TC07740

INCOME TAX – high income child benefit (HICB) charge – taxpayer had liability but did not complete a tax return – HMRC discovered HICB charge liability & raised discovery assessment under s29(1)(a) TMA 1970 - was there discovery that income which ought to have been assessed to income tax had not been assessed? – held: no, as HICBC charge was a self-standing liability to income tax, not income assessable to income tax – assessment invalid – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/01613

BETWEEN

JASON WILKES **Appellant**

-and-

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

TRIBUNAL: JUDGE ZACHARY CITRON
MS JANE SHILLAKER

Sitting in public at Bristol Civil & Family Justice Centre on 12 March 2020, with further written submissions received from HMRC on 24 April 2020 and from the Appellant on 5 May 2020

The Appellant was represented by his wife, Mrs Wilkes

Mr Wilby, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. This was an appeal against income tax assessments raised under s29 Taxes Management Act 1970 ("TMA") in respect of Mr Wilkes' liability to a high income child benefit ("HICB") charge for three tax years.

BACKGROUND TO THE APPEAL

2. On 20 December 2018, HMRC issued income tax assessments (relating to HICB charge liabilities) on Mr Wilkes under s29 TMA as follows:

(1) 2014-15: £1,770

(2) 2015-16: £1,398

(3) 2016-17: £1,076

(an assessment for 2013-14 was later withdrawn)

3. Mr Wilkes notified HMRC of an appeal against these assessments by letter dated 12 January 2019.

4. By letter dated 25 February 2019, HMRC explained their view of the matter to Mr Wilkes, being that the assessments were due and payable.

5. Mr Wilkes notified his appeal to the Tribunal by notice of appeal dated 16 March 2019.

EVIDENCE

6. We had a document bundle prepared by HMRC with correspondence and other papers. We also had witness statements, and heard oral evidence, from two HMRC officers, Mr Pickett, who dealt with Mr Wilkes' case, and Mr Thomas, who provided technical support to caseworkers regarding the HICB charge.

FINDINGS OF FACT

7. During the tax years in question

(1) Mrs Wilkes was entitled to receive child benefit;

(2) Mrs Wilkes was married to Mr Wilkes; they were not separated;

(3) Mr Wilkes' adjusted net income for income tax purposes ("ANI") exceeded £50,000, and was greater than Mrs Wilkes'; and

(4) Mr Wilkes did not submit a tax return, and HMRC did not issue him a notice to file.

8. HMRC wrote to Mr Wilkes in a letter dated 30 November 2018 under the heading "Do you have to pay the [HICB charge]?", explaining the HICB charge and asking him to check if he was liable.

9. Mr Wilkes phoned HMRC on 3 December 2018 in response to their letter. He told them his income exceeded £50,000. They gave him details from his PAYE records and advised him to use their child benefit tax calculator to work out any HICB charge liability.

10. Mr Wilkes phoned HMRC on 18 December 2018 and spoke to Officer Pickett, giving details about his income and child benefit received by Mrs Wilkes in the tax years in question. As a result of that conversation, Officer Pickett established the facts shown at [7] above and formed the view that Mr Wilkes was liable to a HICB charge for the tax years in question that

had not been assessed to income tax. This was the first occasion on which an officer of HMRC had formed such a view based on such facts.

11. HMRC did not charge a "failure to notify" penalty as they considered that Mr Wilkes had a reasonable excuse for not notifying them of his income tax chargeability under s7 TMA.

RELEVANT LAW

12. Under Chapter 8 Part 10 Income Tax (Earnings and Pensions) Act 2003 (inserted by Finance Act 2012), a person (P) is liable to a HICB charge for a tax year if (amongst other circumstances)

(1) P's ANI for the tax year exceeds £50,000;

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

(3) Q is a partner of P (which includes a person to whom P is married, if they are not separated) throughout the week; and

(4) P's ANI for the year exceeds Q's.

