[2020] UKFTT 304 (TC)

TC07786

INCOME TAX – high income child benefit charge – whether discovery assessments valid – yes – whether penalties valid – yes – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/06267

BETWEEN

MARK HASLAM **Appellant**

-and-

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

TRIBUNAL: JUDGE DAVID BEDENHAM
DEREK ROBERTSON

Sitting in public at Nottingham Justice Centre on 30 January 2020

The Appellant appeared in person

Ms G Truelove, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

With further written submissions from HMRC dated 26 February 2020 and 20 April 2020, from the Appellant in March 2020 and April 2020, and from Keith Gordon (as *Amicus Curiae*) dated 31 March 2020.

DECISION

INTRODUCTION

1. The Appellant appeals against assessments raised under s 29(1) of the Taxes Management Act 1970 ("TMA 1970") in respect of his liability to the High Income Child Benefit Charge ("HICBC"). The Appellant also appeals against penalties charged to him pursuant to Schedule 41 to the Finance Act 2008 ("FA 2008") as a result of his failure to notify liability to the HICBC.

2. The table below summarises the assessments and penalties issued to the Appellant:

Year ending 5 April	Assessment amount	Date of assessment	Penalty amount
2013	£184	13 March 2018	£36.80
2014	£648	13 March 2018	£129.60
2015	£743	13 March 2018	£148.60
2016	£1221	13 March 2018	£244.20

THE ISSUES BEFORE THE TRIBUNAL

3. On 20 November 2019, the parties were notified that the hearing of this appeal was to take place on 30 January 2020.

4. In their Skeleton Argument (not drafted by Ms Truelove) dated 11 December 2019, HMRC stated:

> "the failure to notify penalties are the only matter under appeal. To date, the Respondents can confirm that they have received no appeal regarding the assessments themselves, and any appeal of those matters would have to be made to them first."

5. However, on 28 January 2020, HMRC applied for an adjournment of the hearing because "the appeal concerns discovery assessments raised by an Officer of the Respondents under Section 29 Taxes Management Act 1970" and "the Respondents' current bundle of documents and response…deals with penalties only.…[but] the Respondents have had a discussion with the Appellant and it is apparent that the appeal is against both the Assessments and the Penalties". HMRC also applied to categorise the appeal as a "standard" appeal (albeit, as was clear from correspondence from the Tribunal contained in the hearing bundle, the appeal had been categorised as standard on 22 October 2018).

6. At the beginning of the hearing, the Appellant stated that his appeal was against both the s 29(1) TMA 1970 assessments and the penalties. The Appellant summarised his case as follows:

(1) In relation to the s29(1) TMA 1970 assessments:

(a) the discovery upon which the assessments was based had become "stale" because HMRC discovered well prior to 13 March 2018 that the Appellant was liable to HICBC; and

(b) s 29(1) TMA 1970 cannot be used to assess for the HICBC because HICBC is not "income" within the meaning of that provision.

(2) In relation to the penalties:

(a) if the assessments were invalid then the appeal against the penalties should also be allowed; and

(b) he did *not* submit that he had a "reasonable excuse" within the meaning of Schedule 41 to the FA 2008.

7. The Appellant opposed HMRC's application to adjourn, stating that HMRC had always known that he was appealing against both the assessments and the penalties and should have prepared accordingly.

8. Ms Truelove on behalf of HMRC stated that on her review of the papers it had appeared to her that the Appellant was challenging the s 29(1) TMA 1970 assessments as well as the penalties hence HMRC's application (on 28 January 2020) for an adjournment and for the appeal to be re-categorised as a standard appeal.

9. Having reviewed the correspondence, it seemed to us clear that the Appellant had appealed to HMRC against both the assessments and the penalties. In letters dated 3 July 2018 and 31 July 2018, HMRC appeared to confirm this was also their understanding of the scope of the Appellant's appeal. HMRC's skeleton argument was, then, inaccurate to the extent it stated that no appeal had been made to HMRC in relation to the assessments. That being said, the Appellant's Notice of Appeal as filed with the Tribunal was less clear and arguably did only appeal against the penalties.

10. We considered that in all the circumstances the interests of justice were best served by:

(1) treating the Appellant's appeal as an appeal against both the assessments and the penalties;

(2) proceeding with the hearing as listed;

(3) giving HMRC an opportunity to respond in writing to the Appellant's submissions relating to the validity of the s29 (1) TMA 1970 assessments; and

(4) giving the Appellant an opportunity to reply in writing to any written submissions made by HMRC.

11. During the hearing, the Appellant made his submissions in a calm, clear and considered way. The way he conducted himself, despite obviously feeling strongly about these issues, was commendable.

12. On 26 February 2020, HMRC filed written submissions addressing the points raised by the Appellant in relation to the validity of the assessments.

13. In early March 2020, the Appellant (by way of an undated document) replied to HMRC's written submissions. As well as replying to HMRC's submissions, this document sought to argue that the Appellant had a "reasonable excuse" for his failure to notify HMRC of his liability to HICBC. In support of that submission, the Appellant stated "I unwittingly lacked awareness of my wife's Child Benefit awards…I did not comprehend my wife's Child Benefit awards because that was kept separate from me, not deliberately, but because I had no reason to be involved; my wife kept the Child Benefit awards separate from my income so I couldn't have realised I needed to fill in a tax return or owed any repayments…". As noted above, the Appellant had expressly stated at the hearing that his case did *not* include a submission that he had a reasonable excuse. In those circumstances HMRC (and the Tribunal) did not ask him any questions about or otherwise explore his state of knowledge in relation to his wife's receipt of Child Benefit. In other words, the hearing would have been conducted differently had the Appellant not said he was not advancing a reasonable excuse argument. Accordingly, we do

not consider it is in the interests of justice to permit the appeal to raise this new argument at this late stage.

