Neutral Citation: [2024] UKFTT 00277 (TC)

Case Number: TC09123

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2023/01142

HIGH INCOME CHILD BENEFIT CHARGE – penalties for failure to notify – discovery assessments under section 29 of the Taxes Management Act 1970 – whether assessments made within time limits – yes – whether reasonable excuse – no – appeal dismissed

Heard on: 29 January 2024
Judgment date: 27 March 2024

Before

TRIBUNAL JUDGE RACHEL GAUKE
ANN CHRISTIAN

Between

QASIM LATIF

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: In person

For the Respondents: Sawdah Mia, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. This is an appeal by Mr Latif against discovery assessments made under section 29 of the Taxes Management Act 1970 (TMA 1970) for a total amount of £17,887.00 for tax years 2012-13 to 2019-20, inclusive. Mr Latif also appealed against a penalty assessment made under Schedule 41 to the Finance Act 2008 (FA 2008) for a total amount of £3,327.30 for the same tax years. Both the discovery and penalty assessments relate to the high income child benefit charge (HICBC).

2. Having heard and considered the evidence and arguments of both parties, we decided to dismiss Mr Latif's appeal, for the reasons that follow.

HEARING AND EVIDENCE

3. The hearing was conducted by video link on the tribunal's Video Hearing Service. 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 to observe the proceedings. As such, the hearing was held in public.

4. The documents to which we were referred were a 243-page document bundle, which included HMRC's statement of case, and HMRC's generic 925-page HICBC bundle of legislation, case law and other materials. Mr Latif also provided us with a 213-page bundle of case law and legislation. In addition, HMRC provided a further 71-page bundle of case law relating to section 97(5)(b) of the Finance Act 2022 (FA 2022).

5. An issue arose at the hearing as to the email address which had been used for Mr Latif in an exchange of emails between the parties on 13 December 2019 and 24 December 2019, as although the emails were in the document bundle, the address was not visible. In accordance with directions which we made at the hearing, Ms Mia, who appeared before us for HMRC, sent copies of these emails, with visible addresses, to the Tribunal after the hearing, copied to Mr Latif. We decided it was in the interests of justice to admit these emails as evidence of the address from which, and to which, the emails had been sent.

6. We had oral evidence at the hearing from Mr Latif and from two HMRC witnesses, Officer Nathaniel Chigwida and Officer Steven Thomas. HMRC's document bundle included a witness statement from Officer Chigwida, and another from Officer Thomas.

7. Officer Chigwida worked on HMRC's campaign to identify taxpayers who appeared to be liable to the HICBC but had not declared their liability. His evidence related to the checks he carried out in relation to Mr Latif which resulted in the issue of the disputed assessments. We accepted his evidence and take it into account in our findings of fact below.

8. Officer Thomas is a senior officer in HMRC's Campaigns and Projects team. His evidence related to the government publicity campaign carried out in 2012-13 in relation to the introduction of the HICBC, and the subsequent project to identify taxpayers who appeared to be liable to the charge but had not notified HMRC. He had no direct involvement in Mr Latif's case and therefore, although we have taken his evidence into account, we found it of limited assistance.

9. At the hearing, the evidence set out in the witness statements from Officer Chigwida and Officer Thomas stood as evidence in chief. Mr Latif gave oral evidence, and Officer Chigwida and Mr Latif were cross-examined.

10. Mr Latif also supplied a signed witness statement dated 12 August 2023 from Mr Khalid Rafiq, a chartered accountant. Mr Rafiq did not attend the hearing. We cover the extent to which we took account of Mr Rafiq's statement in our discussion below.

FINDINGS OF FACT

11. On the basis of the documentary and oral evidence provided to the Tribunal, we make the following findings of fact.

(1) Mr Latif is an IT professional. He has three children, born on 25 August 2006, 18 March 2009 and 7 March 2012. He applied for child benefit in respect of each child, making claims on 28 August 2006, 23 March 2009 and 12 March 2012. The claim forms did not refer to the HICBC as the charge had not been introduced by those dates.

(2) In his grounds of appeal, Mr Latif stated that he did not claim child benefit directly, and that it was his wife who filled out the child benefit claim forms. At the hearing, Mr Latif was taken to evidence provided by the Child Benefit Office (CBO) which identified him as the child benefit claimant, whereupon he accepted that his recollection must be incorrect and that the claims must have been made in his name. We are satisfied, on the basis of the evidence we saw, that it was Mr Latif, and not his wife, who claimed the child benefit.

(3) Mr Latif did not submit self-assessment tax returns for any of the years under appeal.

(4) In 2012-13, Mr Latif's adjusted net income was £56,799.96. In each of the other years under appeal (2013-14 to 2019-20 inclusive), Mr Latif's adjusted net income exceeded £60,000. In his notice of appeal to the Tribunal, Mr Latif said that in 2013-14 he was earning under £50,000. However, in the hearing Mr Latif told us that he had since remembered that in 2013-14 he had two jobs, and so his P60 for that year did not represent his total income. Mr Latif confirmed that he was no longer contesting the level of his adjusted net income for 2013-14. Our finding that his adjusted net income exceeded £60,000 for the tax years 2013-14 to 2019-20 inclusive is therefore not disputed.

(5) The HICBC was introduced for child benefit payments made after 7 January 2013. In 2012, HMRC conducted a publicity campaign to raise awareness of the pending introduction of the HICBC, including newspaper advertisements in November 2012 and press releases in October and December 2012. There were further press releases in 2013 and 2014 urging parents who were affected by the HICBC to register for self-assessment. In 2018 and 2019, HMRC issued further press releases about HMRC reviewing HICBC penalty cases to investigate whether refunds were due to taxpayers with a reasonable excuse for failing to notify their liability.

(6) On 18 October 2019, HMRC sent Mr Latif a "nudge letter", asking him to check whether he was affected by the HICBC. HMRC did not receive a response so on 18 November 2019 they sent Mr Latif a "final reminder nudge letter", repeating the request for him to check whether he was affected by the HICBC.

(7) Both nudge letters contained identically-worded sections headed "Important information about communicating by email". These sections included the sentence: "If you want us to reply by email, you must tell us that you understand and accept the risks involved". The letters both enclosed a separate factsheet entitled "Corresponding with HMRC by email". These factsheets explained that if the recipient would like to use email, they needed to confirm in writing that they understood and accepted the risks of

using email, that they were content for financial information to be sent by email, and that attachments could be used.

