appellant had told HMRC he was going directly to the Tribunal.

The law

53. This is set out in Chapter 8 Part 10 of the Income Tax (Earnings and Pensions Act) 2003 ("ITEPA"), which was inserted into ITEPA by paragraph 1 Schedule 1 Finance Act ("FA") 2012 with effect for the tax year 2012–13 and subsequent tax years (though in 2012-13 the charge only applied with reference to child benefit amounts received in a week beginning after 6 January 2013).

54. The relevant provisions of that Chapter are:

> "*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.
>
> *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.
>
> For conditions A and B, see section 681B.
>
> (2) "The appropriate percentage" is—
>
> (a) 100%, or
>
> (b) if less, the percentage determined by the formula—
>
> ((ANI – L) / X) %
>
> Where—
>
> ANI is P's adjusted net income for the tax year;
>
> L is £50,000;
>
> X is £100.
>
> (3) If—
>
> (a) the total of the amounts mentioned in paragraphs (a) and (b) of subsection (1), or the amount of the charge determined under that subsection, is not a whole number of pounds, or
>
> (b) the percentage determined under subsection (2)(b) is not a whole number,

it is to be rounded down to the nearest whole number.

681H Other interpretation provisions

(1) This section applies for the purposes of this Chapter.

(2) "Adjusted net income" of a person for a tax year means the person's adjusted net income for that tax year as determined under section 58 of ITA 2007.

(3) "Week" means a period of 7 days beginning with a Monday; and a week is in a tax year if (and only if) the Monday with which it begins is in the tax year."

55. Schedule 1 FA 2012 also made relevant amendments to other provisions which are important for this case. In the Taxes Management Act 1970 ("TMA") it amended s 7 (notifying chargeability) to add the paragraph shown as emboldened

"*7 Notice of liability to income tax and capital gains tax*

(1) Every person who--

(a) is chargeable to income tax or capital gains tax for any year of assessment, and

(b) has not received a notice under section 8 of this Act requiring a return for that year of his total income and chargeable gains,

shall, subject to subsection (3) below, within six months from the end of that year, give notice to an officer of the Board that he is so chargeable.

(3) A person shall not be required to give notice under subsection (1) above in respect of a year of assessment if for that year—

(a) the person's total income consists of income from sources falling within subsections (4) to (7) below,

(b) the person has no chargeable gains, **and**

(c) the person is not liable to a high income child benefit charge.

(4) A source of income falls within this subsection in relation to a year of assessment if—

(a) all payments of, or on account of, income from it during that year, and

(b) all income from it for that year which does not consist of payments,

have or has been taken into account in the making of deductions or repayments of tax under PAYE regulations.

(5) A source of income falls within this subsection in relation to any person and any year of assessment if all income from it for that year has been or will be taken into account—

(a) in determining that person's liability to tax, or

(b) in the making of deductions or repayments of tax under PAYE regulations.

…

(7) A source of income falls within this subsection in relation to any person and any year of assessment if all income from it for that year is income on which he could not become liable to tax under a self-assessment made under section 9 of this Act in respect of that year."

56. Schedule 1 FA 2012 also amended ITEPA in two other significant ways. In section 1 it added the emboldened passage

"*1 Overview of contents of this Act*

(1) This Act imposes charges to income tax on—

(a) employment income (see Parts 2 to 7A),

(b) pension income (see Part 9), and

(c) social security income (see Chapters 1 to 7 of Part 10).

(3) This Act also—

…

(aa) makes provision for the high income child benefit charge (see Chapter 8 of Part 10)

…"

and in s 684 (PAYE Regulations) it added to the items in subsection (2), a list of the matters that may be provided by the regulation:

"2ZA Provision—

(a) for deductions to be made, if and to the extent that the payee does not object, with a view to securing that income tax payable for a tax year by the payee by virtue of section 681B (high income child benefit charge) is deducted from PAYE income of the payee paid during that year,

(b) for repayments to be made in a tax year, if and to the extent that the payee does not object, in respect of any amounts overpaid on account of income tax under that section for that tax year, and

(c) as to the circumstances and manner in which a payee may object to the making of deductions or repayments."