14. Having reviewed the parties' written submissions, the Tribunal considered that it might be assisted by written submissions from *amicus curiae* in relation to whether s 29(1) TMA 1970 can properly be used to assess a person to HICBC and in particular whether HICBC is "income" within the meaning of s 29(1) TMA 1970. The Tribunal therefore wrote to the Revenue Bar Association ("RBA") to ask whether any of its members might be willing to act in this role on a *pro bono* basis. The RBA confirmed that several of its members were willing to assist the Tribunal, including Keith Gordon. Mr Gordon subsequently provided very helpful written submissions to assist the Tribunal. We wish to record here our thanks to Mr Gordon and to the RBA.

15. The submissions drafted by Mr Gordon were then shared with the parties who were invited to file any further written submissions arising therefrom.

16. On 20 April 2020, HMRC filed further written submissions (drafted by Laura Poots, counsel) responding to the points made in the submissions drafted by Mr Gordon.

17. The Appellant also filed a further written document. As well as making submissions about the "income" point, this document sought to raise new arguments based on s 29(3)-(5) TMA 1970 (these arguments not having previously been raised by the Appellant). Had these arguments been raised earlier, they would likely have altered the approach taken and submissions made by HMRC at the hearing and in the subsequent written submissions. We do not consider it is in the interests of justice to permit the Appellant to raise new arguments at such a late stage. We therefore do not consider those new arguments further in this decision.

18. The issues that fall to be determined in this appeal are then:

(a) whether the discovery upon which the s29(1) TMA 1970 assessments was based had become "stale";

(b) whether s 29(1) TMA 1970 can be used to assess for the HICBC; and

(c) whether the penalties were validly issued and whether the appeal against those penalties must also be allowed if the appeal against the assessments is allowed.

FINDINGS OF FACT

19. The following facts were not in dispute:

20. In each of the tax years 2012/13, 2013/14, 2014/15 and 2015/16:

(1) the Appellant's adjusted net income exceeded £50,000;

(2) the Appellant's wife was in receipt of Child Benefit; and

(3) the Appellant was liable to HICBC.

21. The Appellant did not submit a tax return for the years in question. Tax on the Appellant's employment income was accounted for through the PAYE system.

22. HMRC did not send the Appellant a notice to file in relation to the years in question.

23. On 19 February 2018, HMRC wrote to the Appellant stating that "records indicate" that the HICBC "may apply to you and you did not register to receive a Self Assessment tax return for the tax years ended 5 April 2013, 2014, 2015 and 2016." The letter went on to set out the

amount of HICBC that HMRC believed the Appellant was liable to pay, before stating "if you believe that you do not have to pay the Charge, you need to tell us why."

24. On 6 March 2018, the Appellant, having received the 19 February 2018 letter, telephoned HMRC and confirmed that the information contained in that letter was accurate. The Appellant did not proffer any reason as to why he should not be liable to the HICBC.

25. On 13 March 2018, HMRC assessed the Appellant pursuant to s 29(1) TMA 1970. The parties were in agreement that penalties were issued to the Appellant on the same day (although we note that the notice of penalty assessment included in the bundle is dated 27 September 2018).

26. On 27 March 2018, the Appellant wrote to HMRC disagreeing with the decision to assess him although went on to say "I am prepared to pay the charges due, but not the interest or penalty as I hold you responsible for this situation." The Appellant also made a number of complaints about the way that HMRC had conducted itself and administered the HICBC. In this correspondence, the Appellant also raised that HMRC "have been aware of my income every year through the P11D which you received from my employer, and therefore knew my income was above £50,000…my partner and myself were unaware of the high income child benefit charge. At no point did you write to us and inform us of this…you knew about my income and the charge but did nothing for five years effectively allowing a tax liability to build up…"

27. On 7 June 2018, HMRC wrote to the Appellant stating it had taken the letter of 27 March 2018 as an appeal against the penalties but "do not accept you have valid grounds to appeal". The letter then responded to some of the matters raised by the Appellant including as follows:

> "You are issued P60s and P11d statements annually from your employer for tax purposes. It is the taxpayer's responsibility to ensure that they are aware of the conditions of their claims and any tax liability. It is not HMRC's responsibility to notify individuals of changes in legislation that affect them. [Nonetheless] HMRC wrote to you on both 14 October 2012 and 17 August 2013 informing you of the changes in legislation for high earners regarding the [HICBC]. You emailed HMRC on 7 January 2014 to inform us that [HICBC] does not apply to you."

28. On 21 June 2018, the Appellant wrote to HMRC stating that in addition to appealing against the penalties, he also appealed against the s29(1) TMA 1970 assessments on the basis that:

> "1. The HICBC is not my income, therefore it is not an un-assessed income, making the assessments you have raised invalid.
>
> 2. You have been aware since 2013 that my income was high enough to trigger an HICBC but you did not raise an assessment until 2018. Therefore your discovery of the issue has gone stale, rendering your assessments invalid."

The Appellant went on to state:

> "Because your assessments have not been validly raised there was no potential lost revenue, therefore you are at fault in raising penalties and interest."