(8) Mr Latif said that he did not receive the first nudge letter dated 18 October 2019. We accept this evidence.

(9) The most recent of Mr Latif's child benefit claims was made in March 2012, before HMRC's HICBC publicity campaign began. We accept his evidence that he was not aware of the publicity campaign and did not know about the HICBC until he received the second nudge letter dated 18 November 2019.

(10) Having received the nudge letter, Mr Latif attempted to contact HMRC by telephone, but the waiting time was too long and he hung up. Mr Latif could not remember the date of this attempted call.

(11) On 13 December 2019, Mr Latif sent an email to the address provided for HMRC in the nudge letters (in the section headed "Important information about communicating by email"). The email stated: "Hi, I received a letter in regards to High Income Child Benefit Charge. I believe I maybe effected by this so require some help from an advisor to fill out any forms required. If someone could kindly reach-out to me to go over this. Many Thanks, Qasim".

(12) On 24 December 2019, HMRC responded to Mr Latif by sending an email to the same address from which Mr Latif had sent his email of 13 December 2019. This thanked Mr Latif for his email and enclosed a further copy of the "Corresponding with HMRC by email" factsheet. HMRC asked Mr Latif to read the factsheet and stated that if he wanted them to reply by email, he must tell them that he understood and accepted the risks involved. HMRC then stated that "We will only contact you by email about a tax matter where you have already given us permission to do so."

(13) Some time before April 2021, HMRC began a campaign to identify taxpayers who appeared to be liable to the HICBC but had not declared their liability. This included comparing information from the CBO, the taxpayer's self-assessment returns (if any), and PAYE returns. Officer Chigwida worked on this campaign and on 15 April 2021, HMRC's system identified Mr Latif for a compliance check.

(14) Officer Chigwida used the information from the CBO and PAYE returns to establish the amounts of child benefit paid to Mr Latif, and his adjusted net income, in each of the tax years 2012-13, 2013-14, 2014-15, 2015-16, 2016-17, 2017-18, 2018-19 and 2019-20. He checked for self-assessment tax returns from Mr Latif, but found no record that any had been made. He also checked the income of Mr Latif's wife, and was able to establish that Mr Latif was the higher earner in the household. Officer Chigwida used this information to calculate the amounts of HICBC he believed to be due from Mr Latif.

(15) As a result of these findings, we further find as a fact that Officer Chigwida made a discovery on 15 April 2021 that Mr Latif had not notified his chargeability to the HICBC for the tax years 2012-13 to 2019-20 inclusive, and that there was a loss of tax in those years.

(16) On 15 April 2021, Officer Chigwida issued Mr Latif with a letter setting out the amounts of HICBC he was due to pay: a total of £17,887.00.

(17) On 22 April 2021, Mr Latif called HMRC. HMRC's note of this conversation is brief and states simply that Mr Latif agreed the HICBC figure and was informed that penalties and interest would be charged.

(18) Also on 22 April 2021, Mr Latif contacted the CBO and arranged to stop receiving payments of child benefit. The CBO stopped the payments with effect from 12 April 2021.

(19) On 26 April 2021, HMRC's HICBC team sent Mr Latif assessments for the HICBC that they believed to be due. They issued a separate assessment for each of the eight tax years in question. The assessments also stated the amounts of interest charged by HMRC.

(20) The letter sent by HMRC with the assessments included information on the penalties HMRC proposed to charge. These were "failure to notify" penalties under FA 2008, Sch 41 and were imposed at the minimum rate for a non-deliberate prompted failure: 10% for 2019-20, and 20% for the earlier years.

(21) On 27 April 2021, HMRC issued Mr Latif with a penalty assessment. The total amount of the penalties was £3,327.30.

(22) Mr Latif accessed his online HMRC account on 30 April 2021 and paid the HICBC charge of £17,887. On 18 May 2021 he made an additional payment of £1,728.69.

(23) On 14 May 2021, Mr Latif wrote a letter to HMRC. This letter is of central importance to this appeal, but the evidence regarding its contents is unusual and we consider this in more detail below.

(24) On 20 September 2021, Mr Latif wrote again to HMRC referring back to his letter of 14 May 2021, stating that he "wrote back within the allocated 30 days to disagree with your decision of penalty charges".

(25) On 1 October 2021, HMRC wrote to Mr Latif, giving information about the Upper Tribunal's decision in *HMRC v Jason Wilkes* [2021] UKUT 150 (TCC) ("*Wilkes*"). The letter stated that in HMRC's view the assessments were still due to be paid, but that they had paused the penalties in his case.

(26) On 1 November 2021, Mr Latif wrote back to HMRC requesting repayment of the £19,626 which he had paid in respect of both the discovery assessments and the penalties. Mr Latif said he was due this repayment both because HMRC had not replied within 45 days to his letter disagreeing with the penalty charges, and because of the decision in *Wilkes*.

(27) On 20 October 2022, HMRC wrote to Mr Latif again, apologising for the delay, which they said was due to them considering the effect of the decision in *Wilkes*. HMRC explained that the legislation had now been changed to confirm that they could use discovery assessments to assess the HICBC.

(28) On 4 November 2022, Mr Latif responded to HMRC, repeating his reasons for stating that the £19,626 should be repaid to him, namely HMRC's delay and the decision in *Wilkes*.

(29) On 14 February 2023, HMRC sent Mr Latif their "view of the matter" letter, which was described as being in response to Mr Latif's letter of appeal dated 4 November 2022.

(30) On 13 March 2023, Mr Latif wrote to HMRC to appeal the "penalty charge" and request repayment of the £19,626 which he had paid. He appealed to the Tribunal on the same day.

THE LETTER DATED 14 MAY 2021

12. As noted above, Mr Latif wrote a letter to HMRC on 14 May 2021, and posted it on 18 May 2021. He sent the letter by Royal Mail's recorded delivery service and was able to provide proof of this. HMRC were subsequently unable to find the letter and asked Mr Latif to send them a copy. On 4 November 2022, in response to this request, Mr Latif sent HMRC a copy of a letter dated 14 May 2021.

13. This letter was two pages long. It stated that Mr Latif had "decided to appeal against the failure to notify penalty and revenue assessments". It listed a number of reasons for his appeal including that "Neither child benefit, or the HICB charge itself, can be interpreted as income under Section 29 Taxes Management Act 1970".

14. On 9 June 2023, HMRC emailed the Tribunal, stating that following the outcome of the Court of Appeal stage of the *Wilkes* litigation (*HMRC v Jason Wilkes* [2022] EWCA Civ 1612), HMRC would no longer be defending Mr Latif's appeal.

