Neutral Citation: [2023] UKFTT 00649 (TC)

Case Number: TC08870

FIRST-TIER TRIBUNAL
TAX CHAMBER

[By remote video hearing]

Appeal reference: TC/2022/11875

INCOME TAX – High Income Child Benefit Charge (HICBC) – discovery assessments under section 29 Taxes Management Act 1970 – Wilkes – section 97 FA 2022 – assessments upheld – penalties – whether reasonable excuse – no – appeal dismissed

Heard on: 28 April 2023
Judgment date: 14 July 2023

Before

JUDGE ANNE SCOTT
MEMBER MICHAEL BELL

Between

THOMAS JAMES NIEWIAROWSKI

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: We heard the appellant

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

DECISION

INTRODUCTION

1. This is an appeal against:-

   (a) Discovery assessments made under section 29 Taxes Management Act 1970 ("TMA") in the total sum of £11,950 for the tax years 2012/13 to 2019/20 inclusive, and

   (b) Penalty assessments raised under Schedule 41 Finance Act 2008 ("FA08") raised for the tax years 2012/13 to 2017/18 inclusive in the total sum of £909.60.

2. The penalties were charged as a result of the appellant's failure to notify liability to the High Income Child Benefit Charge ("HICBC"). The TMA assessments were issued to the appellant on 21 April 2021 and the FA08 assessments on 22 April 2021.

3. In summary:-

Year	Decision	Amount
2012/13	Tax Assessment	£175.00
2013/14	Tax Assessment	£1752.00
2014/15	Tax Assessment	£1770.00
2015/16	Tax Assessment	£1823.00
2016/17	Tax Assessment	£1788.00
2017/18	Tax Assessment	£1788.00
2018/19	Tax Assessment	£1788.00
2019/20	Tax Assessment	£1066.00
2012/13	Schedule 41 Penalty	£17.50
2013/14	Schedule 41 Penalty	£175.20
2014/15	Schedule 41 Penalty	£177.00
2015/16	Schedule 41 Penalty	£182.30
2016/17	Schedule 41 Penalty	£178.80
2017/18	Schedule 41 Penalty	£178.80
2018/19	Schedule 41 Penalty	£178.80

4. With the consent of the parties the hearing was conducted by video link using the Tribunal's video hearing system.

5. 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.

6. The documents to which we were referred comprised a hearing bundle consisting of 192 pages and a generic authorities bundle extending to 808 pages.

Legislation

7. 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."

8. 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 the appellant did not make a Self-assessment Tax Return in the years assessed.

9. 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 *HMRC v Jason Wilkes* [2021] UKUT 150 (TCC) ("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.

10. 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 matters.

11. 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. Section 97 reads:-

"97 Discovery assessments for unassessed income tax or capital gains tax

(1) In section 29 of TMA 1970 (assessment where loss of tax discovered), in subsection (1), for paragraph (a) substitute—

"(a) that an amount of income tax or capital gains tax ought to have been assessed but has not been assessed,".

(2) In the Registered Pension Schemes (Accounting and Assessment) Regulations 2005 (S.I.2005/3454), omit regulation 9 (which modifies section 29(1)(a) of TMA 1970).

(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 (40 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),

(b) section 424 or ITA 2007 (gift aid: charge to tax),

(c) section 205 or 206 of FA 2004 (pensions) but only where the section is applied by Schedule 34 to that Act, or

(d) section 208, 209, 214, 227 or 244A of FA 2004 (pensions), including where the section is applied by that Schedule.

(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 be 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.

(9) In this section—

"discovery assessment" means an assessment under section 29(1)(a) of TMA 1970, and

"HMRC" means Her Majesty's Revenue and Customs, and

"notified" means notified in writing."

12. 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.

Background facts

13. At all times the appellant's employment income was taxed under PAYE.

14. His wife first claimed child benefit in 2008 and when the second child was born in 2011 a claim was made for both children.

15. On 8 January 2021, HMRC issued a letter to the appellant advising him to check whether or not he was liable to the HICBC. It explained that liability arises where a taxpayer's adjusted net income ("ANI") exceeds £50,000 within a tax year and either the taxpayer or the taxpayer's partner receives Child Benefit. That letter made it explicit that if the appellant was not sure about whether there was a liability then he should contact HMRC.

