TC07861

INCOME TAX – High Income Child Benefit Charge – section 681B ITEPA 2003 - Discovery Assessment – section 29(1)(a) of Taxes Management Act 1970 – appeal allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/02598 (V-TVP)

BETWEEN

NEIL WISEMAN **Appellant**

-and-

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

TRIBUNAL: JUDGE RUPERT JONES
IAN MENZIES-CONACHER

The hearing took place on 28 July 2020 by way of a video hearing on the Tribunal Video Platform (TVP).

The following people were in attendance together with one observer from HMRC and the technical team of Her Majesty's Courts and Tribunal Service:

The Appellant who appeared in person;

Mr Connor Fallon, litigator from HM Revenue and Customs' Solicitor's Office, who appeared for the Respondents.

Supplementary written submissions were filed on behalf of HMRC on 4 August 2020.

DECISION

INTRODUCTION

A question of significance

1. Imagine a taxpayer who earns over £50,000 by way of salary and benefits from employment and whose partner or spouse receives child benefit on behalf of their children. The taxpayer has been unaware for a number of years that they were obliged to file a self-assessment return and pay further tax because they believed all their income tax was deducted at source through PAYE. They were not aware that since its introduction in 2013 they were liable to a further tax on their income called High Income Child Benefit Charge ('HICBC'). HICBC is designed to recoup some or all that Child Benefit received by the household through taxing the income of the higher earner of the couple.

2. Imagine that these circumstances have continued since 2013 to the present day but HMRC only recently become aware of them. Can HMRC now seek payment of that HICBC from the taxpayer several years after it was first due through what is called a 'discovery' assessment to income tax?

3. That is the main question raised in this appeal. It is a particularly important one because its outcome may yet affect a number of taxpayers. They may be called upon to repay significant sums by way of the HICBC tax, equivalent to the child benefit their household received many years before. It is an issue of real importance to HMRC because they have raised a number of 'discovery' assessments in relation to unpaid HICBC and the extent of their 'discovery' powers will affect HMRC's ability to recover a large amount of revenue that they now seek.

4. It is not the first time the First-tier Tribunal has had to consider the issue because there has been a long line of cases where the Tribunal has considered the HICBC. However, most of the Tribunal's decisions have concentrated upon HICBC in the context of penalties raised for the taxpayer carelessly or deliberately not paying HICBC. Thus, the Tribunal has primarily concentrated on the consideration of issues such as reasonable excuse for that failure.

5. However, in this case and some more recent cases, the Tribunal has had to consider whether HMRC is able to make the assessment to tax itself. The Tribunal is specifically asked to consider whether the provisions of section 29(1)(a) of the Taxes Management Act 1970 enable HMRC to raise 'discovery' assessments in respect of HICBC where it has not been self-assessed or notified to HMRC by a taxpayer.

6. The current state of the law in unclear. There are competing conclusions of the First-tier Tribunal. In *Robertson v HMRC* [2018] UKFTT 158 (TC) (which was overturned by the Upper Tribunal on a different ground in [2019] UKUT 0202 (TCC)) and *Wilkes v Revenue & Customs* [2020] UKFTT 256 (TC), the Tribunals decided that s. 29(1)(a) TMA 1970 did not empower discovery assessments in relation to HICBC where there had been a failure to notify HMRC of a HICBC liability. In *Haslam v HMRC* [2020] UKFTT 304 (TC) and *Hill v HMRC* [2020] UKFTT 316 (TC) the Tribunals came to the opposite conclusion, that section 29(1)(a) does enable discovery assessments in those circumstances, but they arrived at the same result for different reasons.

7. While each of these decisions are thoughtful and thorough in their reasoning and worthy of considerable respect, they carry only persuasive weight and are not binding on this Tribunal. As the First-tier Tribunal observed in *Haslam* and Upper

Tribunal observed in *Robertson*, this is a difficult issue with ample room for reasonable disagreement.

8. Before we go any further we should thank the parties for the way in which they approached this appeal. The issues raised in this appeal, despite only concerning an assessment of a few hundred pounds, are not straightforward to decide. The Appellant and the representative for HMRC were helpful, reasonable and clear in the way they put their arguments before, during and after the hearing. They greatly assisted the Tribunal.

Issues in the appeal

9. The Appellant raised grounds of appeal which we will address below. However, they are not the primary issues that the Tribunal was called upon to decide in this appeal.

10. We were satisfied that there were three primary issues that required our determination.

11. The first and primary issue is whether section 29(1)(a) TMA 1970 empowers HMRC to make discovery assessments in relation to the HICBC generally in circumstances where a taxpayer fails to notify their liability to the charge for the purposes of section 7 TMA 1970 and fails to file a self-assessment return. If HMRC cannot make a discovery assessment in these circumstances then the Appellant's appeal must be allowed.

12. The second issue is whether HMRC have proved that its discovery assessment for 2013-2014 is correctly calculated, competent and in time. In particular, we are required to decide whether HMRC have proved: a) there was a discovery of a loss of tax (income which ought to have been assessed to income tax which had not been assessed); b) whether an HMRC officer believed this to be the case – whether there was a subjective discovery; c) if so, whether the belief was objectively reasonable; and d) whether HMRC made the assessment when the discovery was still fresh rather than stale; e) whether they made the assessment within the statutory time limit; and f) whether the assessment was properly calculated. Of these issues, the one that required the most careful consideration was whether HMRC proved there were objectively reasonable grounds for the Officer's belief that she had made a discovery when there was no evidence that HMRC had ascertained that the Appellant's partner had a lower income than the Appellant.

13. The third issue is the validity of the assessment: whether the Appellant has proved that he was not liable to HICBC for tax year 2013-2014 at the sum assessed or at all. Has he proved that HMRC were wrong to assess him to HICBC because he did not satisfy the statutory criteria for the imposition of HICBC under section 681B(1) and (4) ITEPA 2003, for instance because there is no evidence that his partner's income was less than his?

REMOTE HEARING CONDUCTED BY TRIBUNAL VIDEO PLATFORM

14. The hearing took place on 28 July 2020. With the consent of the parties, the form of the hearing was V (video) - Tribunal video platform. This form of hearing had been directed pursuant to Rule 5(g) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The Appellant and Mr Fallon attended and made representations. Other non-participating members of HMRC and HMCTS attended as observers.

15. A face to face hearing was not held because of the public health concerns caused by travelling to and congregating in a court room caused by the pandemic. With the consent of the parties, I was satisfied that a remote hearing would be just and fair and not prejudice the parties' ability to present evidence and arguments. The overriding objective under Rule 2 was satisfied. Both the Appellant and Mr Fallon were able to articulate themselves clearly throughout and had equal access to all the evidence in the appeal. The documents to which we were referred were presented in an ebundle available in advance and throughout the hearing to all parties.

16. It was necessary and an in the interests of justice that the hearing should be conducted in private on the basis that it was not in the public interest during the pandemic to hold a face to face hearing open to the public and that it was in the public interest for the hearing to go ahead remotely. Given the lack of notification to members of the public to be able to connect to and witness the hearing, and limits on the number of participants who can connect to TVP, by necessity the hearing was conducted in private. However, a recording of the hearing was made and is available on application.

17. We were therefore satisfied that all the necessary conditions were satisfied and it was in the interests of justice to proceed in compliance with Rules 32(2A) and Rule 32A which provide:

32(2A) The Tribunal may direct that a hearing, or part of it, is to be held in private if—

(a)the Tribunal directs that the proceedings are to be conducted wholly or partly as video proceedings or audio proceedings;

(b)it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing;

(c)a media representative is not able to access the proceedings remotely while they are taking place; and

(d)such a direction is necessary to secure the proper administration of justice.

32A.—(1) In the circumstances set out in paragraph (3), the Tribunal must direct that the hearing be recorded, if practicable.

(2) Where the Tribunal has made a direction under paragraph (1), it may direct the manner in which the hearing must be recorded.

(3) The circumstances referred to in paragraph (1) are that the hearing, or part of it, is—

(a)held in private under rule 32(2A); or

(b)only treated as held in public by virtue of a media representative being able to access the proceedings remotely while they are taking place.

(4) On the application of any person, any recording made pursuant to a direction under paragraph (1) is to be accessed with the consent of the Tribunal in such manner as the Tribunal may direct.

The decision under appeal

18. This is an appeal by Mr Wiseman ('the Appellant') against HMRC's decision in December 2018 to issue him an assessment to tax, which they considered to be a discovery assessment under section 29 Taxes Management Act 1970, in the sum of £636 for the 2013-14 tax year. The assessment under appeal is set out in the table below:

Tax Year	Date of Assessment	Amount (£)
2013-14	05 December 2018	636

19. HMRC also issued the Appellant assessments for the tax years 2014-15 – 2016-17, but the Appellant does not dispute these and they are not the subject of any appeal.

Background to HICBC

20. From 7 January 2013 changes came into effect as to how the receipt of Child Benefit affected households where an individual's "Adjusted Net Income" (ANI) exceeded £50,000 (within a tax year). For each £100 in excess of £50,000 a 1% tax liability arose calculated on the amount of Child Benefit the household received.

21. Consequently, where an individual's ANI reaches £60,000 the effect was, and continues to be, that 100% of the Child Benefit received becomes liable to a tax charge – the High Income Child Benefit Charge (HICBC). Anyone liable to the HICBC who, or who's partner, chooses to carry on receiving Child Benefit payments has a legal obligation to declare the amount of Child Benefit they or their spouse/partner receive. They must do so by registering for Self-Assessment (if they are not already registered, for example because they are employed and paying income tax through PAYE) and filing a tax return each year.

22. There have been numerous criticisms of HICBC, which was brought into effect through the Finance Act 2012. Prior to that time Child Benefit was a universal non-means test benefit. The HICBC imposed a tax to recoup equivalent sums to the child benefit paid to households with at least one high income as an alternative to introducing a means test for entitlement to Child Benefit itself.

23. Craig McKinlay MP raised several criticisms of HICBC on behalf of his constituents in a debate held in the House of Commons on 3 September 2019 – https://www.theyworkforyou.com/whall/?id=2019-09-03a.59.0. For example, he raised the potential unfairness which is illustrated as follows. Taxpayers whose total household income of £98,000 (where both partners receive £49,000, less than the threshold of £50,000 in ANI) may be exempt from the charge (thus entitled to retain the full benefit of child benefit). In contrast, a household with a total income of £60,000 (the income from the one working partner) must pay the full HICBC (retaining none of the benefit of Child Benefit). The Member of Parliament highlighted the requirement imposed on those earning £50,000 in salaried income and benefits who would now have to file self-assessment returns if they wished to continue to receive Child Benefit, thus potentially bring millions of employed into the self-assessment system with the increased administrative burden on taxpayers and HMRC. He made a further criticism of HICBC, that it erodes taxpayer confidentiality in that it requires partners or spouse to disclose to each other their income and coordinate tax affairs in order to make the requisite decisions and declarations as to whether HICBC is chargeable.