13. Sub-section 29(1) TMA provides that if an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment

> (a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or
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> (b) that an assessment to tax is or has become insufficient, or
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> (c) that any relief that has been given is or has become excessive,
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> the officer or, as the case may be, the Board may (subject to provisions not relevant here) make an assessment in the amount, or further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.

14. Section 7 TMA imposes an obligation to notify HMRC of chargeability to income tax (where the person has not received a notice under s8 TMA) unless three conditions are satisfied, one of which is the person is not liable to a HICB charge in the tax year. (Another condition is, in broad terms, that all of the person's income is subject to PAYE).

15. Under s8 TMA, a person may be required by a notice given to him by an officer of HMRC to make and deliver a tax return.

16. An appeal may be brought against any assessment which is not a self-assessment (s31(1)(d) TMA). If the appellant notifies the appeal to the Tribunal, the Tribunal is to decide the matter in question (s49D TMA).

17. As for the meaning of "discover" in s29 TMA, the following was said by Floyd LJ in the Court of Appeal in *Tooth v HMRC* [2019] STC 1316:

> **[60]** Both parties accepted that the legal approach to whether there is a 'discovery' is correctly set out in this first passage from the decision of the Upper Tribunal in *Charlton v Revenue and Customs Comrs* [2012] UKUT 770 (TCC) at [37], where the tribunal said:
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> > '[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, change of opinion, or correction of an oversight.'

The UT continued in a second passage:

> 'The requirement for newness does not relate to the reason for the conclusion reached by the officer, but to the conclusion itself. If an officer has concluded that a discovery assessment should be issued, but for some reason the assessment is not made within a reasonable period after that conclusion is reached, it might, depending on the circumstances, be the case that the conclusion would lose its essential newness by the time of the actual assessment.'

[61] I agree with the UT's approach in both passages.

18. In *Reeves v HMRC* [2018] STC 2056, the Upper Tribunal gave guidance on statutory interpretation - the following are extracts (edited for relevance to this case) from [34], [35] and [37]:

> (1) In *Barclays Mercantile Business Finance Ltd v Mawson* [2005] STC 1, the House of Lords held that a taxing statute is to be applied by reference to the ordinary principles of statutory construction, ie 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.
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> (2) 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* [1997] STC 853 Neuberger J cited passages from earlier authorities including *Mangin v IRC* [1971] 1 All ER 179, 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.
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> (3) In *Inco Europe Ltd v First Choice Distribution (a firm)* [2000] 2 All ER 109, 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 1996 '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: [2000] 2 All ER 109 at 115. However, the power was strictly confined 'to plain cases of drafting mistakes':
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> > '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 …'

19. Section 3 Human Rights Act 1998 provides that, so far as it is possible to do so, primary legislation must be read and given effect in a way which is compatible with certain provisions in the European Convention on Human Rights. Those provisions include Article 8 (Right to respect for private and family life) and Article 14 (prohibition of discrimination).

APPELLANT'S ARGUMENTS

20. The appellant presented a number of arguments, which we summarise below

(1) Criticisms of the HICB charge

(a) It is wrong in principle and flawed in practice to take a welfare benefit which was claimed and received by one individual (here, Mrs Wilkes' child benefit), for the specific needs of another individual/s (the child), and hold a third person (Mr Wilkes) liable for amounts they were not in control of claiming, by attempting this clawback from within the UK taxation system. It is an absurdity for a welfare benefit, given with consideration to specific family circumstances, to be removed with no consideration for those same family circumstances

(b) HMRC should have alerted Government that: the HICB charge legislation was unable to be implemented fairly; taking large groups of otherwise PAYE earners into self-assessment would not be achievable in any fair or consistent way; that the HICB charge could not be implemented within the normal taxation time limits; and that the HICB charge would conflict with core principles and policy of the taxation system.