29. On 3 July 2018, HMRC notified the Appellant that his appeal against the assessments and penalties was "not upheld".

30. On 20 July 2018, the Appellant wrote to HMRC stating:

> "I now understand my liability but still do not believe that there has been a valid assessment and therefore there was no potential lost revenue and I should

not have been required to pay fines and interest…I am unable to accept your decision. I would like this matter to be reviewed…"

31. HMRC acknowledged the Appellant's letter of 20 July 2018. HMRC's letter was headed "Appeal Against High Income Child Benefit Charges Penalties" but then proceeded to refer to "High Income Child Benefit Charge assessments issued under s29 TMA 1970" as well as "Failure to notify penalties issued under Schedule 41 Finance Act 2008".

32. On 20 August 2018, HMRC notified the Appellant of the conclusion of the review. The review decision letter stated that the matter in issue related solely to the decision to issue the penalties. The decision to issue the penalties was upheld.

33. On 28 September 2018, the Appellant filed a Notice of Appeal with the Tribunal. In a reply (dated 8 October 2018) to correspondence from the Tribunal, the Appellant acknowledged that his appeal had been filed late and explained the reasons for that. HMRC did not object to the appeal being brought out of time and, in all the circumstances, we consider it in accordance with the overriding objective to extend time.

34. We also make the following findings of fact (which were not agreed):

(1) On 14 October 2012, HMRC sent to the Appellant a Child Benefit Awareness letter. Our finding in this regard is based on HMRC's record that this letter was sent to the Appellant on this date (albeit no copy was retained). This letter was issued to over 800,000 taxpayers who had an income of over £50,000. This letter was, then, issued to the Appellant as part of a mass awareness exercise and not because HMRC had already discovered he was liable to HICBC.

(2) On 17 August 2013, HMRC sent to the Appellant letter SA252. Our finding in this regard is based on HMRC's record that this letter was sent to the Appellant on this date (albeit no copy was retained). The SA252 was issued to 2 million higher rate taxpayers who paid tax through PAYE only. This letter was, then, issued to the Appellant as part of a mass awareness exercise and not because HMRC had already discovered he was liable to HICBC.

(3) The Appellant told us he did not receive either of the letters referred to at (1) and (2) above. We accept the Appellant's account.

(4) In November 2013, December 2013, February 2014, December 2014 and January 2015 HMRC issued "targeted" awareness letters to certain taxpayers. None of these letters were sent to the Appellant. Our finding in this regard is based on the fact that HMRC has no record of who it sent these letters to, and the Appellant denied that he received any such letters.

(5) Whilst HMRC's records indicate that the Appellant made "contact" with HMRC on 7 January 2014 to "confirm that HICBC does not apply", we do not make that finding because:

(a) The Appellant disputes contacting HMRC;

(b) HMRC stated that the contact was by email but were unable to produce a copy of that email; and

(c) HMRC records indicate that the contact was made by the Appellant following his receipt of letter P113C. However, P113C was not issued (to anyone) until February 2014 (i.e. a month after the supposed contact), and the Appellant denied receiving any such letters from HMRC in 2012, 2013 or 2014.

RELEVANT LAW

35. The Finance Act 2012 ("FA 2012") inserted the provisions relating to the HICBC into the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA 2003"). The charge took effect from the tax year 2012/13 in relation to child benefit amounts received after 6 January 2013. The relevant provisions are:

> *"681B High income child benefit charge*
>
> (1) A person ("P") is liable to a charge to income tax for a tax year if—
>
> (a) P's adjusted net income for the year exceeds £50,000, and
>
> (b) one or both of conditions A and B are met.
>
> (2) The charge is to be known as a *"high income child benefit charge"* .
>
> (3) Condition A is that—
>
> (a) P is entitled to an amount in respect of child benefit for a week in the tax year, and
>
> (b) there is no other person who is a partner of P throughout the week and has an adjusted net income for the year which exceeds that of P.
>
> (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."
>
> …
>
> *681H Other interpretation provisions*
>
> (1) This section applies for the purposes of this Chapter.
>
> (2) *"Adjusted net income"* of a person for a tax year means the person's adjusted net income for that tax year as determined under section 58 of ITA 2007.
>
> (3) *"Week"* means a period of 7 days beginning with a Monday; and a week is in a tax year if (and only if) the Monday with which it begins is in the tax year."

36. FA 2012 also amended the provisions requiring notification of chargeability by the addition of a new s 7(3)(c) to the TMA 1970 which provided:

> "7.— Notice of liability to income tax and capital gains tax.
>
> (1) Every person who—
>
> (a) is chargeable to income tax or capital gains tax for any year of assessment, and
>
> (b) falls within subsection (1A) or (1B),
>
> shall, subject to subsection (3) below, within the notification period, give notice to an officer of the Board that he is so chargeable.
>
> …

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

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

(b) the person has no chargeable gains, and

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

…"

37. Section 29 TMA 1970 provides in relevant part:

> (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, unauthorised payments under section 208 of the Finance Act 2004 or surchargeable unauthorised payments under section 209 of that Act or relevant lump sum death benefit under section 217(2) of that Act 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
>
> (b) that an assessment to tax is or has become insufficient, or
>
> (c) that any relief which has been given is or has become excessive,
>
> 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.

38. In *Charlton v HMRC* [2012] UKFTT 770 (TCC) (a decision of the Upper Tribunal, despite the neutral citation), the Upper Tribunal stated at paragraph 37:

> "In our judgment, no new information, of fact or law, is required for there to be a discovery. All that is required is that it has newly appeared to an officer, acting honestly and reasonably, that there is an insufficiency in an assessment. That can be for any reason, including a change of view, a change of opinion, or correction of an oversight. The requirement for newness does not relate to the reason for the conclusion reached by the officer, but to the conclusion itself…"

39. Paragraph 37 of *Charlton* was cited with approval by the Court of Appeal in *Tooth v HMRC* [2019] EWCA Civ 826 at [60]. The Court of Appeal in *Tooth* also held that it was possible for a discovery to become "stale" such as to render invalid an assessment under s29(1) TMA 1970.