24. These criticisms, and their potential rebuttal, are not matters for the Tribunal to adjudicate upon because they remain within the realm of political debate. However, some similar points were re-formulated as legal arguments in *Wilkes* where the scheme and its application was challenged as being unlawful, for example, on discrimination grounds. All of those challenges were rejected in *Wilkes* and have not been raised within this appeal. We express no view upon them.

25. In addition, Judge Hellier has made the following criticisms of HMRC's application of penalties for non-payment of HICBC when HMRC have pursued penalties against taxpayers for unpaid HICBC on the basis of taxpayers failing to make self-assessments as to their income. He makes the point that the information as

to the level of a taxpayer's employed income and their receipt of child benefit should already be available to HMRC on their own internal systems and not require taxpayers to notify HMRC of payments received by them – see *Fuller v Revenue & Customs* [2020] UKFTT 189 (TC) (09 April 2020) at [23]-[27] as repeated in *Morrow v Revenue & Customs* [2020] UKFTT 184 (TC) (08 April 2020):

'23. It is to my mind extraordinary that HMRC, the body which pays and administers child benefit, should expect a taxpayer to notify them that he or she or their partner (whose details they have) has received a payment from them before sending the taxpayer a tax return. (I am not saying that it is extraordinary that the legislation requires a taxpayer to notify; rather that it is extraordinary that HMRC did not act promptly on information arising from their own conduct.)

24. That HMRC had all the information necessary to make an assessment is shown by the fact that they wrote to the taxpayer with that information on 19 October 2017 before making the assessments.

25. HMRC had the details of what they had paid, to whom they had paid it, who the recipient's partner was, and in the case of individuals whose income was subject PAYE details of the amount of that income as returned by their employer by May after the end of the tax year. The tax would have been payable on the following 31 January so they had had all that information five months before the end of the period in which notification had to be given under section 7 (being 6 months after the end of the tax year).

26. And yet a taxpayer is potentially penalised [4] for not letting HMRC know that he has chargeable income so that they can send him a tax return in which he can tell them what they already know.

27. If the making of assessments had been done in 2014 or even 2015 one might say that HMRC might reasonably be expected to need time to get their information systems organised before they sent out notices requiring returns to (or wrote to, or assessed) those potentially liable. But to delay the process to 2017 seems to me unfair. If letters could be sent in 2013 to those within the possible charge, why could not tax returns be sent?'

The Facts

26. The Tribunal makes the following findings of fact having heard oral evidence from the Appellant and considered witness statements from HMRC officers Steven Thomas and Rosa Baik who were not required to attend the hearing for cross examination. All findings are made on the balance of probabilities, indicating where there has been any dispute as to the evidence.

27. The Appellant was originally entered into Self-Assessment on 21 May 2002 due to his self-employment as a sub-contractor. However, due to cessation of self-employed work, the Appellant had not been required to file a tax return since the year ending 05 April 2004, and no return was issued or completed in the tax year under appeal, 2013-2014. In the relevant year under appeal the Appellant was employed and paying income tax through PAYE.

28. In anticipation of the coming into force of HICBC in 2013, HMRC records show that on 14 October 2012 a Child Benefit Awareness letter was issued to the Appellant, which the Appellant confirms he received.

29. This letter, prior to coming into force of the charge from January 2013 provided an incomplete statement of the law because it stated:

'From 7 January 2013 a new tax charge will be brought in when a taxpayer or their partner gets Child Benefit, and either of them has an income above £50,000 in a tax year'.

30. It was accompanied by a fact sheet that also referred to HICBC being payable if the taxpayer or partner's income was more than £50,000.

31. Neither the letter nor the factsheet explained that HICBC would be charged when relevant person received £50,000 in 'adjusted net income' which would include salary from employment plus employment benefits. Thus 'an income' of under £50,000 as it is ordinarily understood might not exempt a person from HICBC if their employment benefits took their ANI above the threshold.

32. The 2012 letter and guidance were therefore inaccurate (incomplete or misleading) as to how the income of £50,000 was to be calculated.

33. A salary is what an employed layperson might think of as their income and what would be reasonably inferred from HMRC's notice because it failed to explain that it was adjusted net income which would be applied to the HICBC. The reason this is relevant to the Appellant is that in the year question, 2013-2014, his salary was under £50,000 being £49,069.08. However, as the law applied, when it came into force in 2013, the Appellant's adjusted net income was above £50,000 being £52,348.04. It was calculated in this way:

2013-14 Employment income £49,069.08;

Car benefit £4,048;

Medical Insurance £687;

Employee Pension Contributions (taken after tax) £1,455.96 (£1164.77 x1.25)

Adjusted Net Income (ANI) = £49,069 + £4,048+ £687 – 1,455.96 = £52,348.04

34. Additionally, on 17 August 2013 an "SA252" letter was issued to the Appellant by HMRC at the Appellant's last known address recorded on HMRC's system which was not returned as undelivered. This type of letter was intended to encourage taxpayers to check whether they were liable to the HICBC, either through contacting HMRC or using the online resources.

35. However, the Tribunal accepts the Appellant's evidence that he never received such a SA252 awareness letter.

36. It is not in dispute that the Appellant received an ANI from his employment exceeding £50,000, for the tax years 2014-2015 onwards (indeed his simple salary was above the £50,000 threshold). By the time of the hearing he did not dispute this for the tax year 2013-2014 either. However, at the relevant deadlines for filing a tax return for the tax year 2013-2014 the Appellant was unaware he had to file such a return based purely on the information he had received from HMRC.

37. Whether or not the Appellant had a reasonable excuse for failing to file a self-assessment return is not relevant to this appeal as no penalties have been charged by HMRC for any failure to file a self assessment return or make payment of any tax.

38. Records show that the Appellant's partner had been in receipt of Child Benefit effective from 09 August 2004 and for the purposes of determining this appeal, the Appellant's partner received payments of Child Benefit in the tax year 2013-14 and subsequently.

39. On 28 September 2018, HMRC issued a letter to the Appellant at his last known address, alerting him to the fact that he may need to notify his liability to the HICBC. It included the following question and answer:

'Do you have to pay the High Income Child Benefit Charge?

……

You have to pay the charge if:

- You have taxable income and benefits over £50,000 in a tax year;
- You or your spouse or partner, got any Child Benefit payments;
- Your income is higher than your spouse or partner's income.'

40. It was this letter which prompted the Appellant to take action in respect of HICBC for the first time and contact HMRC.

The voluntary disclosure / discovery

41. On 23 October 2018 HMRC Officer Baik received a telephone call from an agent on behalf of the Appellant. As there was no 64-8 authorisation form in the records at the time giving authorisation for the agent to speak and due to data protection concerns, Officer Baik could not discuss the case with the agent. As the Appellant was present with the agent the phone was passed to the Appellant.

42. The Appellant stated he was calling in response to an awareness letter that he was sent on 28 September 2018. Officer Baik took a voluntary disclosure from the Appellant and noted down the HICBC liability figures that he gave.

43. The Appellant notified the officer that he had himself calculated the amounts of HICBC liability that were due to be paid for the tax years 13-14, 14-15, 15-16 and 16-17. Officer Baik did not cross check the figures that he disclosed or as she did not want to bias the figures given as a voluntary disclosure.

44. The Appellant provided the following figures of HICBC liability for agreement. Officer Baik wrote these figures down in the Note of Conversation/ Letter and Behaviour Audit Trail during the call:

13/14 – tax charge due £930
14/15 – tax charge due £148
15/16 – tax charge due £450
16/17 – tax charge due £525.

45. Officer Baik advised the Appellant that HMRC would check their records and complete a calculation of their own and call him back if their figures differed to his.

46. The Appellant did not deny HICBC liability, in fact he volunteered it. He advised that his Benefits in Kind from employment put him over the threshold for ANI in the 2013-14 tax year. He advised that he had received a letter in 2013 but did not realise that he needed to include his employer benefits as income when calculating if his income went over the threshold for paying HICBC.

47. It is very much to the Appellant's credit that he made such a voluntary disclosure to HMRC. The Tribunal accepts that he did so in response to the notification given by HMRC in September 2018 concerning HICBC. We accept the Appellant's evidence that he was previously unaware that HICBC would apply to him because the only other notice he had received on the topic was the in October 2012 and was inaccurate. This reasonably led the Appellant to believe the HICBC charge would not apply to him for the year 2013-2014 because his salary was less than £50,000.

48. Officer Baik checked the Pay As You Earn (PAYE) record to read the contact history notes in order to see what contact had been made with the Appellant. HICBC had not been included in the tax code. HMRC's records stated the Appellant received

the Child Benefit Awareness letter on 14 October 2012, the terms of which are discussed above. The notes showed that HMRC sent an awareness letter Self-Assessment 252(SA252) on 17 August 2013. However, as above, the Tribunal accepts the Appellant's evidence that he did not receive the SA252 awareness letter.

49. Officer Baik searched for a Self Assessment record for the Appellant using his National Insurance number. There was no Self Assessment record found. As a result, she advised in her notes that HMRC needed to set up a Self Assessment record for him so that he could submit his 17-18 return.

50. After noting down the figures for disclosure, Officer Baik asked the Appellant behavioural questions in order to make a preliminary decision regarding penalties. She made notes of the answers given to the questions on the Note of Conversation/ Letter and Behaviour Audit Trail.

51. There was evidence provided by HMRC of the Appellant's partner receiving child benefit during the relevant tax year, and she was recorded as living at their family address.

52. For the reasons set out above, we are satisfied that on 23 October 2018, Officer Baik subjectively believed she had discovered that the Appellant had not notified his liability to the HICBC and that there had been a loss of tax.

53. There is no evidence contained in any witness statement as to whether Officers Baik or Thomas or any other HMRC officer checked any records to confirm whether the Appellant's partner received any income and if so, whether this was lower or higher than the Appellant's income for any of the relevant tax years. There is no evidence from HMRC that the Appellant disclosed to HMRC whether his partner's income was lower or higher than his for the relevant years. The Appellant's evidence was that he did not mention his wife's income to HMRC. We accept this.

54. The point is of relevance to whether Officer Baik's belief that she had discovered a loss of tax was objectively reasonable (on which HMRC bear the burden of proof). It is also relevant to whether the assessment can lawfully be raised against the Appellant – whether HMRC have satisfied the statutory condition under section 681B(4)(c) ITEPA 2003 to charge HICBC against him.

55. HMRC must prove they discovered a loss of tax (income which ought to have been assessed to income tax which had not been assessed) before they are empowered to make a discovery assessment. In order for the Appellant to be liable to HICBC such that there has been a loss of tax, he must satisfy the statutory conditions for liability under section 681B ITEPA 2003. If the Appellant's partner did not have a lower income than him then she would inevitably be a high earner and any assessment to HICBIC could only be properly made against her and not the Appellant. We will return to these issues in the discussion section of this decision.

56. During the hearing, HMRC applied to admit fresh evidence as to whether a check was made of the Appellant's partner's income or whether it was standard practice for HMRC to check the income of a taxpayer's spouse or partner. However, we refused to admit any further evidence from HMRC or Officer Baik as to whether she or anyone in HMRC checked the Appellant's partner's income to satisfy themselves at the time or subsequently that it was lower than the Appellant's.