57. Provision was made for this by the insertion of regulation 14B into the Income Tax (Pay As You Earn) Regulations 2003 (SI 2003/2682) (the "PAYE Regulations"):

"*Determination of code in respect of high income child benefit charge*

14B. HMRC may determine a code, if and to the extent that the payee does not object, to secure that—

(a) income tax payable for a tax year by the payee by virtue of section 681B of ITEPA (high income child benefit charge) is deducted from PAYE income of the payee paid during that year, and

(b) repayments are made in a tax year in respect of any amounts overpaid on account of income tax under that section for that tax year."

Regulation 14B was inserted by– regulation 1 Income Tax (Pay As You Earn) (Amendment) Regulations 2013 (SI 2013/521) and applied for 2013-14 and later.

58. Schedule 1 FA 2012 also made two amendments to the Income Tax Act 2007 ("ITA"). It amended s 1(1) ITA by inserting the emboldened words

> "*1 Overview of Income Tax Acts*
>
> (1) The following Acts make provision about income tax—
>
> (a) ITEPA 2003 (which is about charges to tax on employment income, pension income and social security income **and makes provision for the high income child benefit charge**),
>
> …"

59. It also amended s 30(1) ITA by inserting the emboldened text to the list"

> "(1) If the taxpayer is an individual, the provisions referred to at Step 7 of the calculation in section 23 are—
>
> …
>
> Chapter 8 of Part 10 of ITEPA 2003 (high income child benefit charge),
>
> …"

60. The other important provisions of law involved in this case are those in Schedule 41 FA 2008, the penalty provision under which the appellant was charged and assessed. The relevant parts of that Schedule are set out in an Appendix.

Discussion

Was there an obligation to notify chargeability?

61. The first question, posed by paragraph 1 Schedule 41, is whether the appellant was under an obligation to notify in accordance with s 7 TMA and, if he was, whether he failed to do so by the relevant time.

62. It is without doubt that for each of those years he was chargeable to income tax, because he received earnings from an employment falling within Part 2 of ITEPA.

63. It is also without doubt that in each of those years the appellant was liable to a high income child benefit charge, and so he cannot claim to be exempted from failing to notify, as to gain exception not only must his total income be within one of the exceptions in subsection (3) (which it was – it was within subsection (4)) he must also not be subject to the HICBC.

64. We had no evidence that he had notified HMRC that he was chargeable to tax. It is arguable that his employer had notified HMRC through the filing of a P14 (or an FPS in a year where the employer was an RTI employer), as that would show that the appellant was chargeable to tax in that year, but that is not what s 7 TMA requires.

65. Nor was there any evidence that HMRC had issued a notice to file a return to the appellant for the years concerned (an action which would nullify his liability to notify). HMRC's evidence was that they had issued an awareness letter in 2012 and an SA 252 letter to him in August 2013. These told the appellant that he had the option of disclaiming child benefit or registering for self-assessment. The second option does not amount to a notice to file: registering for self-assessment is one method of notifying HMRC of chargeability, and the issuing of a notice to file is a subsequent step once a UTR is allocated.

66. We conclude therefore that the appellant failed to notify his chargeability to income tax for 2012-13, 2013-14 and 2014-15 by October 31 2013, 2014 and 2015 respectively. The appellant therefore became liable to a penalty under paragraph 1 Schedule 41.

What was the potential lost revenue?

67. The amount of the penalty is a percentage of the potential lost revenue ("PLR"). Before considering whether the percentage that HMRC have used is a reasonable one in the circumstances of the case based on the available reduction, we need to establish what the PLR is.

68. PLR is defined in paragraph 7 Schedule 41 as so much of any income tax to which the appellant is liable in respect of the tax year as *by reason of the failure* is unpaid on 31 January in the year following the tax year ("the later year").

69. HMRC's calculation of this amount includes only the income tax charged on the HICBC. This must be correct as even if an underpayment arose on a reconciliation of the appellant's income and the tax deducted under PAYE after the tax year and it was unpaid by 31 January in the later tax year, such an underpayment, and in particular its non-payment before 1 February in the later year, did not and could not arise as a result of the failure. And in fact the P800s in the file show he received a repayment in each year.

70. We have a slight doubt about what should be the correct interpretation of unpaid "on 31 January" in paragraph 7 Schedule 41. The doubt we have comes from the use of "on", because if tax is paid at say midday on 31 January of the later year there is a period in that day when the tax is unpaid and a period when it is not. But to make sense the phrase must mean unpaid at all times on 31 January.