40. Paragraph 1 of Schedule 41 FA 2008 provides a penalty is payable by a person who fails to comply with an obligation under, *inter alia*, s 7 TMA 1970. Paragraphs 6-13 set out how the amount of that penalty is to be calculated.

41. Paragraph 14 of Schedule 41 FA 2008 provides that if HMRC think it right because of special circumstances they may reduce a penalty.

42. Paragraph 17(1) of Schedule 41 FA 2008 provides that a person issued with a penalty may appeal against the decision that a penalty is payable. Paragraph 17(2) of Schedule 41 FA 2008 provides that a person issued with a penalty may appeal the amount of the penalty.

43. Paragraph 19 of Schedule 41 FA 2008 provides:

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

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

(a) affirm HMRC's decision, or

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

(3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 14–

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

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

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

44. Paragraph 20 of Schedule 41 FA 2008 provides:

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

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

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

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

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

Approach to statutory interpretation

45. In *Reeves v HMRC* [2018] STC 2056, the Upper Tribunal summarised the case law on statutory construction as follows:

"34. …In the well-known case of *Barclays Mercantile Business Finance Ltd v Mawson* [2004] UKHL 51, [2005] 1 AC 684 ('Mawson') the House of Lords held that a taxing statute is to be applied by reference to the ordinary principles of statutory construction, i.e. by giving the provision a purposive construction in order to identify its requirements and then deciding whether the actual transaction answers to the statutory description. The question is always whether the relevant provision of the statute, upon its true construction, applies to the facts as found…

35. The role of the court in correcting anomalies created by the literal wording of tax legislation has been considered on many occasions. In Jenks v Dickinson (HM Inspector of Taxes) [1997] STC 853, Neuberger J cited passages from earlier authorities including Mangin v Inland Revenue

Commissioner [1971] AC 739 where Lord Donovan had said that the object of the construction of the statute being to ascertain the will of the legislature, it may be presumed that neither injustice nor absurdity was intended. If therefore a literal interpretation would produce such a result, and the language admits of an interpretation which would have avoided it, then such an interpretation may be adopted. Further the history of an enactment and the reasons which led to it being passed may be used as an aid to its construction…

…

37. Both Mr Reeves and HMRC relied before us on Inco Europe [2000] 1 WLR 586. In that case the House of Lords was considering an application for a stay of High Court proceedings on the grounds that they had been brought in respect of a matter which the parties had agreed to refer to arbitration in the Netherlands. The first instance judge had dismissed the application on the grounds that the arbitration agreement was void. A question arose as to whether the Court of Appeal had jurisdiction to entertain an appeal. Lord Nicholls of Birkenhead recognised that the relevant provision in the Schedule to the Arbitration Act "read literally and in isolation from its context" precluded any right of appeal. His Lordship held that "Several features make it plain beyond a peradventure that on this occasion Homer, in the person of the draftsman … nodded" and that something had gone awry in the drafting. Having regard to the purpose of the provision and its context, that is that it was intended to be a consequential amendment rather than making a major legislative change, he held that the proper interpretation of the provision should give effect to Parliament's intention. He referred to the court's role in correcting obvious drafting errors. In suitable cases, in discharging its interpretative function the court will add words, or omit words or substitute words: page 592C-D. However, the power was strictly confined "to plain cases of drafting mistakes":

"The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation …"

38. Lord Nicholls went on to say that even where these three conditions were met the court may find itself inhibited from interpreting the statutory provision in accordance with what it is satisfied was the underlying intention of Parliament.

…"

46. On the facts before it, the Upper Tribunal concluded:

".. applying the three stage test in Inco Europe, we cannot be abundantly sure what Parliament intended to do about a taxpayer in Mr Reeves' position, namely one who is a non-resident transferor and who also controls the resident transferee company.

…

50. In our judgment, there is no doubt that the drafting of section 167(2) achieves the purpose for which it was enacted, that is to put an end to the envelope trick as a widely used arrangement by which UK residents could avoid capital gains tax by gifting their assets to a company controlled by non-resident associates. What it does not achieve is sewing up a different, albeit similar, loophole benefiting a non-resident taxpayer who, because of the way in which a combination of other, subsequently enacted, statutory provisions work, would be liable to tax on the disposal of an asset.

51. If the drafting of section 167(2) had been defective in a way which failed to prevent the envelope trick from working, then that might well have been an error which the Tribunal could repair relying on Inco Europe. But Mr Ewart fairly accepted that Parliament did not address its mind either when section 167 was enacted or when LLPs were created to a non-resident owner of an interest in an LLP like Mr Reeves. We do not consider that the authority of Inco Europe is intended to allow HMRC to extend a provision designed to close one gap so that it closes a different gap which Parliament has not considered.

52. It may be, as Mr Ewart submits, that other non-resident transferors of assets falling within section 10 would seek to take advantage of the mechanism that Mr Reeves has devised. But if Parliament were then to turn its mind to preventing that, we cannot be abundantly sure how, if at all, it would go about stopping such avoidance and in particular whether it would decide as a matter of policy to treat non-resident transferors who hold section 10 assets because they are partners in an LLP in the same way as it treats non-resident transferors who hold section 10 assets directly."