57. Mr Fallon for HMRC argued it would be fair and reasonable to admit the fresh evidence by way of furthers questions of the officers (although they had not been required to attend or called to give evidence) because they may be able to clarify

whether the check was made or whether it was standard practice to do so. He submitted that this would provide complete evidence for the Tribunal and HMRC should have opportunity to address the full merits of the case in light of all the evidence. He apologised that evidence on the topic was missing from HMRC's witness statements – he submitted it was normally addressed.

58. The Appellant objected because he says that when he made his voluntary disclosure of tax payable to officer Baik, he made no mention of his wife's income.

59. We decided it would not be fair and just to admit the evidence pursuant to the overriding objective Rule 2 of the Tribunal Procedure (First-tier Tribunal (Tax Chamber) Rules 2009 and it would not be in the interests of justice pursuant to Rule 15 – on the admission of evidence.

60. HMRC had made the application very late in the proceedings - during the hearing itself when the omission was pointed out by the Tribunal. The appeal itself was over one year old and HMRC had had more than sufficient time to prepare their case and provide evidence, particularly on those issues central to the necessary statutory criteria in order to raise an assessment.

61. The proposed evidence was also central issue to the issue of HMRC's power to make a discovery assessment where the burden of proof is on HMRC to prove Officer Baik had an objectively reasonable belief that she had discovered loss of tax on the part of the Appellant.

62. To the extent that HMRC normally address checking on the partner or spouse's income as a standard issue within their statements, there was conceded to be an omission. HMRC accepted that hitherto no evidence had been given as to whether there had been a check on the Appellant's spouse's income level.

63. We were satisfied that there would be prejudice to the Appellant if HMRC were given the opportunity to 'plug the gap' and potentially prove conclusively that the statutory conditions for liability to HICBC were fulfilled and that the discovery of a loss of tax was objectively reasonable. Without this evidence, they may not have been able to do so.

64. The Tribunal could not know what further evidence HMRC's witnesses could give. If the evidence were to come from Officer Baik, it might require her to be cross examined as she had made no notes of any check of the Appellant's partner's income and did not refer to it in her statement. We were satisfied it would not be reasonable nor proportionate to adjourn or hold a further hearing for her to be cross examined. The case was of low value and old. We therefore excluded any further evidence on the topic.

Calculation of the HICBC liability

65. From the case notes on the Caseflow system HMRC Officer Dodia calculated the Appellant's adjusted net income as follows:

2013-14 Income £49,069. Benefits £4735 Total ANI £52,640
2014-15 Income £50,648. Benefits £519 Total ANI £50,955
2015-16 Income £51,889. No Benefits. Total ANI £51,889
2016-17 Income £52,193. No Benefits. Total ANI £52,193

66. The HICBC liability was therefore calculated as follows:

13/14 – taxpayer figure £930, Officer Dodia calculated £636, lower figure used.

14/15 – taxpayer figure £148, this figure was accepted by Officer Dodia
15/16 – taxpayer figure £450, this figure was accepted by Officer Dodia
16/17 – taxpayer figure £525, this figure was accepted by Officer Dodia.

67. As a result of the calculations done by Officer Dodia, the Appellant's HICBC liability was reduced from the figure declared by the Appellant in 13-14. He had disclosed £930 of HICBC liability for 13-14. HMRC calculated a lower HICBC liability figure of £636 for 13-14. HMRC used the lower figure for the assessment.

68. HMRC discovered that the ANI used in the Appellant's calculation is wrong. The correct ANI was calculated as £49,069.08 (annual income) + £687 (medical insurance) + £4048 (car benefit) - £1164 (pension contributions) = £52,640.08.

69. The correct HICBC calculation, as per s618C Income Tax (Earnings and Pensions) Act 2003, was then calculated as follows:

- £52,640– £50,000 = £2,640
- 2640/100 = 26.4
- 2,449.2 (child benefit received) x 26% = **£636.00**.

70. For the 14-15, 15-16 and 16-17 years HMRC accepted the figures disclosed by the appellant.

71. On 05 December 2018, HMRC issued the Appellant an assessment based on the amounts shown in the table below:

Tax Year	**Adjusted Net Income**	**Child benefit received**	**HICBC due**
2013/14	£52,640.00	£2,449.20	£636.00

Total £636.00

72. No failure to notify penalties were charged.

73. On 5 December 2018 HMRC issued a discovery assessment for the tax year 2013-14, 2014-15, 2015-16 and 2016-17. From the documents uploaded to Caseflow Officer Baik could see that a closure notice and Self-assessment statement of account was issued to Mr Wiseman on 5 December 2018. There is no dispute that the Appellant did not file self assessment returns for the relevant tax years including 2013-2-14 and failed to notify liability to HICBC under section 7(1) TMA 1970.

74. As HMRC were either accepting the HICBC liability figures disclosed by the Appellant or reducing them there was no need to contact the Appellant for additional agreement of the figures. There were no penalties issued in this case.

75. Officer Baik subsequently carried out her own check of the calculation for the 13-14 tax year and further reduced the Appellant's adjusted net income as follows:

2013/14 Employment income £49,069.08; Car benefit £4,048; Medical Insurance £687;

Employee Pension Contributions (taken after tax) £1,455.96 (£1164.77 x1.25)
Adjusted Net Income (ANI) = £49,069 + £4,048+ £687 – 1455.96 = £52,348.04
Child Benefit received £2,449.20 (3 children)
Tax charge to pay £563

76. On this basis HMRC now accept that the assessment for 13-14 should be reduced to £563.

77. From the documents uploaded to Caseflow Officer Baik could see that HMRC received an appeal from the Appellant dated 18 December 2018, which was dealt with by an officer of C&P. They provided a response to the Appellant on 31 January 2019.

78. On the 28 January 2019, the Appellant appealed to HMRC. According to his letter he was appealing against the High Income Child Benefit Charge and about the system as a whole. He also did not agree that car benefit from employment should be included in his Adjusted Net Income.

79. HMRC issued a View of the Matter letter to the Appellant dated 31 January 2019. A response letter was sent on 31 January 2019 by HMRC with the decision and an explanation of the decision.

80. HMRC took the Appellant's letter of 14 February 2019 as a request for an independent review.

81. HMRC received a reply to this from the Appellant disagreeing with the appeal decision and accepting the offer of a review. He advised that he was not happy with the Child Benefit Awareness letter dated 14 October 2012, as it was not clear enough. He advised that it was only the 13-14 High Income Child Benefit Charge assessment that he did not agree with. The case was reviewed, and a review conclusion letter was sent on 29 March 2019.

82. On 29 March 2019, HMRC issued a review conclusion letter to the Appellant stating that the discovery assessment was to be upheld.

83. On 25 April 2019 the Appellant lodged an appeal with the Tribunal.

84. On 3 May 2019 Officer Baik received an email from the Solicitor's office of HMRC advising that the case was now with the Tribunal and therefore the assessment was suspended.

The Law

Taxes Management Act 1970

85. Section 7(1) Taxes Management Act 1970 ('TMA 1970') provides the requirement for an individual who is liable to income tax or capital gains tax for a year of assessment to notify HMRC of that fact within six months of the end of that year.

86. Section 7 TMA 1970 provides the relevant conditions as follows:

"**7(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)(…), shall (…) within the notification period, give notice to an officer of the Board that he is so chargeable.

7(1A) A person falls within this subsection if the person has not received a notice under section 8 requiring a return for the year of assessment of the person's total income and chargeable gains.

(…)

87. The requirement for a taxpayer to give notice of chargeability to the HICBC is introduced by section 7(3)(c) TMA 1970 which states:

"**7(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 –

(…)

"…(c) the person is **not** liable to a high income child benefit charge." (emphasis added)

88. Discovery Assessments are empowered by section 29 of the Taxes Management Act 1970. Section 29(1) provides as follows:

"**29 Assessment where loss of tax discovered**

(1) If an Officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment –

(a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed,

(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 (…) 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."

[Emphasis added]

89. The effect of section 29(1)(a) TMA 1970 is that if an HMRC officer discovers that for any tax year income which ought to have been assessed to income tax has not been assessed, HMRC may assess, subject to section 29(2) and (3). Sub-paragraphs 2 & 3 are only applicable if the taxpayer has made and delivered a self-assessment return. It is not in dispute that the Appellant in this case made no self-assessment return for the years under appeal. Consequently, sub-paragraphs 2 & 3 are not applicable in this case.

90. Where no self-assessment return has been filed The relevant time limit for HMRC to make any assessment is twenty years after the end of the year of assessment to which it relates as set out in section 36(1A)(b) of the Taxes Management Act 1970:

"36(1) An assessment on a person in a case involving a loss of income tax or capital gains tax brought about carelessly by the person may be made at any time not more than 6 years after the end of the year of assessment to which it relates (subject to subsection (1A) and any other provision of the Taxes Acts allowing a longer period).
(1A) An assessment on a person in a case involving a loss of income tax or capital gains tax —
(a)brought about deliberately by the person,
(b) attributable to a failure by the person to comply with an obligation under section 7…
……
may be made at any time not more than 20 years after the end of the year of assessment to which it relates…"

91. Section 50(6) and (7) TMA 1970 provide for the Tribunal's power on appeal:

50(6)If, on an appeal notified to the tribunal, the tribunal decides—**]**

(a)that, ... , the appellant is overcharged by a self-assessment;

(b)that, .. , any amounts contained in a partnership statement are excessive; or

(c)that the appellant is overcharged by an assessment other than a self-assessment,

the assessment or amounts shall be reduced accordingly, but otherwise the assessment or statement shall stand good.

(7)If, on an appeal notified to the tribunal, the tribunal decides**]**—

(a)that the appellant is undercharged to tax by a self-assessment... ;

(b)that any amounts contained in a partnership statement ... are insufficient; or

(c)that the appellant is undercharged by an assessment other than a self-assessment, the assessment or amounts shall be increased accordingly.

The Income Tax Act 2007

92. The Income Tax Act 2007 ('ITA 2007') provides an overview of the types of income to which income tax applies (section 3), the manner in which it is calculated (sections 23 and 30) and the definition of Adjusted Net Income (section 58):

3 Overview of charges to income tax

3(1) Income tax is charged under—

(a)Part 2 of ITEPA 2003 (employment income),

(b)Part 9 of ITEPA 2003 (pension income),

(c)Part 10 of ITEPA 2003 (social security income),

(d)Part 2 of ITTOIA 2005 (trading income),

(e)Part 3 of ITTOIA 2005 (property income),

(f)Part 4 of ITTOIA 2005 (savings and investment income), and

(g)Part 5 of ITTOIA 2005 (miscellaneous income).

23 The calculation of income tax liability

To find the liability of a person ("the taxpayer") to income tax for a tax year, take the following steps.

Step 1

Identify the amounts of income on which the taxpayer is charged to income tax for the tax year. The sum of those amounts is "total income". Each of those amounts is a "component" of total income.