15. On 20 June 2023, HMRC emailed the Tribunal again, stating that their previous decision not to defend the appeal was on the basis that Mr Latif had raised the issue identified in the *Wilkes* case before the cut-off date of 30 June 2021. This decision was based on the copy letter provided by Mr Latif on 4 November 2022. By 20 June 2023, however, HMRC had located a scanned version of the letter dated 14 May 2021, as originally received by HMRC.

16. HMRC had not retained the original letter, and the first page of the scanned version was mostly illegible. However, it was clear that the scanned letter was not the same as the copy letter supplied by Mr Latif on 4 November 2022. The scanned letter was three (rather than two) pages long. Pages 2 and 3 were still legible, and were not the same as the contents of the letter supplied on 4 November 2022.

17. HMRC therefore wished to continue to defend the appeal on the basis that Mr Latif had not, in fact, raised the issue identified in the *Wilkes* case before the cut-off date of 30 June 2021, and in any event had only appealed the penalties, not the discovery assessments, on 14 May 2021.

18. On 27 November 2023, Mr Latif provided HMRC with documents to support his appeal. These included a legible copy of a three-page letter dated 14 May 2021. This letter was included in the hearing bundle at pages 205 to 207. The second and third pages of this letter match the legible pages of the scanned letter retrieved by HMRC between 9 and 20 June 2023.

19. At the hearing, Mr Latif explained that when HMRC asked him to send a copy of his letter dated 14 May 2021, he copied and pasted the letter into the artificial intelligence system ChatGPT, telling it to make the letter shorter and more formal. He said that the original letter was long winded, and he wanted to make it a more appropriate and relevant communication for HMRC. He said that it was not his intention to cause confusion or fabricate anything, that in his opinion the ChatGPT letter had the same context as his original letter, and that his intention was purely to use technology to help him as he works in IT.

20. By the time of the hearing, therefore, there was no dispute between the parties as to which was the original version of Mr Latif's letter dated 14 May 2021: it is the three-page letter which appears in the hearing bundle at pages 205 to 207, and for the remainder of this decision, references to Mr Latif's letter dated 14 May 2021 are to this document. We considered it appropriate, however, to set out this evidential background in some detail, because the Tribunal was provided with two different versions of this letter, one of which is

likely to have decided the appeal in Mr Latif's favour, the other of which, as we find below, does not.

21. Mr Latif's letter dated 14 May 2021 began as follows:

> "I am writing about the 'Notice of penalty assessment' letter received on May 6 2021, dated April 27 2021.
>
> I understand from the Notice I am being charged under Schedule 41 Finance Act 2008, expressly Income Tax Penalty obligation under section 7 of TMA 1970.
>
> Section 7 of TMA 1970 states:
>
> > *Under Section 7 TMA 1970, a person who has not been issued with a return by HMRC is obliged to notify us if they have a liability to Income Tax or Capital Gains Tax.*
>
> Under Section 29 of the TMA, the discovery assessment is not valid notice as I firmly believe I am receiving this Notice unfairly.
>
> Since college up until the present, I have been working as an employee and have never been self-employed. I have always had my tax paid via PAYE and had no reason to notify HMRC as my tax has been produced at the source.
>
> I have never been informed that I should file a self-assessment as I am a high earner."

22. The letter then sets out some of the history of this case, including the timing of his child benefit claims, the introduction of HICBC, and Mr Latif's correspondence with HMRC. Mr Latif argued in the letter that HMRC should have contacted him in 2013 to inform him about the HICBC, as he has always paid his tax through the PAYE system. There are no further references to discovery assessments or the reasons these might be invalid, no further references to TMA 1970, s 29, and no references to the *Wilkes* litigation.

23. The concluding lines of the letter are:

> "I have had no reason to search around on the HMRC website to check changes in legalisations.
>
> I have paid the HICBC liability in a large lump sum of 19,626 GBP from my life savings.
>
> If HMRC informed me of changes in legalisation in 2013 I would have made the relevant declarations and notifications.
>
> I have shown to make every possible effort to correct matters as soon as I become aware of the situation.
>
> The penalty charge should all be waived.
>
> The interest charged should be paid back."

PRELIMINARY MATTER: WHETHER THE APPEAL WAS LATE

24. HMRC objected to Mr Latif's appeal against the discovery assessments (as opposed to the penalty assessment) on the grounds that it was late. The discovery assessments were made on 26 April 2021, and under TMA 1970, s 31A, Mr Latif had 30 days in which to give notice of his appeal to HMRC. HMRC's notice of objection states that his appeal against the discovery assessments was made on 1 November 2021.

25. It was common ground that Mr Latif's letter of 14 May 2021 constituted an in-time appeal against the penalty assessment. HMRC's position was that this was only an appeal against the penalty assessment, not also against the discovery assessments. Ms Mia pointed out that the letter only makes one reference to a discovery assessment, and that Mr Latif had made an informed decision at that time only to appeal against the penalties.

26. She also drew attention to the fact that the letter refers to the notice of penalty assessment dated 27 April 2021: the penalty assessment was indeed dated 27 April 2021, whereas the discovery assessments were dated 26 April 2021. According to Ms Mia this added weight to HMRC's submission that on 14 May 2021 Mr Latif had only intended to appeal the penalty assessment, and only decided to appeal the discovery assessments in November 2021, upon becoming aware of the *Wilkes* case.

27. HMRC further submitted that in his letter dated 20 September 2021, Mr Latif referred to his previous letter dated 14 May 2021, stating that he "wrote back within the allocated 30 days to disagree with your decision of penalty charges". Ms Mia said that this, too, indicated that Mr Latif's original intention was only to appeal the penalty assessment.

28. At the hearing, Mr Latif told us that he had always intended to appeal both the penalty and discovery assessments. He had received a bundle of papers from HMRC (the eight discovery assessments, the penalty assessment, and the associated cover letters) and said that when he made his appeal he simply took the one with the most recent date, which was 27 April 2021. He said he didn't check the others because he thought they were all the same. He said that he included the reference to TMA 1970, s 29 on the advice of Mr Rafiq, a friend of his who is a chartered accountant.

29. Mr Latif is a litigant in person with no specialist tax knowledge. Throughout his correspondence with HMRC, he does not distinguish clearly between the penalty assessment and the discovery assessments. His letter of 1 November 2021, for instance, which HMRC now submit was the first occasion on which he appealed the discovery assessments, states: "I will expect a letter confirming cancellation of the penalty notice and a refund 19,626 GBP within 30 days".