(c) It is a basic and fundamental principle of the tax system that an individual's tax affairs are confidential. The HICB charge legislation cuts across that principle by basing a charge to tax on knowledge about another taxpayer's affairs. It places a legal obligation on a person who is not necessarily able to comply, and who may have no hope of securing compliance.

(d) The notion, within the HICB charge legislation, of one person, P, being exposed to a tax liability due to welfare benefits claimed by another person, Q, runs contrary to the principles underlying the abolition of aggregation of income for married couples in Finance Act 1988. Undoubtedly, one Parliament does not have to be bound by previous legislation, but that this ill-conceived legislation is poorly constructed and should be reviewed.

(e) The HICB charge legislation has disproportionately impacted on women (the large majority of child benefit claimants). In coercive relationships, the high income partner would be likely to use their liability to the HICB charge to take control of the child benefit. The worst ramifications of coercive control do not seem to have been given due consideration.

(2) Criticism of HMRC's administration of the HICB charge

(a) HMRC failed in an obligation to notify employees who were not, apart from their liability to a HICB charge, obliged to notify HMRC of their chargeability to income tax (because, for example, their only source of income was subject to PAYE), and who earned on or near the new £50,000 threshold, directly and in a timely manner, of their liability to a HICB charge after it was introduced.

(b) HMRC have not implemented the HICB charge efficiently and fairly; that there was a dearth of compliance checks in the early years of the HICB charge and yet a large increase in 2017-2018 when the appellant was first contacted.

(c) Extra statutory concession A19 should have been applied by HMRC in this case.

(3) Validity of assessments made under s29(1) TMA

(a) Section 29 was not engaged here for the reasons given in the decision of the Tribunal in *Robertson v HMRC* [2018] UKFTT 0158 (TC); neither child benefit, nor the HICB charge itself, can be interpreted as "income" under s29(1).

(b) Notwithstanding the arguments above, s29(1) is not engaged where the income in question (child benefit) belongs to someone other than the taxpayer

(c) HMRC would have known that Mr Wilkes would be liable to a HICB charge from the time his ANI exceeded £50,000 in 2013, having been informed by his employer of this information; and checking with the Department for Work and Pensions would have told HMRC that Mrs Wilkes was in receipt of child benefit.

HMRC'S ARGUMENTS

Validity of assessments made under s29(1) TMA: what was discovered?

21. Where s29(1)(a) TMA 1970 refers to "income", HMRC's view was that this means any amount liable to income tax; this requires a purposive, as opposed to a literal interpretation to be applied. They cited *HMRC v Rogers & Shaw* [2019] UKUT 406 (TCC) where the Upper Tribunal found that the FTT had been incorrect in using a literal interpretation of "officer of the Board", as opposed to a purposive one

22. HMRC submitted that paragraph 41 Schedule 18 Finance Act 1998 was of assistance, as this refers to an "amount" which ought to have been assessed to tax.

23. HMRC argued that such an approach to statutory interpretation was common practice and in line with Parliament's intention. They made the following submissions as regards Parliament's intention when enacting the legislation relevant to the appeal.

(1) Income tax is charged, not just on "income", but also through income tax "charges" such as the HICB charge: this can be seen in s3 Income Tax Act 2007.

(2) Due to s7(3) TMA, all taxpayers who are liable to a HICB charge and have not been given notice to file by HMRC (s8 TMA) must give notice of their chargeability to HMRC (s7 TMA). Parliament's intention, that everyone liable to an HICB charge notify their income tax chargeability to HMRC, is unequivocal. Once they have notified chargeability, then it can be said to be standard practice for HMRC to issue a s8 TMA notice to file and the taxpayer can expect to receive that notice. The taxpayer is then obliged to self-assess their liability.

24. Here, HMRC argued, Mr Wilkes' failure to notify his income tax chargeability under s7 TMA has led to a loss of tax. Consequently HMRC were empowered to make an assessment under s29(1)(a) TMA.