16. On 13 January 2021, the appellant emailed HMRC having first telephoned HMRC. That email confirmed that Child Benefit had been claimed but the appellant pointed out that he had known nothing about HICBC, he had never been asked to complete a self-assessment tax return and in the 2011/2012 financial year, his total earnings were £46,324. His total earnings for 2012/2013 were £54,042 on a basic salary of approximately £32,000. He confirmed that he would provide evidence of any figures on request. He complained that this sudden demand for substantial charges dating back over eight years was both unfair and unjust. He sought information on what steps he should take next.

17. On 22 January 2021, HMRC emailed the appellant pointing out that the changes had come into effect from 7 January 2013 and had been widely publicised in the media. They explained how the HICBC should be calculated and asked the appellant to provide his calculations.

18. That evening the appellant responded reiterating the previous arguments. He stated that he had been researching the HICBC, that it appeared that numerous people throughout the UK had successfully appealed the HICBC and he strongly believed that his case held many significant similarities. He wished to appeal. He stated that as a long term PAYE employee with no requirement to complete self-assessment tax returns it was completely unreasonable that HMRC should demand that he provide details of his earnings in a situation where they held full details.

19. On 8 February 2021, HMRC wrote to the appellant stating that they could not accept an appeal of the HICBC because they had not yet established the correct tax position or issued an appealable decision. They reiterated the need for him to submit a calculation of the HICBC. They stated that there was no need to provide the information for 2019/20 at that stage as they would send him a self-assessment tax return in due course.

20. On 10 February 2021, the appellant lodged with HMRC his calculation of the HICBC for the years 2012/13 to 2018/19 inclusive. Over those years his income continued to rise.

21. On 23 February 2021, HMRC checked their Real Time Information system to confirm the calculations.

22. On 24 February 2021, HMRC wrote to the appellant requesting him to complete a questionnaire explaining why he did not notify liability to the HICBC. The appellant responded on 27 February 2021, explaining again that the first time that his earnings were greater than the threshold was in 2013 and that had arisen simply as a result of overtime. The first information that he had received was the January 2021 letter from HMRC.

23. On 4 March 2021, HMRC telephoned the appellant to point out that the letter of 8 January 2021 had stated that "You need to tell us if you are due to pay the charge for tax

year 2019 to 2020 …" and that information had not been provided. He was advised that he could make a disclosure as the self-assessment window had closed. The appellant requested that HMRC confirm what was required and HMRC issued an email that day confirming the position.

24. On 8 March 2021, the appellant made that disclosure by email.

25. On 21 April 2021, HMRC issued the TMA assessments based on the disclosures by the appellant.

26. On 22 April 2021, HMRC issued the notice of penalty assessments.

27. On 30 April 2021, the appellant lodged an appeal with HMRC against the assessments and interest. HMRC treated that also as being an appeal against the penalties. The appellant reiterated his previous arguments.

28. Given the provisions of section 97 FA 2022 the arguments advanced in the letter of appeal should be recorded in full, namely:-

> "I have never received any information from HM Revenue and Customs explaining the changes in legislation that were introduced in 2013 and was therefore completely oblivious to any potential tax implications until I was first requested to complete a self-assessment tax return by yourselves on 12/01/21. At this point I immediately responded to the communication, and willingly provided all the information requested of me. Due to being a full time PAYE employee with the same company since 2008, this was the first time I've ever been required, or requested to complete a self-assessment tax return, and therefore have never had reason to familiarise myself with tax charges and allowances.
>
> My wife first started claiming Child Benefit in 2008 when our first child was born. In 2011 when our second child was born, my wife then claimed for both children. Both of our children were born before the introduction of the HICBC 2013, therefore, due to no communication from yourselves, we had no knowledge that anything had changed in terms of the Child Benefit we were receiving. I also believe that it is completely unacceptable that this has been able to continue for 8 years given that HMRC possess all the relevant information to be able to distinguish whether HICBC should be applied or not.
>
> In the 2011/2012 financial year my total earnings were £46,324. My total earnings for the 2012/2013 financial year were £54,042 on a basic salary of around £32,000, it was therefore well beyond January 1st 2013 that I earned more than the £50,000 HICBC threshold, thus HM Revenue and Customs would have had no reason to contact us to inform us of any changes at that time.
>
> With so little communication received from HMRC until 2021; 8 years after the introduction of the HICBC, my employment status and the years at which my children were born, I wholeheartedly dispute these charges, and believe that these payment demands are utterly unfair and unjust. I request all charges be reconsidered with the reasonings detailed in this letter considered as the mitigating circumstances for the complete lack of awareness on our behalf."