DISCUSSION AND DECISION

Was the discovery "stale"?

47. The Appellant's submissions on staleness are encapsulated by the following extract from his written submissions:

> "HMRC could have chosen, five years ago, based on their knowledge of my income from yearly P60s and the records they hold on Child Benefit awarded to my wife, to amend my tax code to collect the HICBC.
>
> …
>
> HMRC issued their compliance check letter on 19 February 2018 detailing my income, number of children, amount of Child Benefit awarded and the amount of HICBC for the tax years ending 2013, 2014, 2015 and 2016. It appears to me that this check was issued for the sole purpose of inducing me to disclose information already known to HMRC.
>
> …
>
> I believe that the point of discovery was each April in the respective tax year when [HMRC] received a P60 from my employer…These P60s demonstrated that I was a higher rate taxpayer for all the relevant years. HMRC also administer the Child Benefit System and hold records of all awards to my wife.
>
> …"

48. The Appellant further submitted that in circumstances where HMRC's case was that he had been issued with an HICBC "awareness letter" on 14 October 2012 and letter SA252 on 17 August 2013 and *potentially* with other awareness letters in November 2013, December 2013, February 2014, December 2014 and January 2015, HMRC must have discovered that he was liable to HICBC years before the s 29(1) TMA 1970 assessment was issued. The Appellant makes this submission without accepting that he received any such letters (stating in his written submissions "I have no record of any of the awareness letters or SA252 [that] HMRC claim to have sent to me").

49. On the issue of staleness, HMRC submitted:

(1) they "do not agree that 'staleness' exists as a statutory concept";

(2) citing from *Johnstone v HMRC* [2018] UKFTT 689 (TC), "the cohort of taxpayers likely to be affected by HICBC is not readily identifiable from the information held by HMRC, especially when the recipient of the child benefit and the taxpayer liable to HICBC are not the same person, as is the case here".

(3) "Simply holding all the relevant information does not amount to a discovery…staleness could only set in once a discovery has been made and lost its essential newness. Presumably as a result of an unreasonable delay between making the discovery and making an assessment".

(4) HMRC's records indicate that the Appellant was issued with a "Child Benefit awareness letter" on 14 October 2012 and SA252 on 17 August 2013. However, HMRC's system does not retain copies of such letters.

(5) The Child Benefit Awareness Letter (which HMRC records indicate was issued to the Appellant in October 2012) was issued to over 800,000 taxpayers who had an income of over £50,000. This letter was issued to the Appellant as part of a mass awareness exercise and not because HMRC had already discovered he was liable to HICBC.

(6) The SA252 (which HMRC records indicate was issued to the Appellant in August 2013) was issued to 2 million higher rate taxpayers who paid tax through PAYE only. This letter was issued to the Appellant as part of a mass awareness exercise and not because HMRC had already discovered he was liable to HICBC.

(7) In November 2013, December 2013, February 2014, December 2014 and January 2015 HMRC issued "targeted" awareness letters to certain taxpayers. HMRC cannot now say whether any of these letters were sent to the Appellant as HMRC no longer has a record of which taxpayers these letters were sent to. The purpose of these letters was to encourage taxpayers to check their liability to HICBC and to contact HMRC if they believed that they were not liable.

(8) "[HMRC] do not hold any evidence of any officer making a discovery of a tax loss for any year for this taxpayer until 2018".

(9) The discovery occurred on 6 March 2018, when the Appellant telephoned HMRC and confirmed that the information contained in the 19 February 2018 letter was accurate and did not proffer any reason why he was not liable to HICBC.

50. Having carefully considered the competing submissions, we conclude as follows:

51. The concept of staleness has been recognised by the Court of Appeal in *Tooth* and by the Upper Tribunal in a number of cases including *Beagles v HMRC* (2018) UKUT 380 (TCC) and

Patullo v HMRC [2016] UKUT 270 (TCC). Those decisions are binding on us. Accordingly, contrary to HMRC's submissions, the concept of staleness exists and needs to be considered.

52. We do not accept the Appellant's submission that there was a discovery "each April" when HMRC received the Appellant's P60 for the tax year just ended. A discovery occurs where it newly appears to an officer, acting honestly and reasonably, that there is an insufficiency in an assessment; it requires a threshold to be crossed (see *Charlton* at [28] "At one point an officer is not of the view that there is an insufficiency such that an assessment ought to be raised, and at another he is of that view."). Such a threshold is not crossed merely because HMRC are in possession of different pieces of information which, if put together, would justify an assessment being made.

53. We do not accept the Appellant's submission that the fact that HMRC's records indicate that the "Child Benefit awareness letter" and letter SA252 were issued to the Appellant on 14 October 2012 and 17 August 2013 respectively shows that HMRC had discovered an insufficiency of tax. The wording of those letters is very much in line with them being "generic awareness" letters as opposed to letters targeted at those in relation to whom HMRC had already made a discovery.

54. As to the further awareness letters sent to some taxpayers in November 2013, December 2013, February 2014, December 2014 and January 2015: HMRC has no record of sending any of those letters to the Appellant (although that is because it has no record at all of who the letters were sent to). More importantly, the Appellant denies ever receiving any of those letters. In those circumstances, we are not satisfied that any of these letters were in fact sent to the Appellant. Further, we accept HMRC's submission that while these further letters were "targeted" HMRC had not, in the case of each addressee, already discovered an insufficiency of tax.