30. HMRC have changed their position as to the date of Mr Latif's first appeal against the discovery assessments. Their letter dated 20 October 2022 refers to his letter dated 20 September 2021, stating: "In your letter you told us that you are making an appeal against both revenue assessments and failure to notify penalties that we sent you dated 28 April 2021". This indicates that HMRC have not found it straightforward to interpret whether Mr Latif's letters were referring to the penalty assessment, the discovery assessments, or both.

31. Mr Latif's letter dated 14 May 2021 includes the statement "Under Section 29 of the TMA, the discovery assessment is not valid notice". Taken together with his oral evidence that it was always his intention to appeal all of the assessments he received from HMRC, we find that this wording is sufficient for the letter dated 14 May 2021 to constitute a notice of appeal against both the penalty assessment and the discovery assessments.

32. We make this finding having taken into account the fact that the remainder of the letter dated 14 May 2021 refers to penalties, and that Mr Latif's letters of 20 September 2021 and 1 November 2021 refer to his previous disagreement with "penalty charges". We find, on the balance of probabilities, that Mr Latif was referring to "penalties" in a broad sense, and was not using this term with the intention of distinguishing the penalty assessment from the discovery assessments.

33. We also do not consider it to be decisive that his letter dated 14 May 2021 referred to a notice dated 27 April 2021 (the date of the penalty assessment), rather than 26 April 2021

(the date of the discovery assessments). Mr Latif had received a large bundle of correspondence from HMRC which clearly all related to the same subject matter, and we accept his evidence that he had intended to appeal everything which he had received.

34. As the discovery assessments were issued on 26 April 2021, our finding that Mr Latif's letter dated 14 May 2021 was a notice of appeal against both the penalty assessment and the discovery assessments means that this appeal was made in time. We therefore do not need to consider the criteria for deciding whether to allow a late appeal.

THE LAW ON DISCOVERY ASSESSMENTS RELATING TO THE HICBC

35. The HICBC is imposed under section 681B of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA 2003"). It was introduced by the Finance Act 2012 with effect for child benefit payments made after 7 January 2013. Section 681B is set out in the Appendix to this decision. The HICBC is a charge to income tax that is imposed on a person in a tax year if:

(1) their adjusted net income that year is more than £50,000;

(2) their adjusted net income for the year exceeds that of their partner ("partner" is defined in ITEPA 2003, s 681G); and

(3) they or their partner are entitled to child benefit in that year.

36. Where liability to the HICBC arises in any tax year to a person who has not received a notice to file a tax return, that person must notify HMRC of this liability under TMA 1970, s 7.

37. The discovery assessments were raised under HMRC's powers in TMA 1970, s 29. As at 26 April 2021 (the date of the discovery assessments), TMA 1970, s 29(1)(a) provided that HMRC could make an assessment if they discovered "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".

38. In the case of *Wilkes v HMRC* [2020] UKFTT 256 (TC), the Tribunal decided that TMA 1970, s 29(1)(a), as it was at the time, did not allow HMRC to make discovery assessments in relation to the HICBC. The Tribunal's reasoning was, in brief, that a discovery of unpaid HICBC does not involve HMRC discovering "income which ought to have been assessed to income tax". HMRC appealed, unsuccessfully, to the Upper Tribunal and then to the Court of Appeal (*HMRC v Wilkes* [2021] UKUT 150 (TCC) and *HMRC v Wilkes* [2022] EWCA Civ 1612).

39. While the *Wilkes* litigation was in progress, Parliament enacted section 97 of the Finance Act 2022 ("FA 2022"). This amended TMA 1970, s 29(1)(a), such that HMRC can make an assessment if they discover "that an amount of income tax or capital gains tax ought to have been assessed but has not been assessed". The effect of this change was that taxpayers cannot succeed on an argument similar to that used in *Wilkes* in respect of discovery assessments for the tax year 2021-22 and later years. The change in law made by FA 2022, s 97 also applies to earlier years unless the disputed assessment was the subject of an appeal that had been notified to HMRC on or before 30 June 2021, and certain other conditions are satisfied.

40. FA 2022, s 97 is set out in the Appendix to this decision. The provisions of FA 2022, s 97 that apply most relevantly to Mr Latif are as follows:

> "(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.
>
> […]
>
> (8) For the purposes of this section an appeal is subject to a temporary pause which occurred before 27 October 2021 if—
>
> (a) the appeal has been stayed by the tribunal before that date,
>
> (b) the parties to the appeal have agreed before that date to stay the appeal, or
>
> (c) HMRC have notified the appellant ("A") before that date that they are suspending work on the appeal pending the determination of another appeal the details of which have been notified to A."

41. A "relevant protected assessment" means, in effect, an assessment that cannot be set aside on the basis of the argument used in *Wilkes*. In other words, Mr Latif must establish that his assessments are *not* "relevant protected assessments" if he is to succeed in challenging them on *Wilkes* grounds.

42. TMA 1970, s 34(1) provides that HMRC may raise an assessment to income tax or capital gains tax within a period of four years from the end of the tax year to which the assessment relates. TMA 1970, s 36(1A) extends the time limit from four years to 20 years where the assessment has been raised as a result of a failure by the taxpayer to comply with their obligation under TMA 1970, s 7 to notify HMRC of their liability to tax.

43. TMA 1970, s 118(2) provides as follows:

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

THE LAW ON PENALTIES FOR FAILURE TO NOTIFY A LIABILITY TO TAX

44. Schedule 41 to the Finance Act 2008 (FA 2008) provides for penalties to apply to a failure to comply with TMA 1970, s 7 (the obligation to notify a liability to tax, including a liability to the HICBC).

45. In a domestic matter (which this is), and where the failure is not deliberate (as HMRC accept in this case), FA 2008, Sch 41, para 6 provides that the amount of the penalty is 30%

of the "potential lost revenue". The potential lost revenue is the amount of tax which is unpaid as a result of the failure to notify.

46. FA 2008, Sch 41, paras 12 and 13 provide for penalties to be reduced where P discloses a relevant failure. Para 12(3) distinguishes between unprompted and prompted disclosures, providing that a disclosure is unprompted if it is made at a time when the person making it has no reason to believe that HMRC have discovered or are about to discover the failure.