25. A summary of HMRC's powers, where a HICB charge has not been assessed to income tax, follows – highlighting the difference between HMRC's and the appellant's position in the lower right hand box:

Scenario involving under-assessment of HICB charge	**HMRC powers to collect HICB charge**
Notice to file (s8 TMA) issued by HMRC; return submitted by taxpayer; no (or incorrect) HICB charge declared	Enquiry under s9A TMA or discovery assessment under s29(1)(b) TMA
Notice to file (s8 TMA) issued by HMRC; no return submitted by taxpayer	Revenue determination under s28C TMA
No notice to file (s8 TMA) issued by HMRC; no notification of chargeability (s7 TMA) given by taxpayer	*HMRC's position*: discovery assessment under s29(1)(a) TMA *Appellant's position*: No power for HMRC to raise an assessment in respect of the HICB charge

26. HMRC argued that interpreting "income" literally would not only prevent HMRC from fulfilling their statutory obligation to collect the amount of tax due, but additionally undermine the income tax system. It would provide an advantage (in cases of income tax imposed by "charge") to taxpayers who failed to comply with their s7 TMA obligations by not giving notice of their chargeability, over those who do comply.

27. HMRC argued that Parliament cannot have intended that HMRC be prevented from assessing a liability to income tax – such a situation would lead to an "absurd" conclusion. Therefore, Parliament's intention must have been for s29(1)(a) to be applicable to the circumstances shown in the table at [25] above in the lower right hand box.

28. The drafters of the TMA could not have known or even predicted that "income tax" would become the vehicle for making "charges to income tax" and therefore wrote the legislation on the basis of their understanding of "income tax" at that time.

29. Referring to the points made by Judge Thomas in *Robertson* (FTT), concerning additional legislation introduced to bring certain income tax "charges" (but not the HICB charge) within "income" – HMRC's position was that, had Parliament deemed such legislative adjustments necessary for the HICB charge, it would have done so. That it did not do so demonstrates that the present wording in the legislation is sufficient to cover income tax "charges", as well as income per se.

Validity of assessments made under s29(1) TMA: was there a valid discovery?

30. HMRC submitted that there had been a valid discovery by Officer Pickett:

(1) Discovery looks at an HMRC officer's subjective state of mind, requiring the officer to have reached a conclusion of tax loss on the basis of the evidence as regards an individual's liability for a year of assessment. When this conclusion of tax loss is satisfied, a discovery is made. This conclusion must be one which is objectively justifiable.

(2) The fact that an outside observer could or would conclude HMRC had the information some time earlier to make a discovery or could have obtained that information, is not relevant.

(3) Discovery was made by Officer Pickett on 18 December 2018. The assessments were raised under s29(1) TMA and notified to the appellant on 20 December 2018: the

discovery cannot be said to have become "stale", having been made only two days after the discovery.

Responses to criticisms of the HICB charge

31. Regarding the appellant's contention that the HICB charge conflicts with s32 Finance Act 1988, which abolished the aggregation of spousal income - HMRC submitted that the HICB charge has no impact on independent taxation. In any case, one Parliament may not bind another Parliament.

32. As for the appellant's point that the HICB charge infringes the confidentiality of person "Q" – HMRC did not accept this, arguing that person Q does not have to claim child benefit (and could preserve confidentiality if they did not). Furthermore, such information is required for other state benefits and for commercial transactions. Forgoing one's right to confidentiality in exchange for benefits or other services is a common feature of both the public and private sectors and it is simply not the case that this is an unfair consequence of a person becoming liable to the HICB charge.

33. HMRC did not accept that the HICB charge discriminates against women: the legislation makes no mention of gender and presumes nothing about the respective roles or earning power of any person within a relevant household.

Human Rights Act 1998

34. HMRC submitted that the HICB charge legislation makes no distinction between genders. It is not therefore open to interpretation based on the gender of person "P" (the person liable to the HICB charge) or person "Q" (their partner). As the definition of "P" or "Q" is not made by reference to a specific gender, it cannot be said that the legislation is in breach of Convention rights, and more specifically Article 14.