55. By 19 February 2018 (when HMRC wrote to the Appellant), HMRC had clearly considered the Appellant's circumstances and formed the view that, subject to the Appellant explaining why he ought not to be liable to HICBC, assessments would be issued to the him. However, the 19 February 2018 letter was framed conditionally (i.e. that assessments would be issued *if* the Appellant did not, by 21 March 2018, provide information explaining why he was not liable to HICBC) suggesting that the officer had not yet crossed the threshold (see *Charlton*) but would do so if no explanation was provided by 21 March 2018.

56. The discovery threshold was crossed on 6 March 2018 when the Appellant confirmed that the information contained in the 19 February 2018 letter was accurate and that there was no reason why he was not liable to the HICBC. The assessments were issued on 13 March 2018. Therefore, at the point of assessment, the discovery had not lost its newness/become stale. Even if the discovery occurred when HMRC wrote to the Appellant on 19 February 2019, there could be no question of that discovery being stale by 13 March 2018.

57. Whilst not something challenged by the Appellant, we find that the discovery assessments were issued in time given that s 23(1A)(b) TMA 1970 provides for an extended time limit of 20 years where a taxpayer fails to notify HMRC of chargeability (including to the HICBC) pursuant to s 7 TMA 1970.

Can s 29(1) TMA 1970 be used to assess for the HICBC?

58. The Appellant's submissions on s 29(1) TMA 1970 are encapsulated by the following extract from his written submissions:

> "the HICBC that I'm required to pay is not part of my income, it is a charge on a benefit which is awarded to my wife who uses it to help and do good for

our children…s 29(1) TMA 1970 refers to 'income', income cannot possibly mean a 'charge' as is the case in the HICBC…discovery assessments under s29 TMA 1970 should only have been made if HMRC had discovered that my income had been insufficiently taxed. However, all my income for the relevant years had already been taxed through PAYE…."

59. As referred to above, Mr Gordon (as amicus) provided us with helpful submissions on this point. In summary, Mr Gordon submitted:

(1) "The HICBC is not a tax in its own right, nor even a provision that deems an amount to be treated as income for the purpose of income tax. Instead it is a standalone charge which is then absorbed into the income tax regime."

(2) "The wording of [s.29(1) TMA 1970] clearly and unambiguously focuses on a taxpayer's 'income…or chargeable gains'. For example, taking the situation of a taxpayer who has failed to pay tax on a salary of £15,000 (with a tax liability of say, £3,000), section 29(1) (a) is focusing on the £15,000 and not the £3,000…"

(3) Liability to HICBC (under s 681B(1)(a) ITEPA 2003) is dependent (in part) on the taxpayer's "adjusted net income" for the tax year in question. By s 681H(2) ITEPA, "Adjusted net income" "means the person's adjusted net income for that tax year as determined under section 58 of ITA 2007". Section 58 ITA 2007 uses as its starting point, a figure derived from each separate component of the taxpayer's income for the year. Therefore "to treat the HICBC as income would be circular."

(4) "If, *ex hypothesi*, the word "income" were to extend to HICBC, what is the amount of this 'income' which ought to have been assessed to income tax?" The only plausible explanation is the Child Benefit itself. However, as noted by the Tribunal in *Robertson,* that is exempt by virtue of s 677(1) ITEPA Table B Part 1 (and, therefore, even if 'income', it cannot fall within the scope of 'income which ought to have been assessed to income tax')."

(5) A purposive approach to statutory construction cannot justify reading in a meaning that is not available in the words found in the statute.

(6) It is not possible to identify the (s 29(1)(a)) "amount" that should have been assessed: it is possible only to identify how much tax has been under-assessed.

(7) HMRC are not without an effective remedy when a taxpayer fails to notify chargeability to HICBC as, once an officer becomes aware of the potential liability, a notice can be issued pursuant to s 8 TMA 1970 requiring a tax return for the relevant year. If the return was filed and did not declare the HICBC liability, s 29(1)(b) could be used to raise an assessment. If no return was filed, a determination under s 28C TMA 1970 could be made.

(8) Section 34A TMA 1970 which provides that tax returns may not now be required to be filed more than four years after the end of the tax year in question was not something that Parliament could have foreseen when enacting the HICBC legislation in 2012.

(9) "Usually, a failure to give a section 7 notice gives rise to a 20-year time limit and, therefore, HMRC must now act 14 years more quickly than in other cases involving a failure to comply with section 7. However, it is arguable that a failure to highlight a liability to the HICBC is potentially less serious than most cases where there is a failure to comply with section 7. In particular, it does not involve a failure to notify HMRC of income of which they are unaware [because HMRC already have information about the

taxpayer's adjusted net income and about the amount of Child Benefit received and just need to join the dots]".

(10) A "rectifying interpretation" should only adopted if the Tribunal is "abundantly sure" that each of the three conditions set out in *Inco Europe v First Choice Distribution* [2000] 1 WLR 586 are met.

(11) As to the first *Inco* condition*:* "It is not unreasonable to assume that Parliament did not intend to require HMRC to address these cases by issuing section 8 notices. On the other hand, when the HICBC was introduced, there was no time limit that restricted the use of section 8 notices. And the section 8 route avoids potential hurdles governing the use of discovery assessments".

(12) As to the second *Inco* condition: "if (but only if) the first part of the *Inco* test can be overcome, then it might be said that the omission was as a result of inadvertence and not deliberate. However, even this is not without doubt. Since the First-tier's decision in *Robertson*, there has been a full Finance Act cycle (and we are now within the second such cycle) and there has been no suggestion from Parliament in either the Finance Act 2019 or in the current Finance Bill that there is anything requiring rectification."