71. But we are much more in doubt about what is meant by tax being unpaid on that date "by reason of the failure". The questions that it raises are whether it refers to a case where before 1 February in the later year a person knows as a result of a return and self-assessment having been made (whether or not delivered) that there is tax which is payable within the meaning of s 59B(1) TMA and is payable by the 31 January.

72. Given that a penalisable failure to notify can only occur after 31 October in the later year, this seems unlikely as there will be few cases where after 31 October the person (and HMRC) will so get their act together that a notice to file will have been issued and a return made and the tax calculated.

73. It is more likely that in a case where a notice to file has been given in response to a late notification or a discovery despite no notification, the calculation that shows that there is tax payable will be made after 31 January in the later year. A time is likely to come when a tax liability to HMRC is calculated. Under s 59B(4) tax payable as a result of such a self-assessment is payable by 31 January in the later year. It is certainly a tenable interpretation that that tax, unless a payment on account is made, is "tax unpaid by reason of the failure" on that 31 January even though on that date, the person may have been under no obligation to file a return and self-assessment. Had there not been a failure to notify, ie had there been a timely notification, a notice to file would have been issued in time for the tax to become payable and capable of being paid on 31 January.

74. But this is not what happened here. No notice to file was ever issued for the tax years in question. By s 59B(6) TMA an amount of income tax payable by an assessment which is not a self-assessment is payable on the day following the end of a period of 30 days from the day on which the notice of assessment was given. If by that date is meant the date on the notice, 12 April 2017, then 30 days from then is 12 May 2017 so the tax was due and payable on 13 May 2017.

75. It is of course obvious that the tax payable as a result of the assessment was unpaid on 31 January in each of the later years concerned. Was it unpaid then by reason of the failure to notify? Had a person notified chargeability in time then HMRC would have been able to issue a s 29 TMA assessment so that the due date would have been on or before 1 February in the later year. Because in this case no notification of liability was made our first thought is that it was the failure to notify that resulted in tax being unpaid on 31 January in the later year.

76. The contrary argument in this s 29 TMA assessment case would be that the difference in the due and payable date makes a difference. Whereas with a return and self-assessment it is meaningful to say that tax with a due and payable date of 31 January is unpaid on that date because of the failure, it cannot be said that tax which could only become due and payable much later than 31 January can meaningfully be described as unpaid on that date in any circumstances.

77. The wording of paragraph 7(1) Schedule 41 FA 2008 does not help to resolve this issue. But we can find nothing in eg the Explanatory Notes for Schedule 41 or the documents published during the consultation on HMRC Powers in 2007 and 2008 to suggest that any change in the law was contemplated in this area.

78. We have therefore considered paragraph 7(1)'s immediate predecessor, s 7(8) TMA (as inserted by substitution by paragraph 1 Schedule 19 FA 1994 with effect for the introduction in 1996 of self-assessment) to see if an archaeological exercise throws any light on the matter. That subsection says:

> "If any person, for any year of assessment, fails to comply with subsection (1) above, he shall be liable to a penalty not exceeding the amount of the tax—

> (a) in which he is assessed under section 9 or 29 of this Act in respect of that year, and
>
> (b) which is not paid on or before the 31st January next following that year."

79. This seems to us to be much clearer than paragraph 7. It caters for both the self-assessment case (a s 9 assessment) and an assessment which is not a self-assessment, although it is limited to a s 29 TMA assessment. The "PLR" in this previous enactment is either the tax shown on a self-assessment or an HMRC assessment under s 29 actually made for the year which is unpaid before 1 February in the later year, irrespective of the due date.

80. In this case then we accept that the PLR is the tax on the s 29 assessment, tax which was unpaid on 31 January in each of the later years. We reject the contrary argument set out in §76 as it would irrationally discriminate between cases where a notice to file was give and one where a s 29 TMA assessment was made instead.

81. We would however add that where neither was done there can be no penalty for failure to notify based on a theoretical calculation, nor in an case where an assessment which is not a self-assessment and is not made under s 29 TMA is made.

82. Where there is what purports to be a s29 assessment, it must actually be a s 29 assessment which charges tax which becomes due and payable.

Was there a valid s 29 assessment?