29. On 15 September 2021, HMRC replied to the appellant stating that *Wilkes UT* was the subject matter of an appeal. In regard to the penalties, HMRC stated that they relied upon the decision in *HMRC v Robertson* [2019] UKUT 0202 (TCC) but they were "working to

understand if the Tribunal decision will affect your case". They asked for payment of the HICBC but stated that they had "paused" the penalties. They stated explicitly that:-

> "At this time, HMRC's view is that the assessments issued under Section 29 of the Taxes Management Act 1970 are still valid and due to be paid."

30. What HMRC did not do was to "pause" the HICBC assessments.

31. On 16 May 2022, HMRC wrote to the appellant setting out their view of the matter that the assessments had been correctly raised and both the tax and penalties were due.

32. There were no penalties imposed for 2019/20.

33. On 23 May 2022, the appellant requested a review arguing that he did have a reasonable excuse because his baseline salary did not exceed the threshold in 2013 and overtime payments were neither guaranteed nor predictable. He argued that his case should be dealt with in line with the appeal in *Wilkes*.

34. On 9 July 2022, HMRC wrote to the appellant upholding the assessments and the penalties that are currently the subject matter of this appeal.

35. On 12 July 2022, the appellant lodged an in-time appeal with the Tribunal arguing that neither he nor his wife had been aware of HICBC until 2021 when HMRC wrote to him.

Discussion

36. In his appeal to the Tribunal, the appellant relied on *Wilkes UT* where it was decided that section 29(1)(a) TMA was an invalid means of making an assessment in a case where a taxpayer has failed to notify liability to the HICBC. Following the issue of the decision of the Upper Tribunal, and before that was upheld by the Court of Appeal on 7 December 2022, the Finance Act 2022 was enacted.

37. The problem for the appellant is that section 97 of that Act amended section 29 TMA such that the argument that was successful in *Wilkes* does not apply to the amended section 29 TMA. Section 97 makes it clear that an assessment which is the subject of an appeal made to HMRC after 30 June 2021 is a "protected assessment" and is thus subject to the amended section 29 TMA.

38. In this case, the appellant made his appeal to HMRC on 30 April 2021 so it was before 30 June 2021. However, as can be seen from his appeal (see paragraph 28 above), he did not raise the issue of an invalid assessment or reference *Wilkes*.

39. For the avoidance of doubt, we agree with the Tribunal in *Hextall v HMRC* [2023] UKFTT 390 (TC) where Judge Sinfield and Mr Howard found that it is not necessary for the appellant to mention *Wilkes FTT* or *UT* specifically. The issue may be raised by describing the issue or the *Wilke*s cases in general terms. However, as they said at paragraph 47:-

> "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."

40. As can be seen there were no such arguments. Of course, we understand that the appellant would view that as a very technical point. However, that is the law. The Tribunal was created by statute and can only apply the law as it is enacted.

41. The first mention of *Wilkes* was in HMRC's letter of 15 September 2021. In that letter the appeal of the assessments was not paused. In fact, that letter makes it explicit that, although HMRC were looking at the implications of the various court decisions, the

assessments remained due and payable (see paragraph 29 above). The penalties were "paused".

42. Accordingly, the assessments are protected assessments in terms of that legislation.

43. In summary, in enacting section 97, Parliament has ensured that the decision in *Wilkes* cannot impact on the appellant's case.

44. The appellant's income was admittedly above the threshold in all of the relevant years including the year in which the HICBC was introduced. Therefore he is liable for the HICBC. The assessments have been correctly calculated and we therefore uphold them.

45. It is not disputed by the appellant that he did not notify his liability to the HICBC. Therefore, because taxpayers must give notice of their liability to the HICBC within six months from the end of the tax year in question, he did become liable to penalties.

46. HMRC has assessed the penalties as being non-deliberate and unprompted. In terms of the relevant legislation, HMRC have charged the penalties at the minimum level. The next question is whether the appellant had a reasonable excuse for his failure to notify liability to the HICBC?