(13) As to the third *Inco* condition: "whilst it is possible to speculate that Parliament would have wanted HMRC to be able to assess for the HICBC in such cases, it is in my view very difficult to say with any certainty 'the substance of the provision Parliament would have made'. One possibility would be a provision that effectively qualifies the meaning of 'income' in section 29 in the context of HICBC cases. However, that is merely one possible candidate. A second possibility has already been chosen by Parliament in respect of another set of 'charges' that has been bolted into the income tax provisions – being the charges that seek to penalise certain transactions in relation to registered pension schemes. As the First-tier noted in *Robertson* at [86]:

> 'a comparison can be made with provisions in Part 4 FA 2004 (pension schemes). There tax is charged on a number of events involving a variety of matters, some very far removed from any concept of income such as the lifetime allowance charge, and others at least involving receipts in some cases such as the unauthorised payments charges in s 208 FA [2004]. But s 208 and other sections of FA 2004 not only make it clear that they do not involve 'income' for any purpose of the Tax Acts, but regulation 9 of the Registered Pensions Schemes (Accounting and Assessment) Regulations 2005 (SI 2005/3453) amends s29(1) TMA specifically to add a discovery of a loss of tax arising on these pension amounts to the scope of a discovery assessment under that subsection.'"

(14) "In short, even if it was Parliament's intention that discovery assessments might be used in a case such as this, there is no clarity as to how this would be achieved."

60. HMRC's submissions can be summarised as follows:

(1) The provision relied on by HMRC to assess the Appellant was s 29(1)(a) TMA 1970 (HMRC confirmed that s 29(1)(b) could not apply to the Appellant's case).

(2) "HMRC acknowledge that the legislation imposing the HICBC does not identity an amount of income, and instead imposes a charge to income tax in a specified amount. HMRC submit however, that on a proper purposive construction of section 29(1)(a), the HICBC is within the words "any income which ought to have been assessed to income

tax". In particular HMRC submit that, in section 29(1)(a), 'income' is to be read as including any amount liable to income tax".

(3) Section 29(1) TMA 1970 must be given a purposive interpretation.

(4) "The proper construction must be workable. As Lord Dunedin observed in *Whitney v the Commissioners of Inland Revenue* (1925) 10 TC 88 at 110:

> "Once that it is fixed that there is a liability, it is antecedently highly improbable that the statute should not go on to make that liability effective. A statute is designed to be workable, and the interpretation thereof by a Court should be to secure that object, unless crucial omission or clear direction makes that end unattainable."

(5) If HMRC is not empowered to issue a discovery assessment to a taxpayer who fails to notify liability to the HICBC, this would render the HICBC ineffective in a scenario that HMRC frequently face: the taxpayer not notifying HMRC and HMRC not becoming aware of the liability for several years.

(6) "A notice to file [under s 8 TMA 1970] will only be effective where it is issued within 4 years of the relevant year of assessment…[However,] HMRC may not become aware until several years down the line [that the taxpayer has failed to notify chargeability to HICBC]. Accordingly, section 8 TMA is not an effective remedy for HMRC in these scenarios."

(7) If HMRC is not empowered to issue a discovery assessment to a taxpayer who fails to notify liability to the HICBC that would lead to absurd results. "the absurdity can be seen when one compares the scenario [of someone who is liable to HICBC but does not file a tax return] with a taxpayer who does submit a return, but that return is inaccurate…[In the latter case,] HMRC could make an assessment…because s 29(1)(b) is fulfilled." In the case of a taxpayer who has filed a return but *deliberately* not included liability to HICBC, HMRC would have 20 years to issue an assessment under s29(1)(b). It would be absurd if a taxpayer who was liable to HICBC and deliberately failed to file a tax return was in a better positon (i.e. was not liable to be assessed after 4 years) (for the avoidance of doubt there is no suggestion that the Appellant behaved deliberately in not filing a tax return).

(8) Whilst section 34A TMA 1970, which imposes a 4 year time limit for notices to file was introduced after the HICBC legislation, it was (up until the Upper Tribunal decision in *R (OAO) Higgs v HMRC* [2015] UKUT 0092 (TCC) in March 2015) HMRC's position that the four-year time limit within section 34 TMA 1979 also applied to self assessments. "Even if HMRC's position was ultimately held to be incorrect, it is clear that Parliament could have appreciated, when drafting the HICBC legislation, that there would be a difference in time limits between notices to file and discovery assessments."

(9) As to the submission that a failure to notify liability to HICBC is "less serious" than other instances of a failure to notify: "This submission is not consistent with the general scheme of the tax regime: the burden is on taxpayers to self-assess in respect of income tax, *including* the HICBC. While HMRC will act if they become aware of an underdeclaration (whether of the HICBC or other amounts), the burden is not on HMRC to investigate the affairs of every taxpayer (or potential taxpayer) to ascertain whether they have fully declared their tax liabilities."

(10) As to the use of regulations to modify section 29 TMA to apply to some of the charges arising in relation to registered pension schemes: "For unauthorised payment charges imposed on *companies*, regulations made specific provision to ensure that

assessments could be made under section 29 TMA, modifying section 29 TMA for that purpose. For unauthorised payment charges imposed on *individuals*, the regulations did not make specific provision for section 29 TMA to apply. This difference in drafting is unsurprising: the assessing provisions of TMA are not generally engaged in relation to UK-resident companies, and so a draftsperson might consider it necessary to clarify that section 29 applies in these circumstances. It is HMRC's position that an unauthorised payment charge on an individual can be assessed under section 29 TMA without the need for regulations to modify section 29. The unauthorised payment charge is, like the HICBC, an amount which is liable to income tax and can therefore fall within section 29(1)."