47. FA 2008, Sch 41, para 13 provides that if a person who would otherwise be liable to a penalty has made a disclosure, HMRC must reduce the penalty, but not below a specified minimum. In the case of a 30% penalty for a non-deliberate failure, if HMRC become aware of the failure less than 12 months after the time when the tax first became unpaid by reason of the failure, the specified minimum is 10% for a prompted disclosure. If HMRC become aware of the failure 12 months or more after the time when the tax first became unpaid by reason of the failure, the specified minimum is increased to 20% for a prompted disclosure.

48. FA 2008, Sch 41, para 14 provides that HMRC can reduce a penalty if they think it right because of special circumstances. Under para 14(2), "special circumstances" does not include ability to pay, or the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

49. Under FA 2008, Sch 41, para 16, where a person is liable to a penalty, HMRC must assess the penalty, notify the person, and state in the notice the period in respect of which the penalty is assessed. The assessment must be made before the end of the period of 12 months beginning with the end of the appeal period for the assessment of tax unpaid by reason of the failure in respect of which the penalty is imposed.

50. FA 2008, Sch 41, paras 17 to 19 deal with rights of appeal, and the Tribunal's powers. The Tribunal may on an appeal against the amount of a penalty affirm HMRC's decision or substitute for HMRC's decision another decision that HMRC had power to make. In substituting its own decision, the Tribunal may rely on special circumstances, but only if the Tribunal thinks that HMRC's decision on the application of special circumstances was flawed. Para 19(4) defines "flawed" as flawed when considered in the light of the principles applicable in proceedings for judicial review.

51. A decision is flawed in this sense if HMRC took into account irrelevant factors, failed to take into account relevant factors, or reached an unreasonable decision. A decision is also flawed in this sense if HMRC failed to think about the matter at all.

52. FA 2008, Sch 41, para 20 provides that liability to a penalty in the case of a non-deliberate failure does not arise if there is a reasonable excuse for the failure. For these purposes, where a person had a reasonable excuse but the excuse has ceased, the person is treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.

BURDEN OF PROOF

53. The burden of establishing that valid in time discovery assessments were issued lies with HMRC. If HMRC meet this burden, then the burden shifts to Mr Latif to establish either that the amount of tax assessed was overstated (Mr Latif did not, in this case, challenge the amounts of HICBC charged) or, for the assessments on which HMRC rely on the extended 20-year time limit, that he has a reasonable excuse for the failure to notify.

54. The burden of establishing that a valid in time penalty assessment was issued lies with HMRC. If HMRC meet this burden, then the burden shifts to Mr Latif to establish that he has a reasonable excuse for the failure to notify, or that there are special circumstances.

55. The standard of proof is the balance of probabilities.

DISCUSSION: THE DISCOVERY ASSESSMENTS

56. We are satisfied that Officer Chigwida made a discovery that Mr Latif was liable to the HICBC. The issues we must decide are whether the discovery assessments were valid in light of the *Wilkes* case and FA 2022, s 97, and whether these assessments were made in time.

Relevant protected assessments

57. As described above, Mr Latif must establish that the discovery assessments are not "relevant protected assessments" if he is to succeed in challenging them on *Wilkes* grounds.

58. Under FA 2022, s 97(5), this requires Mr Latif to establish that his notice of appeal was given to HMRC on or before 30 June 2021, and that:

> (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).

59. We have already found that Mr Latif appealed the discovery assessments on 14 May 2021. We must therefore decide whether an issue in the appeal is that the assessments are invalid as a result of them not relating to the discovery of income which ought to have been assessed to income tax but which had not been so assessed, and whether this issue was raised on or before 30 June 2021 (whether by Mr Latif or in a decision given by the Tribunal).

60. The Tribunal has given no previous decision in this case, so the question is whether this issue was raised by Mr Latif on or before the cut-off date of 30 June 2021. The only relevant communication from Mr Latif within this timeframe was his letter dated 14 May 2021, which we have found constituted his notice of appeal.

61. We have copied the relevant sections of this letter in paragraphs [21] and [23] above. The only reference to discovery assessments is in this sentence: "Under Section 29 of the TMA, the discovery assessment is not valid notice as I firmly believe I am receiving this Notice unfairly."

62. This satisfies part of the requirement in FA 2022, s 97(5), in that Mr Latif has raised, on or before 30 June 2021, as an issue in his appeal, that the assessments are invalid. The question is then whether Mr Latif has satisfied the remainder of the requirement in FA 2022, s 97(5). This will be the case if he raised the issue that the assessments were invalid "as a result of [their] not relating to the discovery of income which ought to have been assessed to income tax but which had not been so assessed".

63. We refer in this context to the witness statement provided by Mr Latif dated 12 August 2023 by Mr Khalid Rafiq, a chartered accountant. As we have mentioned, Mr Rafiq did not attend the hearing. His statement (in its entirety) is as follows:

> "I, Khalid Rafiq, can confirm that on 7th May 2021 Mr Qasim Latif sought my advice with regards to his HICBC notice and his intent to appeal the said notice under Section 29 of the Tax Management Act 1970. I advised Mr Latif to document the matter as follows:

1. Contextualise the facts showing how the current situation has emerged; and
2. Respond to HMRC to ask for a reassessment with the view to have the charge cancelled under Section 29 of the Tax Management Act 1970.

I understand that the original submission made by Mr Latif to HMRC in May 2021 has been misplaced and hence my statement of recollection of the matter on my involvement at that time."

64. In our view, we do not need to make any findings as to the likely accuracy of Mr Rafiq's recollection of a conversation that took place over two years earlier, as we do not consider that Mr Latif's case derives any assistance from this statement. It does not refer to *Wilkes* or make reference to the grounds on which it should be asserted that the assessments are invalid. It refers to TMA 1970, s 29, but Mr Latif's letter dated 14 May 2021 also refers to that provision. We therefore do not consider it necessary to take account of, or make further reference to, the statement from Mr Rafiq.

65. This Tribunal has considered the meaning of FA 2022, s 97(5) in several published decisions. We agree with the Tribunal in *Hextall v HMRC* [2023] UKFTT 390 (TC) that s 97(5)(b) requires the issue identified in the *Wilkes* cases to be specifically identified by a party or the Tribunal. The issue can be raised in general terms, but must make clear that the point to be considered is whether the assessments were invalid on the grounds that the HICBC is not income that should have been assessed to income tax. In the words of the Tribunal in *Wills v HMRC* [2024] UKFTT 12 (TC) at paragraph [37], "there should be some express reference which can be identified as a challenge based on the *Wilkes* issue, even if that challenge is imprecise."