35. Furthermore, while the Human Rights Act 1998 requires courts and tribunals so far as possible to read and give effect to legislation in a way which is compatible with Convention rights, it does not enable a tribunal to disapply or rewrite any legislation that it may deem incompatible.

Proportionality and EU law

36. The principle of proportionality is a general principle of EU law, but only applies to national measures falling within the scope of EU law. As a result, it has no application here: direct taxation falls outside the competence of the EU, notwithstanding the case of Commission v France (Case 270/83) in which the European Court of Justice held that, while direct taxation is within the competence of member states, national law must be compatible with the EU's fundamental freedoms.

37. Even if that were not the case, and the principle of proportionality was in fact relevant, HMRC submitted that the HICB charge is a reasonable and proportionate means of achieving a legitimate aim of government.

Responses to criticisms of HMRC's administration and conduct

38. HMRC considered that extra-statutory Concession A19 did not apply, nor does it come under the jurisdiction of the Tribunal.

39. The appellant may feel that HMRC could or should have acted sooner and notified Mr Wilkes of his liability, but there is no obligation in law for HMRC to take action any sooner than they did.

DISCUSSION

40. As Mrs Wilkes acknowledged at the hearing, a number of the arguments raised by the appellant were matters outside the powers, or jurisdiction, of the Tribunal: the Tribunal's power in this case is limited to deciding whether Mr Wilkes was correctly charged to income tax by the assessments in question; and in so deciding, we must apply the law as it stood at the relevant time. We therefore have no powers as regards criticisms of the HICB charge as enacted, or over HMRC's administrative actions (including their decision not to apply an extra statutory concession).

41. We see no conflict between the HICB charge legislation and s32 Finance Act 1988; and even if we did, it would be resolved in favour of the later enactment (the HICB charge).

42. It seems to us clear in this case (if not common ground between the parties) that on the plain meaning of the statute implementing the HICB charge, Mr Wilkes was liable to that charge for the three years in question, in the amounts assessed by HMRC. What is in dispute (and for us to decide) is:

(1) are there any legal principles requiring us to depart from the plain meaning of the statute implementing the HICB charge?

(2) was Mr Wilkes' liability to a HICB charge for those tax years validly assessed to income tax under s29 TMA?

43. We can deal quickly with the first point. We have considered whether the appellant's criticisms of the HICB charge as (i) disproportionately affecting women, potentially in an unfair manner and (ii) compromising confidential information of person Q (being their entitlement to child benefit), indicate a way of interpreting the HICB charge legislation that is more compatible with Convention rights than the "plain meaning" of that legislation we give in [42] above. It seems to us that these criticisms are so broadly expressed that it would be impossible, even if we accepted that the "plain meaning" of the legislation was incompatible with Convention rights, to come up with an alternative reading (that did not breach the bounds of interpretation, as opposed to re-writing) that was more compatible. Furthermore, the Tribunal does not have power to make a declaration of incompatibility with Convention rights. We thus answer our first question in [42] above in the negative.

44. Turning now to the validity of the s29 TMA assessments, we are satisfied, based on our findings of fact (in particular [10] above), that Officer Pickett made a "discovery" as that term is understood in the law. The question we are left with – and the main issue in this appeal, as we see it – is whether Officer Pickett discovered "that any income which ought to have been assessed to income tax had not been so assessed".

45. The sort of income tax assessment that "ought" to have been made in respect of Mr Wilkes' liability to a HICB charge was a self-assessment under s9 TMA – he should have notified HMRC of his income tax chargeability (under s7 TMA), upon which HMRC would have required him to file a tax return (under s8 TMA). Self-assessment involves (in the words of s9 as relevant):

(1) an assessment of the amounts in which, on the basis of information contained in the return and taking into account any relief or allowance a claim for which is included in the return, Mr Wilkes was chargeable to income tax for the tax year; and

(2) an assessment of the amount payable by him by way of income tax, that is to say, the difference between the amount in which he was assessed to income tax under the sub-paragraph above and the aggregate amount of any income tax deducted at source.