83. The next question is then whether what was issued here was a valid s 29(1) TMA assessment. Such an assessment may only be made if HMRC discover (relevantly)

> that **any income** which ought to have been assessed to income tax … [has] not been assessed

84. This raises a fundamental issue: what is the "income" that is assessed in the s 29 assessment issued in this case? It cannot be the child benefit, because that is exempt by virtue of s 677(1) ITEPA Table B Part 1, and in any case the appellant was not the spouse receiving child benefit.

85. If we look at the charge to tax it is not expressed in Chapter 8 Part 10 ITEPA to be a charge on income. In fact the amendments made by Schedule 1 FA 2012 to ITEPA draw an explicit contrast between what is in s 1(1)(c) ITA 2007 (social security *income*, which is what child benefit is even if exempt) and what is covered by s 1(3)(aa) which does not refer to *income* but to the charge to tax.. Much the same point can be made about s 1(1) ITA 2007

86. A comparison can be made with provisions in Part 4 FA 2004 (pension schemes). There tax is charged on a number of events involving a variety of matters, some very far removed from any concept of income such as the lifetime allowance charge, and other at least involving receipts in some cases such as the unauthorised payments charge in s 208 FA 1994. But s 208 and other sections of FA 2004 not only make it clear that they do not involve "income" for any purpose of the Tax Acts, but regulation 9 of the

Registered Pensions Schemes (Accounting and Assessment) Regulations 2005 (SI 2005/3454) amends s 29(1) TMA to specifically add a discovery of a loss of tax arising on these pension amounts to the scope of a discovery assessment under that subsection.

87. We are aware that making comparisons of this sort does not provide an answer to the question of statutory interpretation we are faced with, but it shows that legislation enacted before the HICBC recognised that, where a payment or other amount is not naturally "income", special measures are required in cases where there is no self-assessment.

88. There is a variety of such special methods to being amounts not naturally income into charge other than through self-assessment. They may be "treated as income" and charged under Chapter 8 Part 5 ITTOIA (and see s 1016 ITA 2007). The method may, as we have mentioned in §86, be to amend s 29 TMA or they may involve creating a separate category of HMRC assessment not governed by s 29 (see for example s 698 etc ITA 2007 (transactions in securities)).

89. As to the last method it is very noticeable that provisions in TMA about assessment procedures and appeal rights very close to s 29 do not treat the notion of an assessment which is not a self-assessment as synonymous with a s 29 discovery assessment. See in particular s 30A(1), 31(1)(d) and 50(6)(c) TMA as well as s 59B(6) referred to in §74.

90. But nothing in Schedule 1 FA 2012 either amended s 29 or provided its own assessing provision.

91. A further indication that the charge does not involve any tax on "income" is in the amendment to s 684 ITEPA and the PAYE Regulations made on the introduction of the HICBC charge. If the chargeable amount was income, then regulation 14 of the PAYE Regulations would have been sufficient to allow coding out of the HICBC without the need for regulation 14B.

Conclusions

92. The conclusions we draw then are that

(1) in case of failure to notify within paragraph 1 Schedule 41, the PLR is the tax shown on any self-assessment actually made or on any s 29 TMA discovery assessment made on the taxpayer.

(2) in this case there was neither a self-assessment (because no notice to file was given) nor a s 29 TMA assessment (as the HICBC is not income, a requirement of s 29(1) TMA).

(3) therefore there is no PLR within the terms of paragraph 7

(4) there can be no penalties.

93. Nothing we have said here relates to the treatment of HICBC in a self-assessment, as that was not the case here. Nor does it affect the collection of HICBC in a tax code.

We add here that we can see no reason why a HICBC charge has to be self-assessed before it can be coded out as HMRC seemed to suggest.

Other penalty issues – in case we are wrong

94. In case it is found that we are wrong about the inability of HMRC to assess HICBC using a s 29 assessment, we have considered further matters on the assumption that there was a PLR equal to the amount of the HICBC.

95. HMRC have given 100% reductions to the standard penalty percentage on account of a prompted disclosure and we agree that is right, or at least in accordance with HMRC's policy.

96. As to whether the minimum penalty here should be 10% the question is whether HMRC became aware of the failure less than 12 months after the time when the tax *first* becomes unpaid by reason of the failure. It is arguable that when the SA 252 was issued HMRC must have been aware that the appellant earned more than £50,000 and that his wife received child benefit and had not stopped receiving it. That is how it seems the SA 252s were targeted. And that awareness arose within 12 months of the failure.