66. We consider that we should interpret the statute in a manner which does not result in part of FA 2022, s 97(5)(a) (the part which follows the word "invalid") being redundant. It is not sufficient that Mr Latif's letter dated 14 May 2021 raised the issue of the validity of the discovery assessments; it must have raised this issue on the grounds (even if expressed imprecisely) that the assessments did not relate to the discovery of income which ought to have been assessed to income tax. In fact, Mr Latif's letter contended that the assessments were invalid because they were unfair. This does not meet the requirements of FA 2022, s 97(5).

67. We have also considered the application of FA 2022, s 97(6). Under this provision, the discovery assessments would not be relevant protected assessments if:

(a) they are subject to an appeal notice of which was given to HMRC on or before 30 June 2021 – we have found that this requirement was met,

(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.

68. We have considered, in this context, whether HMRC's letter of 1 October 2021 meets the criteria set out in s 97(6)(b) and s 97(6)(c). This letter was in response to Mr Latif's letter of 20 September 2021 (not his notice of appeal dated 14 May 2021). In this letter HMRC refer to the discovery assessments issued to Mr Latif, and to the decision of the Upper Tribunal in *Wilkes*. It states that HMRC do not agree with this decision and have sought permission to appeal to a higher court. The letter continues: "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".

69. HMRC's letter then states that penalties are unaffected by the *Wilkes* decision, and that this was confirmed by the decision of the Upper Tribunal in *HMRC v Robertson* [2019] UKUT 202 (TCC). The letter continued: "We are working to understand if this tribunal decision will affect your case. We have paused the penalties on your case. However, the assessments we have raised are still due to be paid." It is not clear, from the context, whether "this tribunal decision" refers to *Wilkes* or to the Upper Tribunal's decision in *Robertson*.

70. The meaning of an appeal being subject to a temporary pause is given by FA 2022, s 97(8). The only subsection with potential relevance in this case is s 97(8)(c), which applies where HMRC have notified the appellant that they are suspending work on the appeal pending the determination of another appeal the details of which have been notified to the appellant.

71. We find that HMRC's letter of 1 October 2021 does not meet the criteria set out in s 97(8)(c) for determining whether there is a temporary pause. The letter does not state that HMRC are suspending work on the appeal of the discovery assessments, in fact it does not refer to Mr Latif having made an appeal at all. HMRC's letter of 1 October 2021 states that they have paused the penalties on Mr Latif's case, but that in their view the discovery assessments were still due to be paid. There is no reference to work on an appeal being suspended pending the determination of the *Wilkes* litigation, or of any other appeal.

72. We are reinforced in this interpretation by the decision of this Tribunal in *Niewiarowski v HMRC* [2023] UKFTT 649 (TC). This considered a letter from HMRC in very similar terms to HMRC's letter to Mr Latif of 1 October 2021, and concluded that "What HMRC did not do was to "pause" the HICBC assessments". We consider that the same interpretation applies in this case.

73. We have therefore concluded that the discovery assessments issued to Mr Latif were relevant protected assessments. This means that they were validly issued under TMA 1970, s 29, provided that they were made in time.

Time limits and reasonable excuse

74. The time limits for raising a discovery assessment under TMA 1970, s 29 are set out in TMA 1970, s 34 and s 36. HMRC can raise a discovery assessment at any time within a period of four years from the end of the tax year to which the assessment relates. The discovery assessments were all issued on 26 April 2021. This means that the assessments for tax years 2017-18, 2018-19 and 2019-20 were issued in time. HMRC do not need to satisfy any further requirements for these tax years, and no question arises as to whether Mr Latif had a reasonable excuse.

75. As regards the five assessments for 2012-13 to 2016-17 inclusive, TMA 1970, s 36(1A) extends the time limit from four years to 20 years where, as in Mr Latif's case, the assessment has been made as a result of a failure by the taxpayer to notify HMRC of their liability to tax. However, as a result of TMA 1970, s 118(2), HMRC cannot rely on this 20-year time limit if Mr Latif had a reasonable excuse for not notifying his liability to tax within six months of the end of each relevant tax year and, after the excuse ceased, notified his liability without unreasonable delay.

76. In *The Clean Car Co Ltd v C&E Comrs* [1991] VATTR 234, Judge Medd QC said the following on the meaning of a reasonable excuse:

> "…the test of whether or not there is a reasonable excuse is an objective one. In my judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?"

77. The Upper Tribunal in *Christine Perrin v HMRC* [2018] UKUT 0156 (TCC) ("*Perrin*") confirmed that this was the correct test, and set out a recommended process for this Tribunal when considering whether a person has a reasonable excuse. This is set out at paragraph [81] of that decision as follows:

> "(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."

78. The Tribunal has considered many appeals against HICBC penalties in recent years, with differing outcomes. We adopt the approach (which has been set out and applied by Judge Popplewell in cases including *Chattaway v HMRC* [2023] UKFTT 752 (TC) and *Shahid v HMRC* [2023] UKFTT 715 (TC), and followed by the Tribunal in other cases, such as in *Hussain v HMRC* [2023] UKFTT 545 (TC) and *Wills v HMRC* [2024] UKFTT 12 (TC)) that a taxpayer is likely to have a reasonable excuse where they:

(1) were not under an obligation to complete a tax return up to the tax year 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) were in receipt of child benefit payments prior to the introduction of 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) had not received notification from HMRC directly at any point prior to the contact which led to the issue 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.

79. In this case Mr Latif meets the criteria set out at (1) and (2) above. We have found that he was not aware of the HICBC until he received the nudge letter of 18 November 2019, and accept that he had a reasonable excuse until that time.

80. The critical issue for this aspect of the appeal is whether he continued to have a reasonable excuse even after he had received the nudge letter. Mr Latif contends that there are two reasons why we should find that the reasonable excuse continued. The first is his belief that the HICBC did not apply to him, and the second is the effect on him of the covid pandemic.

81. As to his belief that the HICBC did not apply to him, we have applied the test in *Perrin*, and have considered both the nature of his belief regarding his liability to the HICBC, and whether this belief amounted to an objectively reasonable excuse.

82. Mr Latif explained that he did not believe the HICBC applied to him, despite having received HMRC's nudge letter of 18 November 2019, because at that time he believed that neither he nor his wife were receiving child benefit. He said that when he received the letter, he asked his wife whether she received any child benefit. She told him that she did not, and Mr Latif therefore concluded, as the letter stated that the HICBC only applied to people who were receiving child benefit, that the charge did not affect him.