46. From this it appears that what Mr Wilkes "ought" to have self-assessed was amounts chargeable to, and payable by way of, income tax. In referring to "income which ought to be assessed to income tax" – words first introduced into s29(1)(a) TMA by Finance Act 1998 - the draftsman employed an unusual turn of phrase: in addition to s9 TMA, other neighbouring provisions of the TMA (such as s28H(3) and s28I(3)), also refer to assessment of amounts in which a person is chargeable to income tax. Indeed, later in sub-section 29(1) itself there is reference to assessment "in the amount" to be charged to make good to the Crown the loss of tax. There are, however, other places in tax legislation that refer to income being assessed to income tax: sub-sections 258(4) and 479(4) Capital Allowances Act 2001 treat certain charges under that Act as "income to be assessed to income tax".

47. In our view, when the statute refers to assessing "income to income tax", as opposed to assessing "amounts chargeable to income tax", it is referring to the steps in the calculation of income tax liability whereby income is identified, adjusted, subjected to the appropriate income tax rate, and thereby becomes an "amount" chargeable as income tax. We are reinforced in that view by the accompanying phrase used in s29(1)(a) TMA – "chargeable gains which ought to have been assessed to capital gains tax" – which refers to very similar steps taken in a capital gains tax context.

48. For income tax, those steps are set out at s23 Income Tax Act 2007: step 1 is to "identify the amounts of income on which the taxpayer is charged to income tax"; steps 2 and 3 are deduction of reliefs and allowances; step 4 is to "calculate tax at each applicable rate on the amounts of the components [of income]"; step 5 is to add these amounts together; step 6 is to deduct any relevant tax deductions; and, finally, step 7 is "add to the amount of tax left after step 6 any amounts for which the taxpayer is liable" under certain provisions – which include the HICB charge.

49. Assessing income to income tax, it seems to us, is the first six steps, by which "income" becomes a liability to income tax. Step 7, in contrast, is the addition of a self-standing liability to income tax – unrelated to the "total income" of step 1. Officer Pickett's discovery related entirely to the components of the computation of the HICB charge, and so to step 7. It would thus appear, on what seems to us the most straightforward interpretation of the words of s29(1)(a) TMA, that the officer did not discover that any income which ought to be assessed to income tax, had not been so assessed.

50. The effect of this interpretation, as HMRC point out, is that HMRC have no power to raise a s29 assessment where a taxpayer is liable to a HICB charge but has not been required by HMRC (under s8 TMA) to file a self assessment tax return; yet HMRC do have such power in respect of a taxpayer liable to a HICB charge, if he has filed a self assessment tax return (due to s29(1)(b) TMA). HMRC say that this is an anomalous outcome, and an unjust one, particularly where the reason the "first" taxpayer has not been required to file a tax return is that he has failed to notify HMRC of his income tax chargeability under s7 TMA.

51. The case law indicates that we can – and should – adopt a "strained" interpretation of a statutory provision – as opposed to the one we have found to be "most straightforward" above - where a literal interpretation produces an unjust or absurd result, if the statutory language admits of such an interpretation and it would avoid the injustice or absurdity. In addition, in plain cases of obvious drafting mistakes in the statute, we can apply a "corrected" version of the statute that omits and/or substitutes words (this is the principle in *Inco Europe Ltd*).