Step 2

Deduct from the components the amount of any relief under a provision listed in relation to the taxpayer in section 24 to which the taxpayer is entitled for the tax year. See [F1sections 24A and 25] for further provision about the deduction of those reliefs. The sum of the amounts of the components left after this step is "net income".

Step 3

Deduct from the amounts of the components left after Step 2 any allowances to which the taxpayer is entitled for the tax year under Chapter 2 of Part 3 of this Act or F2... (individuals: personal allowance and blind person's allowance). See section 25 for further provision about the deduction of those allowances.

Step 4

Calculate tax at each applicable rate on the amounts of the components left after Step 3.

See Chapter 2 of this Part for the rates at which income tax is charged and the income charged at particular rates. If the taxpayer is a trustee, see also Chapters 3 to 6 and 10 of Part 9 (special rules about settlements and trustees) for further provision about the income charged at particular rates. [F3See also section 863I of ITTOIA 2005 which provides for certain partnership profits to be charged at the additional rate.]

Step 5

Add together the amounts of tax calculated at Step 4.

Step 6

Deduct from the amount of tax calculated at Step 5 any tax reductions to which the taxpayer is entitled for the tax year under a provision listed in relation to the taxpayer in section 26.

See sections 27 to 29 for further provision about the deduction of those tax reductions.

Step 7

Add to the amount of tax left after Step 6 any amounts of tax for which the taxpayer is liable for the tax year under any provision listed in relation to the taxpayer in section 30.

The result is the taxpayer's liability to income tax for the tax year.

30 Additional tax

(1)If the taxpayer is an individual, the provisions referred to at Step 7 of the calculation in section 23 are—

…….

Chapter 8 of Part 10 of ITEPA 2003 (high income child benefit charge),

…….

58 Meaning of □adjusted net income□
(1) For the purposes of Chapters 2 and 3, an individual's adjusted net income for a tax year is calculated as follows.
Step 1
Take the amount of the individual's net income for the tax year.
Step 2
If in the tax year the individual makes, or is treated under section 426 as making, a gift that is a qualifying donation for the purposes of Chapter 2 of Part 8 (gift aid) deduct the grossed up amount of the gift.
Step 3
If the individual is given relief in accordance with section 192 of FA 2004 (relief at source) in respect of any contribution paid in the tax year under a pension scheme, deduct the gross amount of the contribution.
Step 4
Add back any relief under section 457 or 458 (payments to trade unions or police organisations) that was deducted in calculating the individual's net income for the tax year. The result is the individual's adjusted net income for the tax year.
(2) The grossed up amount of a gift is the amount of the gift grossed up . . . [if for the tax year the individual is UK resident but not a Scottish taxpayer, by reference to the default basic rate for the tax year if for the tax year the individual is non-UK resident] [or, in the case of a gift made by an individual who is a Scottish taxpayer for the tax year, by reference to the Scottish basic rate for the tax year].
(3) The gross amount of a contribution is the amount of the contribution before deduction of tax under section 192(1) of FA 2004.
[(4) Subsection (6) of section 809ZM (removal of income tax relief in respect of tainted donations etc) excludes certain donations from being deducted at step 2 in subsection (1).]

The Finance Act 2012 and ITEPA 2003 – HICBC

93. Section 8 and Schedule 1, para. 1 of the Finance Act 2012 introduced the High Income Child Benefit Charge with effect for the tax year 2012-13 and subsequent tax years. The provisions governing High Income Child Benefit Charge (HICBC) were inserted into Part 10, Section 681B-H, of the Income Tax (Earnings and Pensions) Act 2003 (ITEPA 2003). Section 681B-H ITEPA 2003 provide as follows:

Section 681B

(1) A person ("P") is liable to a charge to income tax for a tax year if—
(a) P's adjusted net income for the year exceeds £50,000, and
(b) one or both of conditions A and B are met.

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

(3) Condition A is that—
(a) P is entitled to an amount in respect of child benefit for a week in the tax year, and
(b) there is no other person who is a partner of P throughout the week and has an adjusted net income for the year which exceeds that of P.

(4) Condition B is that—
(a) a person ("Q") other than P is entitled to an amount in respect of child benefit for a week in the tax year,
(b) Q is a partner of P throughout the week, and
(c) P has an adjusted net income for the year which exceeds that of Q."

Section 681C(1)
"The amount of the high income child benefit charge to which a person ("P") is liable for a tax year is the appropriate percentage of the total of–
(a) any amounts in relation to which condition A is met, and
(b) any amounts in relation to which condition B is met. For conditions A and B, see section 681B"

Section 681C(2)
"The appropriate percentage" is–
(a) 100%, or
(b) if less, the percentage determined by the formula–
ANI − L
X = %
Where–
ANI is P's adjusted net income for the tax year;
L is £50,000;
X is £100.

Section 681C(3) If–
(a)the total of the amounts mentioned in paragraphs (a) and (b) of subsection
(1), or the amount of the charge determined under that subsection, is not a whole number of pounds, or
(b) the percentage determined under subsection (2)(b) is not a whole number, it is to be rounded down to the nearest whole number.

Section 681H(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"

Section 681H(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."

94. In short, section 681C ITEPA 2003 means that, for each £100 of income in excess of £50,000, a 1% tax charge arises equivalent to the 1% of the amount of Child Benefit received. This percentage results in an equivalent liability to the tax charge. Where an individual's Adjusted Net Income ('ANI') reaches £60,000, the effect is that 100% of the amount of the Child Benefit received becomes liable to the tax charge.

Authorities on discovery assessments under section 29 TMA 1970

95. At [10]-[60] of *Atherton v HMRC* [2019] UKUT 41 (TCC) the Upper Tribunal summarised the principles on discovery assessments as follows:

'10. Two important principles underpin the construction and application of the discovery assessment provisions.

11. First, as this Tribunal stated in *Burgess v HMRC* [2015] UKUT 578 (TCC), at [59]:

"It must be recognised… that the assessment system that Parliament has legislated for is designed to provide a balance between HMRC and the taxpayer. Part of that balance is the requirement, in relation to discovery assessments and assessments outside the normal time limits, that HMRC satisfy the FTT that the relevant conditions for those assessments to have been validly made have been met."

12. In this case, the burden of proof is on HMRC to establish on the balance of probabilities that the discovery assessment was validly made.

13. Secondly, the discovery provisions now in force were intended to be more restrictive of HMRC's powers than the provisions in force prior to the introduction of self-assessment in 1996-97. In the context of the pre-2008 rules, which referred to fraudulent or negligent conduct, Moses LJ stated in the Court of Appeal's judgment in *Tower MCashback LLP 1 v HMRC* [2010] EWCA Civ 32, at [24]:

"… apart from a closure notice, and the power to correct obvious errors or omissions, the only other method by which the Revenue can impose additional tax liabilities or recover excessive reliefs is under the new s29. That confers a far more restricted power than that contained in the previous s29."

Meaning of discovery

14. In *HMRC v Charlton* [2012] UKUT 770 (TC), this Tribunal stated (at [28]): "…the word "discovers" does connote change, in the sense of a threshold being crossed. 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. That is the only threshold that has to be crossed. We do not agree that the lawyer, in Lord Denning's example, would be regarded as having made a discovery any the less by waking up one morning with a different conclusion from the one he had earlier reached, than if he had changed his mind with the benefit of further research. It is, we think, evident that the relevant threshold for there to be a discovery may be crossed as a result of a "eureka" moment just as much as by painstaking research."

15. It is well established that the threshold at which a discovery arises for the purposes of section 29 is low. In *Hankinson v HMRC* [2011] EWCA Civ 1566, the Court of Appeal stated that it simply meant that the officer came to a conclusion, or satisfied himself, as to an insufficiency of tax. No new information, of fact or law, is required in order for there to be a discovery. It includes a case where an officer (acting honestly and reasonably) changes his mind, changes his opinion or corrects an oversight: *Charlton* at [37].

Staleness

…….

17. The answer lies in the supposed concept of staleness. This asserts that, in order for a discovery assessment to be valid, it must be issued by HMRC without undue delay after they have discovered an insufficiency.

18. Ms Balmer argued forcefully that the concept of staleness has no place in the legislation. We acknowledge the cogency of the argument. However, in *Pattullo v Revenue & Customs Commissioners* [2016] STC 2043, this Tribunal decided that on the natural meaning of section 29 there was a requirement for HMRC to act upon a discovery while it remained fresh. This was part of the ratio of the decision in *Pattullo*. Although for the reasons given below it is unnecessary for us to decide the point, we would record our agreement with the recent conclusions and comments of this Tribunal in *Clive Beagles v Revenue & Customs Commissioners* [2018] UKUT 0380 (TCC), as follows:

"58. In the absence of the authorities, we can see some force in the submission that the concept of "newness" involved in a discovery relates simply to the nature of the discovery at the time at which it is made. Whilst we accept Mr Firth's arguments that the implication of a requirement for HMRC to act promptly following any discovery promotes efficiency in the administration of tax and that the concept of a discovery must clearly involve something new (as confirmed by the House of Lords in *Cenlon*), on the words of s29(1), there is nothing express which would appear to provide for any requirement that the discovery must retain that quality until the assessment is made. The only requirement on the face of the legislation is that an assessment under s29(1) can only be made following a discovery.

59. Nevertheless, whatever might be said of the status of the statements of the Upper Tribunal in *Charlton* or in *Tooth* on this issue, in our view, the decision of the Upper Tribunal in *Pattullo* is not obiter. A decision of the Upper Tribunal is not binding on a later Upper Tribunal (see *Raftopoulou v Revenue and Customs Commissioners* [2018] STC 988 at [24]). As a tribunal of coordinate jurisdiction the later tribunal will follow the decision of the earlier one unless it is convinced that the earlier decision is wrong (see *Gilchrist v. Revenue and Customs Commissioners* [2014] STC 1713 at [94] referring back to *Secretary of State for Justice v B* [2010] UKUT 454 (AAC) at [40]). We are not convinced *Pattullo* is wrong, particularly given the existence of the other similar (obiter) statements and so we will follow it.

60. It seems to us that, given the state of the authorities at the Upper Tribunal level, the question of whether a discovery is capable of becoming "stale" is a matter best reviewed by the higher courts. We recognise both sides of the argument, particularly, on the one side, the point that it seems wrong not to require HMRC to make an assessment promptly once a discovery has been made, and, on the other, the simple point that the legislation does not make any express provision for any kind of limitation period except that specified by s34 TMA and so in *Pattullo* the Upper Tribunal pressed the word "if" into action to achieve that end."'

96. The Tribunal will apply the principles set out in the authorities above in relation to the requirements for a) HMRC to prove that a discovery has been made, b) what constitutes 'a discovery', and c) the current requirement that a discovery must be fresh or not stale.

97. A discovery under section 29(1) of the TMA 1970 requires an Officer to have reason to believe a loss of tax exists (*Aramayo* per Mr Justice Avory at p 289). The loss of tax must newly appear to the Officer (*Cenlon Finance* per Viscount Simonds at p 204).