83. As to why he did not know he was receiving child benefit, Mr Latif explained that when he subsequently received HMRC's letter of 15 April 2021, he again asked his wife whether they were receiving child benefit. He said she initially denied this was the case, but they investigated further and discovered that the child benefit money was being paid into a bank account in the name of his eldest child. Mr Latif said that he thought what had happened was that when they made the child benefit claim, they had accidentally given his son's bank account details because his son and his wife share the same first initial.

84. Mr Latif said that until April 2021, neither he nor his wife knew that child benefit was being paid into his son's account. He said that it was his wife who had access to their son's account, and he had no reason to check it. We asked if they had received any paper statements, but Mr Latif thought that the account was managed entirely online. We had no direct evidence from Mr Latif's wife. We therefore did not receive a satisfactory explanation for the unusual situation whereby child benefit payments were building up in an account for around nine years (from the third child benefit claim in March 2012 until Mr Latif stopped the payments in April 2021) without Mr Latif or his wife at any point being aware of this, whether by logging in to the account, receiving a statement, or otherwise.

85. Nonetheless, HMRC did not challenge Mr Latif's evidence on this point and we accept, on the balance of probabilities, that when he received the nudge letter of 18 November 2019 he did not know that he was at that time in receipt of child benefit.

86. However, this is not the same as him having a genuine belief, on this date, that he was not liable to the HICBC. In this context it is relevant to refer to the wording of HMRC's nudge letter of 18 November 2019. This includes the following:

> "You have to pay the charge if:
>
> - you have taxable income and benefits of over £50,000 in a tax year
> - you, or your spouse or partner, received any Child Benefit payments

> You should check if you have to pay the High Income Child Benefit Charge for the tax year 2017 to 2018 or any other tax year beginning with the tax year 2012 to 2013, when the tax began."

87. The letter is clear that the charge could apply for any year from 2012-13 onwards. The letter did not therefore provide Mr Latif with a basis on which to conclude that because neither he nor his wife were (as he thought) receiving child benefit at the time he received the nudge letter, he had no HICBC liability. His most recent child benefit claim was on 12 March 2012, so the question he should have addressed was whether he had received child benefit payments at any time after that claim (or strictly, after 6 April 2012, this being the start of the tax year 2012-13). Mr Latif is an intelligent IT professional, and in our view he would not have had difficulty understanding this from HMRC's letter.

88. We have accepted that, at the time he received the nudge letter, he did not know that he was receiving child benefit. However, this does not mean that he believed that he had not received any payments since April 2012, and we find that it would not have been reasonable for him to have reached this conclusion, given that he filled out the forms and had no reason to believe that the payments were not being made into the account which he had nominated for this purpose.

89. Mr Latif further contended that he thought HMRC might have stopped paying child benefit at the point when his income exceeded £50,000 per year. However, there is nothing in the nudge letter on which he could have based this conclusion, and he was unable to direct us to any other evidence that would have led him to this belief.

90. Mr Latif's email of 13 December 2019 stated that he believed he was affected by the HICBC. In the hearing, under cross examination, Mr Latif said that he found the wording of HMRC's letter of 18 November 2019 unclear, and wanted clarification of his position.

91. Taking all of the above into account, we do not accept that, once he had received the nudge letter of 18 November 2019, Mr Latif held a firm belief that he was not liable to the HICBC. Our finding of fact, on the balance of probabilities, is that he was uncertain whether he was liable or not.

92. We considered what, in light of this finding, Mr Latif could reasonably have done upon receipt of the nudge letter, and concluded that he should have taken more steps to contact HMRC to resolve the matter. He attempted to call HMRC, but in the hearing he only referred to one call, on which occasion he hung up because the waiting time was too long.

93. Mr Latif also sent HMRC an email in December 2019 but, as we have recorded in our findings of fact above, he did not respond when HMRC replied to ask him to provide their standard confirmation regarding accepting the risks of email correspondence. He said that he did not receive this email from HMRC. We do not need to decide whether he received it or not, because it is our view that even if he did not receive it, the reasonable course of action was for him to follow up with a further email, phonecall or letter. We observe that after HMRC contacted Mr Latif in April 2021, he phoned them and subsequently sent several letters, indicating that he knew how to contact HMRC.

94. We find that a reasonable taxpayer with Mr Latif's experience and attributes would not have let matters lie after sending his email on 13 December 2019, but would have taken more proactive steps to discover whether he was liable to pay the HICBC.

95. In addition to contacting HMRC, we find that it would have been reasonable upon receipt of the nudge letter for Mr Latif to take steps to ascertain whether he or his wife were, in fact, receiving child benefit. It was in his power in November 2019 to conduct the same investigation that he conducted in April 2021, which resulted in his discovery that child

benefit payments were being made into his son's account. He did not explain to our satisfaction why he did not conduct that investigation at that earlier time.

96. Mr Latif has also not provided us with sufficient evidence to enable us to find that the covid pandemic was a reasonable excuse for him not having contacted HMRC between November 2019 and April 2021. He told us he had lost loved ones, but did not specify who this was, or how this affected his ability to contact HMRC. We accept his evidence that the pandemic resulted in additional tasks for him in his voluntary roles and in his home life, and that taken together these would have been a significant drain on his time and attention. However, at the hearing Mr Latif conceded that these activities would not have prevented him from contacting HMRC, but that the main reason he had not done so was that he believed the HICBC did not apply to him.

97. We also observe that the effects of the covid pandemic were not felt in the UK until March 2020, and that Mr Latif received the nudge letter from HMRC in November or December 2019. There were therefore two or three months after the receipt of the letter during which Mr Latif could have made further attempts to contact HMRC before experiencing the effects of the pandemic.

98. We therefore find that Mr Latif's reasonable excuse ceased once he received HMRC's nudge letter of 18 November 2019. As he did not engage actively with HMRC until after they had contacted him in April 2021, we further find that he did not notify his liability without unreasonable delay once the excuse had ceased.

99. The result of these findings is that all of the disputed discovery assessments were issued within the relevant time limits, and Mr Latif's appeal against them is dismissed.

DISCUSSION: THE PENALTY ASSESSMENT

100. Mr Latif was liable to the HICBC for the tax years 2012-13 to 2019-20 inclusive, but did not notify HMRC of this by the deadline of 5 October following the end of each tax year. HMRC have therefore issued him with "failure to notify" penalties under FA 2008, Sch 41. HMRC have calculated the amount of penalty on the basis that his failure to notify was not deliberate, and that his disclosure of this failure was prompted, because he did not make this disclosure until HMRC had informed him of the amounts they intended to charge him under the HICBC.