(11) "In summary, HMRC submit that the proper purposive interpretation of section 29(1)(a) TMA covers <u>any amount</u> which ought to have been assessed to income tax".

61. We are aware that in *Robertson v HMRC* [2018] UKFTT 158 (TC), the FTT held that the discovery assessments were not valid because HICBC is not "income" within the meaning of s 29(1) TMA 1970. The Upper Tribunal did not need to determine that point on appeal (the appeal being allowed on other grounds) but stated "there are respectable arguments on both sides".

62. We are also aware of the recent FTT decision of *Jason Wilkes* v HMRC [2020] UKFTT 0256 (TC) where the FTT concluded that HICBC was not income within the meaning of s 29(1)(a) TMA 1970 and therefore the assessments were not validly raised.

63. For the reasons set out below, we have reached a different conclusion to that reached in *Jason Wilkes.* However, we are of the view that this is an issue that would benefit from consideration by the Upper Tribunal.

64. For the reasons explained at paragraphs 47-49 of *Jason Wilkes*, we agree that HICBC is not "income" within the meaning of s 29(1)(a) TMA 1970. However, in our view, that leads to an absurd and unjust result in that taxpayers who are liable to HICBC but do not file a tax return (despite this being required by s 7 TMA 1970) cannot be issued with a discovery assessment and can only be assessed to HICBC if, within 4 years of the relevant tax year, HMRC issue a notice to file (whereas statute provides for an extended time limit of 20 years to raise discovery assessments if there has been a failure to notify under s 7 TMA 1970). The absurdity is highlighted by the scenario posited by HMRC: a taxpayer who is liable to the HICBC but deliberately fails to file a return is in a considerably better position than a taxpayer who has filed a return but has deliberately (or carelessly) failed to declare liability to HICBC.

65. One way of avoiding this absurdity and injustice would be read "income" as meaning "any amount liable to income tax" which is the approach urged on us by HMRC. However, we do not think that the statutory language admits of such an interpretation for the reasons given at paragraph 52(4) of *Jason Wilkes*.

66. However, we are of the view that it is possible and permissible to rectify this absurdity and injustice by reading words into s 29(1) TMA 1970. This is where we depart from the analysis in *Jason Wilkes.*

67. Applying the three stage approach set down in *Inco Europe:*

(1) We are abundantly sure that the intended purpose of s 29(1)(a) TMA 1970 is to allow HMRC to make good a loss of tax to the exchequer where under-assessed tax is discovered. The intended purpose of s 36 TMA 1970 is to allow HMRC 20 years to issue assessments where chargeability (including to HICBC) has not been notified as required by s 7 TMA 1970.

(2) We are abundantly sure that Parliament's failure to amend s 29(1)(a) TMA 1970 so as to include within it the HICBC was due to inadvertence. Having determined that liability to HICBC should be notified to HMRC by way of filing a tax return (and amending s 7 TMA 1970 accordingly), we find it inconceivable that Parliament intended that HMRC be prevented from assessing a taxpayer that failed to comply with that obligation unless and until HMRC issued to that taxpayer a notice to file given that such an approach would lead to the absurdities and injustice referred to at paragraph 64 above.

(3) We are abundantly sure that, but for this inadvertence, Parliament would have added to s 29(1)(a) TMA wording to the effect that the HICBC could be assessed under that provision (e.g. by adding in the following underlined words "that any income, unauthorised payments under section 208 of the Finance Act 2004 or surchargeable unauthorised payments under section 209 of that Act or relevant lump sum death benefit under section 217(2) of that Act which ought to have been assessed to income tax, <u>or any high income child benefit charge under section 681B of the Income Tax (Earnings and Pensions) Act 2003 which ought to have been charged,</u> or chargeable gains which ought to have been assessed to capital gains tax have not been assessed…").

68. We are very conscious then whenever a court or tribunal read words into a statute there is a risk that this crosses the line into the impermissible realm of judicial legislating. However, for the reasons already given we are of the view that reading in words so as to allow s 29(1)(a) TMA 1970 to be used to assess for the HICBC is consistent with Parliament's intention.

69. Accordingly, we find that s 29(1)(a) TMA 1970 can and should be read as permitting HMRC to issue discovery assessments to assess a taxpayer to the HICBC.

Validity of the penalties

70. The Appellant submitted that if the assessments were invalid (whether because the discovery was "stale" or because s 29(1) TMA 1970 did not permit assessments to be issued in relation to HICBC), the appeal against the penalties would also fall to be allowed.

71. For the reasons given above, we have found the s 29(1) TMA 1970 assessments to be valid. We would, however, have dismissed the penalty appeal in any event given that, as the Upper Tribunal made clear in *Robertson,* there is no requirement for a valid assessment before a penalty can be issued. This is because the focus of "potential lost revenue" is on liability (i.e. whether someone is liable to the HICBC) not whether that liability can be enforced.

72. On the present facts we are satisfied that the Appellant was liable to the HICBC and failed to declare that liability to HMRC as required by s 7 TMA 1970. In those circumstances the Appellant was properly liable to a penalty under paragraph 1 of Schedule 41 FA 2008. The Appellant did not dispute the amount of the penalty and we find it was properly calculated in accordance with paragraphs 6-13 of Schedule 41 FA 2008.

73. Accordingly, the Appellant's appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

74. 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.

DAVID BEDENHAM

TRIBUNAL JUDGE

RELEASE DATE: 23 JULY 2020