97. We add further that having read the Upper Tribunal's decision in *HMRC v Raymond Tooth* [2018] UKUT 38 (TCC) (Marcus Smith J and Judge Charles Hellier), we are inclined to the view that the assessments, had they been valid, could well have been "stale". The issue of the SA 252, whether or not the appellant received it, indicates strongly that HMRC discovered no later than then that the appellant was chargeable to the HICBC. The opening letter of 1 February 2017 admits that HMRC were well aware of his liability, and there seems to have been nothing in the intervening period which added to their knowledge. A stale discovery assessment is an invalid assessment and so there would have been no "unpaid tax".

98. As to whether the appellant had a reasonable excuse, while we accept his evidence that neither he nor his wife received any awareness letters or SA 252s in 2012 or 2013, we do not think that this is enough to establish a reasonable excuse. Unlike some tax changes this one was very high profile and was widely discussed in all sorts of media, and we think that it would not be unreasonable for the appellant in his particular circumstances, knowing that his wife was receiving child benefit and knowing his own income level, to make enquiries about the change.

99. We have also considered whether the cursory consideration given by HMRC to the question whether there were special circumstances here amounted to a flawed decision. We think it does because so little information and reasoning is given. But we do not see anything unusual or out of the ordinary in the circumstances of this case, in fact we suspect the appellant is one of many who did not notify liability to the HICBC.

100. Nor can we say that the clear compliance intention of Schedule 41 is not to penalise a failure to notify the HICBC. Parliament specifically amended s 7 TMA to

prevent someone subject to the HICBC from being excepted from the obligation to notify chargeability.

Decision

101. In accordance with paragraph 19(1) Schedule 41 FA 2008 we cancel the penalty assessments.

Observations on the tax assessments and interest

102. The appellant did not appeal against the discovery assessments and has paid the CHIBC. Our decision above includes a finding that those assessments were not validly issued to bring the HICBC into charge. We leave it to the parties, both the appellant and HMRC to decide what of anything to do about the assessments as a result of this decision.

103. The appellant did however consider the interest charges on the assessments unfair. This Tribunal has no jurisdiction to decide on the correct treatment of interest charged on late payment.

104. We have however, given our decision on the assessments, considered the position on interest.

105. The interest charged on the appellant in a statement dated 12 April 2017, the date the assessments to the HICBC were issued, is £24.29 on a tax bill of £258 (2012-13), £47.27 on a tax bill of £736 (2013-14) and £56.37 on a tax bill of £1,646. These represent nearly 10%, 7% and 4% respectively.

106. It is obvious that interest charges of this magnitude cannot be based on the due date for payment of the tax on the assessments as that had not at that time arrived. Yet the notices of assessment say:

> "We will charge you interest on any tax you pay late. We will charge it from the date the payment should have been made …".

107. They then add:

> "We will charge you interest on the above amount from 31 January 2014/2015/2016."

108. The opening letter to the appellant said:

> "We will also charge you interest, on a daily basis, on any tax that you pay later than it was originally due."

109. So why does interest apparently run from 31 January 2014, 2015 and 2016?

110. If we turn to the rules for interest in the Taxes Acts we find s 101 FA 2009.

> "(1) This section applies to any amount that is payable by a person to HMRC under or by virtue of an enactment.
>
> …

(3) An amount to which this section applies carries interest at the late payment interest rate from the late payment interest start date until the date of payment.

(4) The late payment interest start date in respect of any amount is *the date on which that amount becomes due and payable*.

(5) In Schedule 53—

…

(b) Part 2 makes special provision as to the late payment interest start date." [Our emphasis]

111. We cannot see in s 101 FA 2009 any escape from the conclusion that in this case LPISD was 12 May 2017. So where does 31 January 2014 etc come from? There might be a clue in the wording of subsection (5)(b) but nothing in subsection (4) suggest that the statement in it is in any way qualified.

112. But when we look at Part 2 Schedule 53 the first paragraph, paragraph 3, is headed "amendments and discovery assessments etc". It says

"(1) This paragraph applies to any amount which is due and payable as a result of—

(c) an assessment made by HMRC in place of an assessment ("assessment A") which ought to have been made by a taxpayer.

(2) The late payment interest start date in respect of that amount is the date which would have been the late payment interest start date if—

(a) assessment A had been complete and accurate and had been made on the date (if any) by which it was required to be made, and

(b) accordingly, the amount had been due and payable as a result of assessment A.