101. In calculating the penalties, HMRC have allowed the maximum permitted reductions for a prompted disclosure. This meant that for the tax year 2019-20, they calculated the penalty at 10% of the unpaid HICBC for that year. For the other years under appeal, they calculated the penalty at 20% of the unpaid HICBC, because for these years HMRC became aware of the failure to notify more than 12 months after the time when the tax was first due. There was no dispute as to the calculation of the penalties or the reductions that were given.

102. On the basis of the evidence provided we are satisfied that HMRC have met the requirements to assess and notify the penalties, and state in the notice the periods in respect of which the penalties were assessed.

103. The relevant time limit for assessment of the penalties was within 12 months of the end of the appeal period for the discovery assessments. The discovery assessments were issued on 26 April 2021, and the penalties were assessed on the following day, 27 April 2021. The penalties were therefore assessed in time.

104. We are therefore satisfied that the penalties were validly issued.

105. Liability to a penalty does not arise if there is a reasonable excuse for the failure to notify. Where a person had a reasonable excuse but the excuse has ceased, they are treated as continuing to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.

106. We have described above that Mr Latif did have a reasonable excuse for his failure to notify his HICBC liability, but that this excuse ceased once he had received HMRC's nudge letter dated 18 November 2019, and that he did not remedy this failure without unreasonable delay after that time.

107. As to HMRC's decision regarding special circumstances, their letter of 26 April 2021 (in which they inform Mr Latif of their decision to issue the discovery assessments and penalties) states that based on the information they have, they do not think there are any special circumstances. We see no basis for us to conclude that this decision was flawed in the relevant sense, and so our jurisdiction to substitute our own decision is not engaged.

108. These findings mean that we must dismiss Mr Latif's appeal against the penalty assessment.

DELAYS BY HMRC

109. Mr Latif's grounds of appeal refer to delays by HMRC. He states that he appealed by a letter dated 14 May 2021, but did not receive any acknowledgement from HMRC until 20 October 2022, around 17 months later. Mr Latif said that he believed this delay to be deliberate, to prevent him from appealing using the Upper Tribunal's decision in *Wilkes*, and that this was a clear attempt to manipulate the legal process.

110. We appreciate that Mr Latif found the delays in this case frustrating, but we are not able to set aside the assessments on this basis. This Tribunal can only find the facts and apply the relevant law as enacted by Parliament. We have considered whether the assessments were issued within the relevant statutory time limits, and have concluded that they were. We do not have the power to decide the appeal in Mr Latif's favour on the basis of any perceived motive of HMRC regarding the timing of their correspondence.

111. We would observe that in any event, Mr Latif's appeal was in time to have raised the issue that was in point in the *Wilkes* litigation, but we have decided that it did not do so.

DISPOSITION

112. Mr Latif's appeal against the discovery assessments and the penalty assessment is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

113. 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.

RACHEL GAUKE

TRIBUNAL JUDGE

Release date: 27th MARCH 2024

APPENDIX: RELEVANT LEGISLATION

Section 681B of the Income Tax (Earnings and Pensions) Act 2003 (high income child benefit charge):

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

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

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

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

(3) Condition A is that—

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

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

(4) Condition B is that—

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

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

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

Section 58(1) of the Income Tax Act 2007 (meaning of "adjusted net income"):

"For the purposes of Chapters 2 and 3, an individual's adjusted net income for a tax year is calculated as follows.

Step 1 Take the amount of the individual's net income for the tax year.

Step 2 If in the tax year the individual makes, or is treated under section 426 as making, a gift that is a qualifying donation for the purposes of Chapter 2 of Part 8 (gift aid) deduct the grossed up amount of the gift.

Step 3 If the individual is given relief in accordance with section 192 of FA 2004 (relief at source) in respect of any contribution paid in the tax year under a pension scheme, deduct the gross amount of the contribution.

Step 4 Add back any relief under section 457 or 458 (payments to trade unions or police organisations) that was deducted in calculating the individual's net income for the tax year.

The result is the individual's adjusted net income for the tax year."

Section 97 of the Finance Act 2022 (omitting provisions that are not relevant to this case):

> "(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) […]
>
> (3) The amendments made by this section—
>
> > (a) have effect in relation to the tax year 2021-22 and subsequent tax years, and
> >
> > (b) also have effect in relation to the tax year 2020-21 and earlier tax years but only if the discovery assessment is a relevant protected assessment (see subsections (4) to (6)).
>
> (4) A discovery assessment is a relevant protected assessment if it is in respect of an amount of tax chargeable under—
>
> > (a) Chapter 8 of Part 10 of ITEPA 2003 (high income child benefit charge),
> >
> > (b)-(d) […]
>
> (5) But a discovery assessment is not a relevant protected assessment if it is subject to an appeal notice of which was given to HMRC on or before 30 June 2021 where—
>
> > (a) an issue in the appeal is that the assessment is invalid as a result of its not relating to the discovery of income which ought to have been assessed to income tax but which had not been so assessed, and
> >
> > (b) the issue was raised on or before 30 June 2021 (whether by the appellant or in a decision given by the tribunal).
>
> (6) In addition, a discovery assessment is not a relevant protected assessment if—
>
> > (a) it is subject to an appeal notice of which was given to HMRC on or before 30 June 2021,
> >
> > (b) the appeal is subject to a temporary pause which occurred before 27 October 2021, and
> >
> > (c) it is reasonable to conclude that the temporary pausing of the appeal occurred (wholly or partly) on the basis that an issue of a kind mentioned in subsection (5)(a) is, or might be, relevant to the determination of the appeal.

(7) For the purposes of this section the cases where notice of an appeal was given to HMRC on or before 30 June 2021 include a case where—

(a) notice of an appeal is given after that date as a result of section 49 of TMA 1970, but

(b) a request in writing was made to HMRC on or before that date seeking HMRC's agreement to the notice being given after the relevant time limit (within the meaning of that section).

(8) For the purposes of this section an appeal is subject to a temporary pause which occurred before 27 October 2021 if—

(a) the appeal has been stayed by the tribunal before that date,

(b) the parties to the appeal have agreed before that date to stay the appeal, or

(c) HMRC have notified the appellant ("A") before that date that they are suspending work on the appeal pending the determination of another appeal the details of which have been notified to A.

(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."