98. No new fact or law is required for there to be a discovery. The loss of tax, newly appearing to the Officer, can be for any reason, including a mere change of view, change of subjective opinion and indeed the correction of an oversight (*Charlton* per Judge Norris [37]).

99. In this regard, the threshold for an Officer's discovery is low. At one point the Officer may not be of the view that a tax loss exists and at another, they conclude a loss of tax exists, such that an assessment ought to be raised. This is the subjective 'threshold' which exists under section 29(1) (*Charlton* [28]).

100. An officer of HMRC's subjective discovery pursuant to section 29(1) of the TMA 1970 must be proven on the balance of probabilities and positively advanced on appeal (*Burgess & Brimheath v HMRC* [2015] UKUT 578 (TCC) per Judge Berner at [49]).

101. In addition to the principles set out above there are also subjective and objective thresholds which are required to be met to raise a discovery assessment.

102. Put in another way, an Officer making the discovery must believe that the information available to them points in the direction of there being an insufficiency of tax (*Anderson* [28]). An Officer's conclusion is subjective, as is the test under section 29(1) (*Sanderson* per Lord Justice Patten sitting in the Court of Appeal [25]).

103. However, the conclusion must be a reasonable conclusion based upon the evidence available to him or her (*Charlton* [24]). As such, the Officer's belief must be one which a reasonable Officer could form (*Anderson* [30]).

104. Consequently, a second stage and element of objectivity is introduced into section 29(1). Additionally, there need only be a progression in the Officer's knowledge rather than a 'eureka moment' that leads to the subjective conclusion and discovery (*Hicks* per Judge Scott [51]-[54]).

105. The fact that the Officer could have reached the conclusion earlier on the basis of the evidence available, does not preclude a discovery at a later date (*Sanderson* per Mr Justice Newey sitting in the Upper Tribunal [24]).

106. The concept of staleness has been recognised by the Court of Appeal in *Tooth v HMRC* [2019] EWCA 826 (which is currently the subject of an appeal to the Supreme Court) 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, the concept of staleness exists and needs to be considered.

Case Law on HICBC

107. In *Robertson v HMRC* [2018] UKFTT 158 (TC) the First-tier (Judge Richard Thomas and Susan Stott) held at [83] to [91]:

'Was there a valid s 29 assessment?

83. The next question is then whether what was issued here was a valid s 29(1) TMA assessment. Such an assessment may only be made if HMRC discover (relevantly) that any income which ought to have been assessed to income tax… [has] not been assessed

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

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

86. A comparison can be made with provisions in Part 4 FA 2004 (pension schemes). There is charged on a number of events involving a variety of matters, some very far removed from any concept of income such as the lifetime allowance charge, and other at least involving receipts in some cases such as the unauthorised payments charge in s 208 FA 1994. But s 208 and other sections of FA 2004 not only make it clear that they do not involve "income" for any purpose of the Tax Acts, but regulation 9 of the Registered Pensions Schemes (Accounting and Assessment) Regulations 2005 (SI 2005/3454) amends s 29(1) TMA to specifically add a discovery of a loss of tax arising on these pension amounts to the scope of a discovery assessment under that subsection.

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

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

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

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

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

108. In *Jason Wilkes v HMRC* [2020] UKFTT 256 (TC) the First-tier (Judge Citron and Ms Shillaker) decided that HMRC had no power to raise discovery assessments in relation to HICBC as section 29(1) TMA 1970 did not empower them to do so. Its reasoning was set out at [44] to [54] in the following terms:

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*.

106. In *Mark Haslam v HMRC* [2020] UKFTT 304 (TC) the Frist-tier Tribunal (Judge Bedenham and Mr Robertson) came to the opposite conclusion that section 29(1) TMA 1970 should be read purposively to empower HMRC to raise discovery assessments in relation to HICBC. The First-tier stated at [64] to [69]:

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, 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, 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.

107. In *Vivian Hill v HMRC* [2020] UKFTT 316 (TC) the First-tier Tribunal (Judge Manuell and Ms Shillaker) came to the same conclusion at [33]-[34] of its decision as the Tribunal in *Haslam*, but for the reasons submitted by HMRC which are different to those relied in *Haslam*:

'33. Having had the advantage of receiving further written submissions from HMRC, we take the view that a purposive interpretation of statute makes it plain that "income" in section 29(1) TMA 1970 for HICBC purposes include amounts received as Child Benefit. That was in our view the plain intention of Parliament. (The Appellant who was not legally represented made no detailed submissions on the issue which we assured him would not prejudice a future permission to appeal application in the event that he wished to have a ruling on this point of law from the Upper Tribunal.)

34. Applying the purposive interpretation propounded on behalf of HMRC by Mr Fallon means that all of the Discovery Assessments in the present appeal have bene validly raised and so must stand. The Appellant is accordingly liable to HICBC as notified to him on 1 March 2019.'

Burden of proof

108. As set out above, in relation to section 29(1) TMA 1970, the onus is on HMRC to prove that a loss of tax has been discovered.

109. Once this has been proved, the onus is then upon the Appellant for the purposes of section 50 TMA 1970 to prove that HMRC's assessment should either be reduced or cancelled. Otherwise the assessment issued under section 29 TMA 1970 shall stand good.

110. The standard of proof is the ordinary civil standard, the balance of probabilities.

Appellant's submissions

111. The Appellant's grounds of appeal, as per his notice of appeal dated 25 April 2019, were as follows.

112. The Appellant submitted that the letter he received from HMRC in 2012 regarding the changes to Child Benefit stated that it affected persons with an income of £50,000 or more, which his income was not at the time. '*On reading the letter as my income was below £50,000 it stated 'No, please ignore it''*. He also reviewed the help sheet that was enclosed the letter which again confirmed that HICBC applied to an income of £50,000 or more, but as his income was less than that the figure, the guidance stated 'No, take no further action'.

113. He submitted his P60 from his employer for the 2013/14 tax year stated that the figure £49,069.08 should be used on tax returns.

114. He submitted that '*I received a letter dated 28th September 2018 which clearly shows that previous correspondence was unclear and now also stated taxable income and benefits over £50,000. The addition of 'taxable' income and 'benefits' was never stated in the letter dated 14th October 2012 and for myself had implications as I had a company car and therefore considered a benefit in excess of £50,000.*'

115. The Appellant stated that he had contacted HMRC and paid the HICBC for the tax years 2014-15 to 2016-17 because his taxable income was over £50,000 but he disputed the 2013-14 tax year '*as the information originally provided was unclear and in my view has since been changed.*'

116. The Appellant therefore disputed that he failed to notify HMRC of his chargeability as the information in the October 2012 letter did not require him to notify HMRC. He would not have been able to notify HMRC of his chargeability by 05 October 2013 anyway because the only reason his taxable income exceeded £50,000 was due to a pay increase in January 2014 and a one-off bonus in February 2014.

117. He went on to state, '*I also wish to raise that had I completed a Self Assessment for the tax year 2013/14 the figure that HMRC are suggesting would have be less, as I would have been able to include the pension contributions that were taken by my employer*'.

118. The Appellant submitted that it was unreasonable that the onus is on the taxpayer to notify HMRC when the information provided by HMRC is misleading and unclear. The Appellant stated that the assessment was made more than four years after the end of assessment.

119. The Appellant made further points in his closing submissions at the hearing.

120. First, he submitted that Child Benefit is not income for the purposes of income tax and specifically section 29 of the TMA 1970. He submitted that he did not receive Child Benefit because it was paid to wife and was not his income – he also submitted that HICBC was a higher income charge not an income tax.

121. Second, he submitted that the discovery assessment was made out of time because it was made in December 2018 more than four years after the tax year to which it related. He submitted that the twenty-year time limit did not apply because he had not deliberately understated or misled HMRC as to his tax liability.

122. Third, he submitted that the assessment sum of £630 calculated was calculated incorrectly as HMRC conceded the actual figure should be £563. The difference in figures is due to the fact the pension contribution should be calculated gross rather than net – that is how it is calculated on HMRC's calculator.

123. He reiterated his grounds of appeal that he had a reasonable excuse for not notifying HMRC of his liability to HICBC because the information letter sent out in 2012 – and accompanying guidance – did not clarify what was meant by income (adjusted net income including employment benefits). Therefore, he submitted he had no liability to notify of HMRC at the relevant time during or file any self-assessment return after the end of the tax year. He accepted that it was only on 28 September 2018 that he became aware of his liability – when he received a letter which defined adjusted net income as including income and employment benefits. That was when he responded to HMRC. He had no dispute as to his liability for the later tax years after 2014 because his salaried income was over £50,000.

124. He confirmed that when he spoke to Officer Baik in October 2018 he made no mention of his partner's income.

HMRC'S Submissions

125. Mr Fallon, for HMRC submitted as follows.

The failure to notify

126. Mr Fallon argued that HMRC are not legally obliged to notify changes in legislation to each and every individual taxpayer. The HICBC came into force from 7 January 2013 through the introduction of section 8 of the Finance Act 2012. Nonetheless, he submitted that steps were taken to raise awareness of the HICBC. Whilst they were under no legal obligation to do so, HMRC took extraordinary measures to enable taxpayers to establish their liability.

127. HMRC submitted that leading up to the introduction of the HICBC, there was an extensive publicity campaign to raise awareness. Furthermore, the HICBC was considered by Parliament in several debates, and the measures announced by the Chancellor in the 2012 budget. On their website HMRC provided full details of the Child Benefit Helpline and also the times when this was open and available to answer queries on whether the HICBC applied or not. On their website, HMRC also made available a calculator on which taxpayers could verify whether they had to pay some or all of the Child Benefit as a tax charge if their ANI was over £50,000 per year.

128. Mr Fallon submitted that there is no evidence that the Appellant sought advice from this, or any other HMRC, helpline. Nevertheless, ultimately it is for taxpayers affected by the change to notify their liability to HMRC, which the Appellant in this case did not do.

129. Mr Fallon relied on the Tribunal decision of *Nonyane v HMRC***,** at [28] concerning penalties raised due to a failure to notify liability to the HICBC where Judge McGregor stated: *"I agree with HMRC's submissions that it is not obliged to notify all customers of changes in the law."* This view was supported by the Tribunal in *Lau v HMRC*, at [33], where Judge Scott stated: *"…HMRC are under no obligation to notify individual taxpayers."*

The discovery of a loss of tax

130. Mr Fallon relied on the decision in *Jerome Anderson v HMRC*, [2018] UKUT 0159 (TCC) where the Upper Tribunal set out the two tests which must be met for the relevant conditions of section 29(1) TMA 1970 to be satisfied: a subjective test and an objective test.

131. The Upper Tribunal set out the *subjective test* in the following terms (at [28]):

"…Having reviewed the authorities, we consider that it is helpful to elaborate the test as to the required subjective element for a discovery assessment as follows:
"The officer must believe that the information available to him points in the direction of there being an insufficiency of tax." That formulation, in our judgment, acknowledges both that the discovery must be something more than suspicion of an insufficiency of tax and that it need not go so far as a conclusion that an insufficiency of tax is more probable than not."