(3) In the case of a person ("P") who failed to give notice in accordance with a requirement under section 7 of TMA 1970 (notice of liability to tax) that arose by virtue of subsection (1A) of that section, the reference in sub-paragraph (1)(c) to an assessment which ought to have been made by P is a reference to the assessment which P would have been required to make if an officer of Revenue and Customs had given notice under section 8 of that Act."

113. The first question is what (self-)assessment ought the appellant to have made? He had not been given a s 8 TMA notice to file, so the answer is there is no such assessment. Sub-paragraph (3) then seems to come to HMRC's rescue by dealing with a person who hadn't, like the appellant, received a s 8 TMA notice (the counterfactual at the end). But this creation of a deemed obligation to self-assess in the dim and distant past only applies if P has failed to give notice of chargeability to income tax.

114. Here the appellant, being P, did fail to give notice under s 7 TMA although he was as a person liable to the HICBC required to do so. This must be the basis on which HMRC say the LPISD is 31 January 2014 etc. But the notices of assessment are highly misleading.

115. In this case it is our view that as we have decided that the assessment is not valid there is no tax which became due and payable. Therefore s 109(1) FA 2009 does not apply. We would therefore expect, but cannot require, HMRC to repay any interest the appellant has paid, and to remove any interest not paid from the appellant's statements of account.

116. 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.

RICHARD THOMAS
TRIBUNAL JUDGE

RELEASE DATE: 22 MARCH 2018

APPENDIX

Schedule 41 FA 2008

Failure to notify etc

1 A penalty is payable by a person (P) where P fails to comply with an obligation specified in the Table below (a "relevant obligation").

Tax to which obligation relates	Obligation
Income tax and capital gains tax	Obligation under section 7 of TMA 1970 (obligation to give notice of liability to income tax or capital gains tax).

Degrees of culpability

5—(1) A failure by P to comply with a relevant obligation is—

(a) "deliberate and concealed" if the failure is deliberate and P makes arrangements to conceal the situation giving rise to the obligation, and

(b) "deliberate but not concealed" if the failure is deliberate but P does not make arrangements to conceal the situation giving rise to the obligation.

Amount of penalty: standard amount

6—(1) This paragraph sets out the penalty payable under paragraph 1.

(2) If the failure is in category 1, the penalty is—

…

(c) for any other case, 30% of the potential lost revenue.

6D Paragraphs 7 to 11 define "potential lost revenue".

Potential lost revenue

7—(1) "The potential lost revenue" in respect of a failure to comply with a relevant obligation is as follows.

(2) In the case of a relevant obligation relating to income tax or capital gains tax and a tax year … the potential lost revenue is so much of any income tax or capital gains tax to which P is liable in respect of the tax year as by reason of the failure is unpaid on 31 January following the tax year.

11—(1) In calculating potential lost revenue in respect of a relevant act or failure on the part of P no account is to be taken of the fact that a potential loss of revenue from P is or may be balanced by a potential over-payment by another person (except to the extent that an enactment requires or permits a person's tax liability to be adjusted by reference to P's).

(2) In this Schedule "a relevant act or failure" means--

(a) a failure to comply with a relevant obligation,

…

Reductions for disclosure

12—(1) Paragraph 13 provides for reductions in penalties—

(a) under paragraph 1 where P discloses a relevant failure that involves a domestic matter, and

…

(1B) Sub-paragraph (2) applies where P discloses—

(a) a relevant failure that involves a domestic matter,

…

(2) P discloses the relevant act or failure by—

(a) telling HMRC about it,

(b) giving HMRC reasonable help in quantifying the tax unpaid by reason of it, and

(c) allowing HMRC access to records for the purpose of checking how much tax is so unpaid.

(3) Disclosure of a relevant act or failure—

(a) is "unprompted" if made at a time when the person making it has no reason to believe that HMRC have discovered or are about to discover the relevant act or failure, and

(b) otherwise, is "prompted".

(4) In relation to disclosure "quality" includes timing, nature and extent.

(6) In this paragraph "relevant failure" means a failure to comply with a relevant obligation.

13A (1) If a person who would otherwise be liable to a penalty of a percentage shown in column 1 of the Table (a "standard percentage") has made a disclosure, HMRC must reduce the standard percentage to one that reflects the quality of the disclosure.