47. There is no statutory definition of reasonable excuse. However, we agree with Judge Berner in *David Collis v HMRC* [2011] UKFTT 588 (TC) where he stated at paragraph 29 that:-

> "… [a] penalty applies if the inaccuracy in the relevant document is due to a failure on the part of the taxpayer (or other person given the document) to take reasonable care. We consider that the standard by which this falls to be judged is that of a prudent and reasonable taxpayer in the position of the taxpayer in question".

48. HMRC relied on paragraph 81 in *Perrin v HMRC* [2018] UKUT 156 (TCC) which reads:

> "81. When considering a "reasonable excuse" defence, therefore, in our view the FTT can usefully approach matters in the following way:
>
> (1) First, establish what facts the taxpayer asserts give rise to a reasonable excuse (this may include the belief, acts or omissions of the taxpayer or any other person, the taxpayer's own experience or relevant attributes, the situation of the taxpayer at any relevant time and any other relevant external facts).
>
> (2) Second, decide which of those facts are proven.
>
> (3) Third, decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default and the time when that objectively reasonable excuse ceased. In doing so, it should take into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times. It might assist the FTT, in this context, to ask itself the question "was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?"
>
> (4) Fourth, having decided when any reasonable excuse ceased, decide whether the taxpayer remedied the failure without unreasonable delay after that time (unless, exceptionally, the failure was remedied before the reasonable excuse ceased). In doing so, the FTT should again decide the matter objectively, but taking into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times."

49. HICBC took effect from the tax year 2012/13 in relation to child benefit received in a week beginning after 6 January 2013. As can be seen the appellant's wife was in receipt of child benefit at that time and his ANI exceeded the threshold. There was extensive publicity. His income rose considerably over the following years and was significantly over the threshold.

50. We cannot accept the argument that HMRC knew what his income was and should therefore have sent him a self-assessment tax return. HMRC do not have a statutory duty to notify taxpayers who are potentially liable to the HICBC or indeed to notify any potential changes in the law.

51. What HMRC did do was to mount an extensive media and publicity campaign starting in the autumn of 2012 which was reinforced after the introduction of the HICBC. There has been further, and often unfavourable, publicity in the intervening years.

52. The legislation places the obligation to notify liability on the taxpayer which means that it is for the taxpayer to ensure that all income, whether overtime, benefits in kind or benefits etc, is correctly assessed to tax. Unfortunately Child Benefit was claimed in circumstances where the appellant's income exceeded the threshold in every year.

53. The appellant has simply relied on the fact that he was subject to PAYE, his income, because of overtime rose, but he was simply unaware of the HICBC.

54. The appellant may not have been aware of the HICBC but the test is not whether he was or was not aware, it is whether the reasonable taxpayer, observant of his obligations should have been aware. His income in 2011/12 had been £46,324 so the overtime payments in that year had put him close to the threshold for the HICBC which was introduced with effect from January 2013. As can be seen his income for 2012/13 was £54,042 which was a significant further increase.

55. This was not a case of someone whose income suddenly rose above the threshold years after the HICBC was introduced. The publicity campaign by HMRC was not limited to 2012. It continued through 2013 with press releases in March and September 2013. His income was above the threshold in both of those months.

56. Given that in more than half of the years under appeal his income was in excess of £75,000 per annum, it would have been prudent to check the taxation position.

57. We find that the penalties were assessed in time in terms of the legislation and that in regard to the penalties there was not a reasonable excuse nor special circumstances for the failure to notify liability.

58. Whilst we understand that the appellant believes that the law is not only unfair but also unjust, unfortunately for the appellant, the Upper Tribunal in *HMRC v Hok* [2012] UKUT 363 (TCC) made it clear that this Tribunal cannot consider whether the law is fair or not.

59. The Tribunal can only find the facts and apply the relevant law as enacted by Parliament. Parliament, and only Parliament, can change the HICBC legislation and that includes the issue of penalties in relation thereto. The Tribunal has no jurisdiction to amend or ignore the legislation.

Decision

60. For all these reasons we find that the assessments are validly made and the appellant has not established a reasonable excuse in relation to the penalties. The appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

61. 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.

ANNE SCOTT
TRIBUNAL JUDGE

Release date: 14th JULY 2023