132. At [30], the Upper Tribunal set out the *objective test*:

"The officer's decision to make a discovery assessment is an administrative decision. We consider that the objective controls on the decision making of the officer should be expressed by reference to public law concepts. Accordingly, as regards the requirement for the action to be "reasonable", this should be expressed as a **requirement that the officer's belief is one which a reasonable officer could form**. It is not for a tribunal hearing an appeal in relation to a discovery assessment to form its own belief on the information available to the officer and then to conclude, if it forms a different belief, that the officer's belief was not reasonable." (Emphasis added.)

133. Mr Fallon therefore submitted that the two questions to be asked are: (a) did the Officer believe that there was an insufficiency? and (b) was that belief one which a reasonable Officer could form? He contended that both questions were unarguably satisfied in this appeal.

134. He submitted that on 23 October 2018, Officer Baik of HMRC established the following facts:

 the Appellant's partner had received payment of Child Benefit in the tax years now under appeal;
 the ANI of the Appellant exceeded £50,000 in those years;
 the Appellant had not completed a self-assessment tax return declaring the HICBC for the years under appeal.

135. Only once these facts had been established was the Officer able to:
a. Decide that the liability to HICBC arose,
b. Decide which person in the household was liable,
c. Quantify the liability, and
d. Verify whether or not it had been declared.

136. Mr Fallon therefore submitted that the Officer had therefore discovered income which ought to be chargeable to income tax and had not been assessed or declared.

137. He submitted that the discovery was therefore made by Officer Baik on 23 October 2018 and the assessment notified to the Appellant on 05 December 2018.

Time limits

138. Mr Fallon submitted that the Appellant was liable to the HICBC and was required to give notice of his liability to HICBC within 6 months from the end of the year of the tax year in question.

139. He submitted that section 36(1A)(b) of TMA 1970 provides that there is a time limit of 20 years for raising an assessment where no self-assessment return or notification has been given by the taxpayer. In this case all assessments had been issued within this time limit.

Calculation of the assessment

140. Mr Fallon submitted that the method by which the assessments are calculated is set out in statute. Child benefit is paid at fixed rates dependent on the number of eligible children in the household. The rates of payment and other relevant information concerning eligibility is held on the system used by HMRC for the administration of Child Benefit.

141. He submitted that the assessments were correctly calculated in line with statute and the information held on HMRC systems, albeit he conceded the reduction to £563.

Response to the Appellant's grounds of appeal

142. In his appeal letters, the Appellant has also sought to dispute the assessments on the basis that HMRC should have raised the assessments earlier, having been aware of the Appellant's income and the fact that there was a relevant Child Benefit claim in the household. Mr Fallon submitted that HMRC could confirm that the Appellant's pension contributions have been deducted from his ANI, so filing an assessment in 2013-14 would not have made a difference to the amount of his tax liability.

143. HMRC maintained that the discovery made by Officer Baik met the conditions for discovery had been met, and the discovery is therefore valid. Furthermore, in the case of *Nicholson v Morris* the Judge made the following observation:

"…the Taxes Management Act throws upon the taxpayer the onus of showing that the assessments are wrong. It is the taxpayer who knows and the taxpayer who is in a position (or, if not in a position, who certainly should be in a position) to provide the right answer, and chapter and verse for the right answer, and it is idle for any taxpayer to say to the Revenue, 'Hidden somewhere in your vaults are the right answers: go though and dig them out of the vaults' That is not a duty of the Revenue. If it were, it would be a very onerous, very costly and very expensive operation, the costs of which would fall entirely on the taxpayers as a body. It is the duty of every individual taxpayer to make his own return…"

144. Mr Fallon submitted that the Appellant's argument that HMRC should have raised the assessments earlier as they had all the relevant information within their records was irrelevant. It is the duty of the taxpayer to notify liability, not the duty of HMRC to do so on a taxpayer's behalf. No additional information has been provided by the Appellant to demonstrate that the assessments are incorrect, therefore he submitted that the assessment should be confirmed and upheld.

Post hearing submissions on the applicability of section 29(1) of the TMA to HICBC

145. The Tribunal at the hearing on 28 July 2020 requested that HMRC address the argument that the High Income Child Benefit Charge ("HICBC") is not "income" for the purposes of raising a discovery assessment under section 29(1) TMA 1970 and that, consequently, section 29 is an invalid mechanism by which to assess the tax due. This proposition was put forward by the Tribunals in the decision of *Robertson* (in the First-tier) and in *Wilkes*.

146. HMRC provided post hearing written submissions dated 4 August 2020 which addressed the issue as follows.

147. HMRC respectfully disagreed with the decision in *Wilkes* and argued that where s29(1)(a) TMA 1970 refers to "income", this means "any amount liable to income tax". This conclusion requires a purposive, as opposed to a literal interpretation to be applied.

148. HMRC contended that such an approach is common practice and in line with Parliament's intention. To make clear why the purposive interpretation should be followed, it would assist the Tribunal to consider Parliament's intention when enacting the legislation relevant to the present appeal.

149. Firstly, it was submitted that income tax is charged, not just on income itself, but also through direct charges to income tax such as the HICBC, this is shown in section 3 of the Income Tax Act 2007 ("ITA") which provides for both income to be charged to income tax and direct charges to tax made by reference to the relevant provisions of the Acts specified.

150. As regards the HICBC, the liability to income tax is created by virtue of Section 681B(1) Income Tax (Earnings and Pensions) Act 2003 ("ITEPA"), which sets out that "P" is liable to a charge to income tax subject to the conditions in 681B(1)(a), (3), (4) and other relevant provisions.

151. The formula for working out the amount of charge is set out in 681C ITEPA 2003, as follows:

"Section 681C(1)
"The amount of the high income child benefit charge to which a person ("P") is liable for a tax year is the appropriate percentage of the total of–
(a) any amounts in relation to which condition A is met, and
(b) any amounts in relation to which condition B is met.
For conditions A and B, see section 681B."

Section 681C(2)
(2) "The appropriate percentage" is –
(a) 100%, or
(b) if less, the percentage determined by the formula –
Where –

ANI is P's adjusted net income for the tax year;
L is £50,000;
X is £100.

Section 681C(3) If –
(a) the total of the amounts mentioned in paragraphs (a) and (b) of subsection (1), or the amount of the charge determined under that subsection, is not a whole number of pounds, or (b) the percentage determined under subsection (2)(b) is not a whole number, it is to be rounded down to the nearest whole number."

152. When a taxpayer is chargeable to tax, the onus is on that taxpayer, subject to various exceptions, to give notice of their chargeability to HMRC.

153. As section 7(3) TMA 1970 can only ever apply to taxpayers who are not liable to the HICBC, the consequence is that all taxpayers who are liable to the HICBC and have not been given notice to file by HMRC under section 8 TMA 1970 must give notice of their chargeability to an officer of the Board under section 7 TMA 1970. Thereafter HMRC would issue them with a notice to file so that the taxpayer could file a self-assessment return. Parliament's intention, that everyone chargeable to the HICBC notify their chargeability to allow collection of that liability, is unequivocal.

154. Parliament cannot have legislated to impose a charge to tax, but at the same time have intended for HMRC to be prevented from assessing that charge in certain cases. As Lord Dunedin observed in *Whitney v Inland Revenue Commissioners* [1926] AC 37 (at p52):

"My Lords, I shall now permit myself a general observation. Once that it is fixed that there is a liability, it is antecedently highly improbable that the statute should not go on to make it 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."

155. Once a liability arises, the taxpayer is obliged to notify their chargeability to HMRC. Once they have notified chargeability, then it can be said to be standard practice for HMRC to issue a notice to file a return under section 8 TMA 1970 and the taxpayer can expect to receive that notice. The taxpayer is then obliged to self-assess their liability under section 9 of the TMA 1970.

156. If the taxpayer has already received a notice to file under section 8 then he or she is no longer obliged to notify chargeability under section 7. Furthermore, in future years they may arrange for the liability to be collected through Pay As You Earn ("PAYE") or, in the alternative, they may, if they wish, elect not to receive the Child Benefit payments to prevent further liability in those future years, both of which would remove their section 7 obligation.

157. However, none of these scenarios are applicable to the Appellant. The Appellant had not received a section 8 notice to file; neither the Appellant nor his partner had elected not to receive Child Benefit payments; and the Appellant had not arranged for the HICBC to be collected through PAYE. The Appellant was therefore unquestionably obliged under section 7 to notify his chargeability.

158. The Appellant's failure to notify his chargeability has led to a loss of tax. Consequently, HMRC were empowered to make an assessment under section 9 TMA 1970: section 29(1)(b) TMA 1970 only applies where a taxpayer has made a self-

assessment under section 9 TMA 1970, but the amount of that assessment is or has become insufficient. Additionally, HMRC have other powers to make Revenue Determinations under the provisions of section 28C TMA 1970 which can apply to taxpayers who have been given notice to file a tax return under section 8 TMA 1970, but have not done so. Such a determination holds no right of appeal and may only be displaced by a self-assessment.

159. Section 29(1)(a) TMA 1970 applies where, the taxpayer's liability has not been assessed, most obviously where they have failed to notify their chargeability under section 7. This was the provision which applies to the Appellant.

160. It was submitted that where HICBC has not been charged, when the word 'income' in section 29(1)(a) is interpreted to mean "amount", the provision would read as follows:

> If an Officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment –
>
> (a) that any **amount** [or **amount liable to income tax**] which ought to have been assessed to income tax, ……., have not been assessed,
>
> ……
>
> the officer or, as the case may be, the Board may (…) 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."

161. If this interpretation is adopted, HMRC are empowered to act as follows:

Type of failure	**Remedy**
Notice to file issued, return received, no HICBC declared (s8 TMA 1970)	Enquiry under s9A TMA or Discovery assessment under s29(1)(b) TMA 1970
Notice to file issued, return received, incorrect amount of HICBC declared (s8 TMA 1970)	Enquiry under s9A TMA 70 or Discovery assessment under s29(1)(b) TMA 1970
Notice to file issued, no self-assessment return submitted (s8 TMA 1970)	Revenue determination under s28C TMA 1970

162. When, however, the literal interpretation of "income" is applied, the result would be as follows:

Type of failure	**Remedy**
Notice to file issued, return received, no HICBC declared (s8 TMA 1970)	Enquiry under s9A TMA 70 or Discovery assessment under s29(1)(b) TMA 1970
Notice to file issued, return received, incorrect amount of HICBC declared (s8 TMA 1970)	Enquiry under s9A TMA 70 or Discovery assessment under s29(1)(b) TMA 1970
Notice to file issued, no self-assessment return submitted (s8 TMA 1970)	Revenue determination under s28C TMA 1970
No notice to file issued, no notification of chargeability given (s7 TMA 1970)	**HMRC are prevented from making an assessment, no charge to income tax**

163. Interpreting "income" literally would not only prevent HMRC from fulfilling their statutory obligation to collect the amount of tax that, by law, is due, but additionally undermine the income tax system.