(2) But the standard percentage may not be reduced to a percentage that is below the minimum shown for it—

(a) for a prompted disclosure, in column 2 of the Table, and

(b) for an unprompted disclosure, in column 3 of the Table.

(3) Where the Table shows a different minimum for case A and case B—

(a) the case A minimum applies if HMRC becomes aware of the failure less than 12 months after the time when the tax first becomes unpaid by reason of the failure;

(b) otherwise, the case B minimum applies.

Standard %	Minimum % for prompted disclosure	Minimum % for unprompted disclosure
30%	Case A: 10%	Case A: 0%
	Case B: 20%	Case B: 10%

Special reduction

14—(1) If HMRC think it right because of special circumstances, they may reduce a penalty under any of paragraphs 1 to 4.

(2) In sub-paragraph (1) "special circumstances" does not include—

(a) ability to pay, or

(b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

(3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to—

(a) staying a penalty, and

(b) agreeing a compromise in relation to proceedings for a penalty.

Assessment

16—(1) Where P becomes liable for a penalty under any of paragraphs 1 to 4 HMRC shall—

(a) assess the penalty,

(b) notify P, and

(c) state in the notice the period in respect of which the penalty is assessed.

(2) A penalty under any of paragraphs 1 to 4 must be paid before the end of the period of 30 days beginning with the day on which notification of the penalty is issued.

(3) An assessment—

(a) shall be treated for procedural purposes in the same way as an assessment to tax (except in respect of a matter expressly provided for by this Act),

(b) may be enforced as if it were an assessment to tax, and

(c) may be combined with an assessment to tax.

(4) An assessment of a penalty under any of paragraphs 1 to 4 must be made before the end of the period of 12 months beginning with—

(a) the end of the appeal period for the assessment of tax unpaid by reason of the relevant act or failure in respect of which the penalty is imposed, or

(b) if there is no such assessment, the date on which the amount of tax unpaid by reason of the relevant act or failure is ascertained.

(5) In sub-paragraph (4)(a) "appeal period" means the period during which—

(a) an appeal could be brought, or

(b) an appeal that has been brought has not been determined or withdrawn.

(6) Subject to sub-paragraph (4), a supplementary assessment may be made in respect of a penalty if an earlier assessment operated by reference to an underestimate of potential lost revenue.

Appeal

17—(1) P may appeal against a decision of HMRC that a penalty is payable by P.

(2) P may appeal against a decision of HMRC as to the amount of a penalty payable by P.

18—(1) An appeal shall be treated in the same way as an appeal against an assessment to the tax concerned (including by the application of any provision about bringing the

appeal by notice to HMRC, about HMRC review of the decision or about determination of the appeal by the First-tier Tribunal or the Upper Tribunal).

(2) Sub-paragraph (1) does not apply—

(a) so as to require P to pay a penalty before an appeal against the assessment of the penalty is determined, or

(b) in respect of any other matter expressly provided for by this Act.

19—(1) On an appeal under paragraph 17(1) the tribunal may affirm or cancel HMRC's decision.

(2) On an appeal under paragraph 17(2) the tribunal may—

(a) affirm HMRC's decision, or

(b) substitute for HMRC's decision another decision that HMRC had power to make.

(3) If the First-tier tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 14—

(a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or

(b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 14 was flawed.

(4) In sub-paragraph (3)(b) "flawed" means flawed when considered in the light of the principles applicable in proceedings for judicial review.

(5) In this paragraph, "tribunal" means the First-tier Tribunal or Upper Tribunal (as appropriate by virtue of paragraph 18(1)).

Reasonable excuse

20—(1) Liability to a penalty under any of paragraphs 1, 2, 3(1) and 4 does not arise in relation to an act or failure which is not deliberate if P satisfies HMRC or (on an appeal notified to the tribunal) the tribunal that there is a reasonable excuse for the act or failure.

(2) For the purposes of sub-paragraph (1)—

(a) an insufficiency of funds is not a reasonable excuse unless attributable to events outside P's control,

(b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the relevant act or failure, and

(c) where P had a reasonable excuse for the relevant act or failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the relevant act or failure is remedied without unreasonable delay after the excuse ceased.

Interpretation

24—(1) This paragraph applies for the construction of this Schedule

(2) "HMRC" means Her Majesty's Revenue and Customs.

…