52. HMRC suggest in this case that we should read the statutory language in question as discovery that "amounts", rather than "income", which ought to be assessed to income tax, have not been so assessed. We agree that this would "correct" the anomaly identified; but we have the following doubts about taking this path:

(1) Whilst the statutory purpose of s29(1) is quite clear in very general terms – to empower HMRC to raise an assessment to make good a loss of tax to the Exchequer where under-assessed tax is discovered – it is (like most of HMRC's collection and enforcement powers under the tax legislation) subject to various limits and conditions. For example, although not relevant here (as no tax return was filed), sub-sections (2) and (3) of s29 set out important limitations on deployment of HMRC's powers under s29(1)(b) TMA; and other provisions of TMA impose time limits for the raising of assessments. The intricacy of the rules means that it is not always easy to be certain whether an apparent limitation on HMRC's powers based on a straightforward reading of the words, like the one in question, is an intended delineation of HMRC's powers, or an imperfection in the drafting.

(2) The force of the examples of alternative methods used in tax legislation to address the kind of anomaly present here, set out by Judge Thomas in *Robinson* (FTT) at [86] and [88], is their suggestion that the absence of any such "fix" here was not oversight. (HMRC argue that their absence indicates Parliament's confidence that the statute would be read in the way HMRC propose – we are unable to accept this, given our view of the straightforward reading of the provisions in question).

(3) We agree with HMRC's assertion here that the effect of what we call the "straightforward" reading of s29(1) is the anomaly described at [50] above (and illustrated by the table at [25] above); however, we are not entirely convinced that the anomaly rises to the level of absurdity or injustice, in part because HMRC's s29 powers can be unleashed where an assessment to tax is insufficient (s29(1)(b)), and HMRC, under s8 TMA, has power to require the delivery of self-assessment returns. We appreciate that it may be difficult to deploy these s8 TMA powers if a taxpayer has not complied with his obligation to notify chargeability under s7 TMA – but it seems to us that, through the informal methods used here by HMRC to discover that Mr Wilkes was liable to a HICB charge (i.e. writing to him to as they did in their 30 November 2018 letter), HMRC might also have come to the realisation that he was a person to whom a s8 notice should be issued for the tax years in question.

(4) Our most profound doubt is as to whether the statutory language would admit of the interpretation HMRC propose – or indeed any other interpretation that would eliminate the anomaly identified at [50] above. It is in our view impossible to conflate, as HMRC propose in interpreting "income which ought to be assessed" as meaning "amounts which ought to be assessed", two quite different figures: the figure for the overall income tax liability, and the figure for the income which is adjusted for various matters, and then subjected to a rate of tax, before emerging as an amount of tax due. In our view the statutory language does not admit of such conflation.

(5) The principles surrounding correcting obvious drafting errors in legislation set out in *Inco Europe* are, understandably, careful and strict, to reflect the distinct roles of the legislature and the courts. Of the three matters of which we must be "abundantly sure" before correcting the words of a statute, we are less than confident about two: the intended purpose of s29 is clear to us in very general terms, but not at the level of detail we are here engaging, as explained at sub-paragraph (1); and, related to this (and again as explained at sub-paragraph (1)), we are less than certain that by inadvertence the draftsman and Parliament failed to give effect to such purpose. We are more confident on the third matter: the provision Parliament would have made, as HMRC suggest, would have been to follow the drafting used in paragraph 41 Schedule 18 FA 1998, which speaks of discovery that "an amount" which ought to have been assessed to tax has not

been so assessed. However, overall, this is not in our view a case of an "obvious" drafting error in the statute.

53. We conclude that we are unable to adopt the "correcting" suggestion made by HMRC – of the doubts we express above, the ones that are firm enough to impel this conclusion are (i) that the statutory language does not allow of such an interpretation; and (ii) that this is not an appropriate case for deployment of the courts' power to correct obvious statutory drafting errors upon the principles set out in *Inco Europe*.

54. It follows that Officer Pickett did not discover that any income which ought to be assessed to income tax had not been so assessed; and so we answer our second question at [42] above in the negative: the s29 TMA assessments were not validly raised.

CONCLUSION

55. The appeal is allowed; the assessments are accordingly reduced to nil.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

56. 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.

ZACHARY CITRON

TRIBUNAL JUDGE

RELEASE DATE: 15 JUNE 2020