164. Nor is it the case that simply issuing a notice to file under section 8 TMA 1970 is a remedy to this problem.

165. As submitted, in some circumstances HMRC may be able to initiate giving effect to the HICBC by issuing a notice under section 8 TMA 1970, requiring the taxpayer to submit a return. If the taxpayer fails to comply, HMRC can then issue a determination under section 28C TMA 1970. That remedy is, however, only available to HMRC within a limited timeframe. A notice to file will only be effective where it is issued within 4 years of the relevant year of assessment.

166. It is important to remember that this scenario involves a taxpayer who has not notified HMRC that they are chargeable. HMRC would not be aware that the taxpayer is liable to the HICBC and has failed to self-assess for that charge, and HMRC may not become aware until several years after the fact. Accordingly, section 8 TMA 1970 is not an effective remedy for HMRC in these situations.

167. Moreover, to suggest that HMRC must issue section 8 notices in order to collect the charge would have the effect of relieving the taxpayer of their statutory obligation to give notice of their chargeability under section 7(3)(c) TMA 1970, placing it instead on HMRC to issue a tax return within the 4-year time limit. This is both in direct contravention of section 7(3)(c) and long-established authority.

168. So, on the interpretation advanced by the Tribunals in *Robertson* and *Wilkes*, HMRC are left without an effective remedy in many HICBC cases.

169. As well as being unworkable, HMRC submitted that this interpretation produces irrational results. The irrationality can be seen when one contrasts the scenario with a taxpayer who does submit a return, albeit an inaccurate return.

170. Consider the example of a self-employed taxpayer who is also liable to the HICBC. The taxpayer submits a return, including their income from self-employment, but leaving out the HICBC. In those circumstances, it is common ground that HMRC could make an assessment under section 29 TMA 1970, because section 29(1)(b) is fulfilled (the taxpayer's self-assessment is insufficient). If HMRC discover the inaccuracy several years later, the time limits for an assessment under section 29 TMA 1970 give them an effective remedy. While the ordinary time limit is 4 years, that is extended to 6 years where the taxpayer has acted carelessly and 20 years where the taxpayer acted deliberately, by virtue of sections 34 and 36 TMA 1970.

171. For the purposes of comparison, take the example of a taxpayer who deliberately avoids declaring liability to the HICBC: (a) A taxpayer who deliberately failed to notify HMRC of his chargeability would be able to 'escape' the tax liability after some 4 years; (B) A taxpayer who filed a return but deliberately failed to include the HICBC would be at risk of a discovery assessment for 20 years.

172. This would put a taxpayer who deliberately fails to notify chargeability in a better position than a taxpayer who deliberately fails to include the HICBC in their return. There is no logical basis for that distinction, and it undermines the purpose of section 29 TMA 1970. This is not an outcome that Parliament would have intended.

173. For the avoidance of doubt, HMRC accepted that there is no assertion of deliberate behaviour in the case of the Appellant, this was simply an example to demonstrate the effects of applying a literal interpretation.

174. Therefore, HMRC submit that such an interpretation would provide an advantage (in cases of taxation via direct tax charge) to taxpayers who failed to

comply with their obligations (either unintentionally or by design) by not giving notice of their chargeability, over those who fully or partially complied with their obligations and made such a disclosure.

175. By contrast, on applying HMRC's interpretation, a taxpayer who has failed to notify HMRC of their chargeability is in the same position as a taxpayer who has failed to include the HICBC on their return.

176. As a further example, HMRC asked the Tribunal to consider a taxpayer who has earned income from self-employment or another source such as dividends and has failed to notify HMRC of their chargeability under section 7 TMA 1970. This failure is discovered by HMRC 8 years later. It is clear, in those circumstances, that HMRC could raise a discovery assessment under section 29 TMA 1970. The time limit for doing so would be 20 years, because the loss of tax would be attributable to the taxpayer's failure to comply with the notification obligation under section 7 TMA 1970 (section 36(1A)(b) TMA 1970).

177. Compare this with the position where a taxpayer fails to notify chargeability to the HICBC or other charge to income tax (rather than income chargeable to income tax). Applying the literal interpretation, HMRC cannot raise a discovery assessment in relation to the charge to tax and so HMRC simply cannot enforce the tax charge when they become aware of it.

178. Moreover, as submitted, section 7 TMA 1970 imposes a statutory obligation on a taxpayer chargeable to the HICBC to give notice of said chargeability. No such obligation exists on HMRC to issue a notice to file a return under section 8. It cannot be said then that Parliament's intention was for HMRC to assess that chargeability was via a section 8 notice.

179. If it were the case this would have the additional effect of imposing an absolute limit of 4 years in which HMRC would be expected to identify and rectify the failure of the taxpayer, as opposed to the limit of 20 years allowed by section 36(1)(A)(b) TMA 1970. Once again, a taxpayer who failed to notify chargeability, deliberately or otherwise, could expect to "escape" the tax liability after 4 years.

180. There is no logical reason to believe that Parliament would intend to limit HMRC's assessing powers in this way, nor is there any logical basis for the difference in treatment between the HICBC and other income tax charges. This is simply not an outcome that Parliament would have intended.

181. By contrast, on HMRC's interpretation the same powers are available whether the income tax charge in question is the HICBC or arises from income charged to income tax.

182. Put simply, a taxpayer's liability to tax is determined by reference to the law. In this case the relevant legislation is section 58 ITA 2007, which sets out how to calculate a person's ANI, and section 23 ITA 2007 which sets out how to calculate a person's liability to income tax.

183. Step 7 of section 23 ITA 2007 (by way of section 30 ITA 2007 which adds the HICBC as a further income tax charge in the relevant table) sets out that a person's liability to income tax includes those relevant amounts, such as HICBC, which are not themselves income, but attract a charge to income tax.

184. Parliament has empowered HMRC to collect the tax that is due and indeed expects them to do so. Parliament cannot have intended for HMRC to identify that an

amount of tax is due but be prevented from assessing it, as was set out in the dicta in *Whitney* – such a situation would lead to the aforementioned absurd conclusion. Therefore, Parliament's intention, in legislating for the HICBC and other tax charges, and in expecting that tax charge to be collected through the income tax regime, must have been for the relevant legislation to be applicable to the circumstances shown in the table above.

185. In further support of the purposive interpretation of 'income' to mean 'amount', HMRC contend that since the introduction of TMA 1970, 50 years ago, Parliament has made additions to TMA and the other taxes acts that go far beyond what the initial drafters of the income tax legislation could have envisaged.

186. So, it is the case that the drafters 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.

187. Referring to the points made by the Tribunal in *Robertson*, concerning the additional legislation used to apply tax charges to pensions for example, Parliament has, at times, deemed it necessary to pass additional legislation in order for its will to be enacted in law, but it has not done so with the HICBC.

188. Indeed, HMRC would go so far as to submit that, had Parliament deemed such an additional qualification necessary for the HICBC, and had it deemed it necessary to legislate for such a qualification, it would have done so. That it did not do so demonstrates that the present wording in the legislation is sufficient to cover charges to income tax, as well as direct taxes on income.

189. The difficulties with the application of a literal interpretation become even more stark when one considers other income tax charges which are imposed without identifying an amount of income, such as charges arising in the context of registered pension schemes. Transactions carried out by pension schemes can give rise to a charge to income tax known as the unauthorised payment charge, which can be imposed on employers or scheme members. The same issue of interpretation arises in this context: can an assessment be made under section 29 TMA 1970 in the event of a failure to notify chargeability?

190. The Tribunal in *Robertson* states that regulations were made to modify section 29 TMA to apply to some of the charges arising in relation to registered pension schemes. Looking at unauthorised payment charges in more detail: (a) For unauthorised payment charges imposed on *companies,* regulations made specific provision to ensure that assessments could be made under section 29 TMA 1970, modifying section 29 TMA 1970 for that purpose (b) For unauthorised payment charges imposed on *individuals,* the regulations did not make specific provision for section 29 TMA 1970 to apply.

191. 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' position that an unauthorised payment charge on an individual can be assessed under section 29 TMA 1970 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)(a).

192. While it is not the role of the Tribunal in these proceedings to determine how unauthorised payment charges are to be assessed, HMRC submitted that the alternative constructions of section 29 TMA 1970 put forward in this case by the Tribunals in *Robertson* and *Wilkes* and, and by HMRC will also be relevant to unauthorised payment charges: (a). Following the approach of those Tribunals, section 29 TMA 1970 assessments for income tax cannot be imposed on individuals; (b) Following HMRC' approach, section 29 assessments could be imposed on individuals.

193. Once again, HMRC's construction of section 29 TMA 1970 enables assessments to be applied consistently, in line with the statutory purpose of making good the loss of income tax.

194. As such an irrational loophole has been neither legislated for nor applied, it cannot therefore be deemed necessary, and Parliament must therefore have intended for (in situations where no notice has been given) section 29(1)(a) TMA 1970 to be an appropriate means of making an assessment of the tax due, resultant from the tax charge imposed by section 681B ITEPA 2003.

195. Failing to interpret legislation purposively would allow for absurd situations to prevent Parliament's intention from being giving effect. In order to remedy such absurdity, it is common practice to apply purposive or alternative definitions to words, when it is clear that application of the literal definition is flawed.

196. While the words "income tax" may lead one to conclude that what is taxable at first glance is simply income itself, it is clear in the way the law is applied that income tax is chargeable on both income and amounts that are not income, and that such a conclusion would therefore be inaccurate.

197. If Parliament intended to apply tax charges to other amounts not currently chargeable to income tax, then it *could* do so. HMRC *would* then be empowered to assess such amounts as Parliament deemed chargeable. In the case of the HICBC, Parliament *has* legislated, and HMRC *are* empowered to assess the amount of the liability.

198. HMRC' powers of assessment in cases where no notice has been given under section 8 TMA 1970 are granted by section 29(1) TMA 1970. As section 29(1)(b) can only be used where a self-assessment made by the taxpayer is, or has become, insufficient, section 29(1)(a) is the only appropriate means of assessing the outstanding liability, therefore Parliament's intention must have been for HMRC to use section 29(1)(a) and the purposive interpretation of "income" must therefore apply. Indeed, HMRC submitted that it is the only sensible interpretation that can apply.

HMRC's alternative argument as to why s29(1) applies to assessments to HICBC

199. In the alternative, HMRC submitted that the Tribunal should find that the wording of section 29(1) TMA 1970 should be interpreted in line with the approach offered by the Tribunal in the case of *Haslam.* HMRC relied on the reasoning in paragraphs 63 – 69 of the decision.

200. In short, the Tribunal applied the three-stage approach set out in *Inco Europe* [2000] 1 WLR 586, to determine that the words *"…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"* should be read into section 29(1) TMA 1970.

201. In reaching this conclusion, the Tribunal determined that all three stages of the above approach had been met, on the basis that: the purpose(s) of the relevant pieces of legislation were abundantly clear; that the lack of amendment to s29(1) TMA 1970 expressly to include the HICBC was due to inadvertence; and that, but for that inadvertence, the above wording (or an equivalent) would have been added to the legislation.

202. The Tribunal in *Haslam* also made it clear that, given the clear absurdity referenced by HMRC above, this reading was consistent with Parliament's intention in enacting both sections 681 ITEPA 2003 and 29(1) TMA 1970.

203. HMRC maintained that the purposive interpretation of "income", as put forward in their primary submission, remains the correct interpretation. Whilst the approach of the Tribunal in *Haslam* does not fully accord with this, HMRC nonetheless invited the Tribunal to adopt it as an alternative should their preferred purposive interpretation be rejected.

204. In conclusion, HMRC contended that section 29(1)(a) TMA 1970 is the valid means of assessing a taxpayer where there is a loss of tax as a result of the taxpayer failing to declare their chargeability to the HICBC.

Discussion and Decision

The Appellant's grounds of appeal

205. We are particularly grateful to the Appellant for the admirably reasonable and concise way in which he pursued his grounds of appeal. However, for the reasons we now explain, we are bound to reject the arguments he raises. We do so with some regret because hethe Appellant was transparently honest in his evidence and in his conduct with HMRC throughout.

206. In respect of the tax year 2013-2014, the Appellant argues that in effect that he had an honest and reasonable belief that he was not required to file a self-assessment return nor notify HMRC of his partner's receipt of Child Benefit for the purposes of the HICBC.

207. He submits that he did not need to notify HMRC of his income due to them providing the incorrect information to him as to the circumstances in which he would be liable to HICBC. He submits that HMRC provided him with inaccurate information in 2012 that HICBC only applied to incomes of £50,000 and above. They did not explain that 'income' meant 'adjusted net income' which would include his employment benefits in addition to his salary. Therefore, he reasonably believed that his salary of under £50,000 for the tax year 2013-2014 would not render him liable to HICBC, thus not require him to file a self-assessment return.

208. The Tribunal has already accepted that the Appellant did not receive the further SA 252 in 2013 which would have given him HMRC's accurate guidance. We agree that inaccurate information (referring to 'income' rather than ANI) was provided to the Appellant in 2012 by HMRC.

209. HMRC rely on the fact that they launched a publicity campaign, informing the public about HICBC which they were not required to do in any event because it is the duty of taxpayers to inform themselves of the law. HMRC rely upon these arguments to suggest the Appellant should have been aware of his liability or properly informed himself of it, notwithstanding the terms of the notice sent to him in 2012.

210. However, we are not required to decide whether the Appellant had a reasonable excuse for failing to file a self-assessment return and failing to pay HICBC for the tax year 2013-2014. This is because HMRC have not charged him any penalties for either failure. This Tribunal only need decide if the assessment that the Appellant was liable to HICBC for the tax year 2013-2014 is correct in law and properly calculated. We are not required to determine the reasonableness of the Appellant's behaviour.

211. Had we been required to decide the point however, in the specific and exceptional circumstances of his case, we may well have been satisfied that the Appellant reasonably relied upon that information in order not to file a self-assessment tax return and pay HICBC for that specific year (2013-2014).

212. Further, we should record that the Applicant acted honestly and reasonably in making a voluntary disclosure to HMRC on 23 October 2018 that he was liable to pay sums of HICBC for various tax years. This was to his credit as it followed shortly after receiving the notice regarding HICBC from HMRC dated 28 September 2018. That notice accurately explained how liability to HICBC operated such that the Appellant clearly understood that the tax charge applied to him.

213. We are bound to reject the Appellant's ground of appeal that HMRC's assessment made on 5 December 2018 was made out of time. We are satisfied that the law provides that where no self-assessment return is filed, HMRC may make an assessment up to twenty years after the tax year in question – pursuant to section 36(1A)(b) TMA 1970.

214. It appears that the Appellant may have confused this provision with the power under section 36(1A)(a) TMA 1970 that HMRC also may raise assessments up to twenty years later where they prove that a loss of tax has been brought about deliberately by a taxpayer who has filed a self-assessment return (for example, where there has been a deliberate understatement of tax)

215. The Appellant submits that no discovery assessment could be made because he did not receive child benefit himself, rather his wife did. Therefore, he did not receive any 'income' which ought to have been assessed to income tax such that s.29(1) TMA 1970 does not apply.

216. We are unable to accept this submission for the reasons set out below. In short, we are satisfied that the 'income' referred to in section 29(1) TMA 1970 is the Appellant's ordinary adjusted net income as defined in section 58 ITA 2007 from all sources as defined in section 3 ITA 2007 (such as employment or self-employment). This income may or may not include child benefit (because the tax can be imposed on the higher earner where they do not receive the benefit but their partner does). Whether or not they themselves received the child benefit, their income which is used to calculate their ANI for the purposes of the HICBC would not simply be from the income from child benefit alone, if at all.

217. The mechanism by which the HICBC legislation operates is not necessarily to tax the person who receives the child benefit – it is a not a tax on the child benefit income itself but on the general income of a taxpayer. This is obvious from the provisions in 681B(1) and (4) ITEPA 2003:

Section 681B

(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".
…….
(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."

218. Section 681B(1) and (4) ITEPA 2003 provide for a tax on a person with an ANI exceeding £50,000 (a high income), when either that person or their live-in partner receives child benefit and that person has the higher income of the couple. Therefore, HICBC should not be narrowly characterised as a direct form of income tax on people who receive child benefit in order to recover that child benefit. Rather, it is a scheme to recoup up to the equivalent sums to the child benefit received by either partner in a co-habiting couple through an income tax on the higher income earner where the higher earner's adjusted net income exceeds £50,000.

219. We will return to this analysis when examining the arguments on the applicability of discovery assessments to HICBC.

220. We now turn to consider that issue together with the other primary issues in the appeal.

Determination of the primary issues in the appeal

221. The first and primary issue is whether section 29(1)(a) TMA 1970 empowers HMRC to make discovery assessments in relation to the HICBC generally in circumstances where a taxpayer fails to notify their liability to the charge for the purposes of section 7 TMA 1970 and fails to file a self-assessment return. If HMRC cannot make a discovery assessment in these circumstances then the Appellant's appeal must be allowed.

222. The second issue is whether HMRC have proved that their discovery assessment for 2013-2014 is correctly calculated, competent and in time. In particular, we are required to decide whether HMRC have proved: a) there was a discovery an insufficiency of tax (income which ought to have been assessed to income tax); b) whether an HMRC officer believed this to be the case – whether there was a subjective discovery; c) if so, whether the belief was objectively reasonable; and d) whether HMRC made the assessment when still fresh rather than stale; e) whether they did so within the statutory time limit; and f) whether the assessment was properly calculated. Of these issues, the one that concerned us the most careful is whether HMRC had objectively reasonable grounds for believing it had made a discovery when there was no evidence that they had ascertained that the Appellant's partner had a lower income than the Appellant.

223. The third issue is the validity of the assessment: whether the Appellant has proved that he was not liable to HICBC for tax year 2013-2014 at the sum assessed or at all. Has he proved that HMRC were wrong to assess him to HICBC because he does not satisfy the statutory criteria for the imposition of HICBC under section 681B(1) and (4) ITEPA 2003, for instance because there is no evidence that his wife's income was less than his.

Discovery assessments and HICBC

224. The wording of s.29(1)(a) TMA 1970 and the applicability of discovery assessments to HICBC have concerned Tribunals since the decision in *Robertson* in 2018.

225. The subsection provides:

"**29(1)** If an Officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment –

(a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed,

……

the officer or, as the case may be, the Board may (…) 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."

226. Interpretation of the relevant and underlined phrase '*income which ought to have been assessed to income tax*' has troubled Tribunals in *Robertson, Wilkes, Haslam* and *Hill* who have arrived at differing conclusions for differing reasons.

227. The Tribunals in *Robertson* and *Wilkes* concluded that discovery assessments are not available in respect of HICBC because the statutory language does not empower HMRC to make them and no purposive interpretation should be adopted. However, the Tribunals in *Haslam* and *Hill* adopted two differing purposive construction of section 29(1)(a) TMA 1970. They decided that discovery assessments in respect of HICBC are available to HMRC.

228. HMRC in their post hearing submissions concede that the literal wording in s.29(1)(a) TMA 1970 does not apply to HICBC and that the Tribunal cannot apply the natural and ordinary meaning of the words but must apply a purposive interpretation. Their primary case is that the word 'income' should be substituted with the words '*any amount*' or '*any amount liable to income tax*'. This is the interpretation accepted by the Tribunal in *Hill*. Their secondary case is that the purposive interpretation in *Haslam* should be adopted adding the words '*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*' after the relevant phrase in the subsection.

229. At the time of HMRC filing their supplementary submissions in this case, they indicated that they would be seeking permission to appeal the decision in *Wilkes* to the Upper Tribunal. The Upper Tribunal, and perhaps the appellate courts thereafter, may be called upon to resolve the issue authoritatively.

230. In the mean time, we are tasked with considering each of the previous Tribunal decisions and HMRC's submissions with care. The previous decisions carry persuasive weight and we afford them a significant degree of respect but they are not binding on us.

231. Unfortunately, we have arrived at a different conclusion from each of the Tribunals and from the arguments that HMRC rely upon.

232. Our analysis begins by considering whether the wording of section 29(1)(a) TMA 1970 is required to be read purposively or whether, its ordinary and natural meaning applies to HICBC.

233. We start by repeating the observation above. The 'income' referred to in section 29(1)(a) as being assessed is the ordinary income of a taxpayer from all sources (whether from employment or self-employment or any other source within

section 3 of ITA 2007). Section 3 of ITA 2007 assists with understanding the types of income which may be subject to income tax and this includes social security income (income from benefits) which may be a form of income but it is only one form of many.

234. The income being assessed under section 29(1)(a) is not the 'income' from child benefit (which may not even be received by the taxpayer against whom the discovery is made) but from all sources and as calculated to be ANI under section 58 ITA 2007. The calculation of a taxpayer's ANI following the steps set out in section 58 requires their income to be assessed.

235. We repeat the observation that section 681B(1) and (4) ITEPA 2003 provide for a tax to be imposed on a person whose ANI exceeds £50,000 (a high income), when either that person or their live-in partner receives child benefit and that person has the higher income of the couple. Therefore, HICBC should not be narrowly characterised as a direct charge to income tax on people who receive child benefit to recover that child benefit. Rather, it is a scheme to recoup up to the equivalent sum to the child benefit received by either partner in a co-habiting couple through an income tax on the high income earner where they are the higher earner of the couple.

236. Therefore, we do not agree with HMRC that the word '*any income*' needs to be reinterpreted to mean '*any amount*' or '*any amount liable to income tax'.*

237. While we respect the careful reasoning of the Tribunal in its decision in *Wilkes* and have considerable regard for the thought and consideration it gave the issue, we have decided we cannot adopt the line of reasoning set out at [44] to [50] of the decision. We are not satisfied that section 23 of the Income Tax Act 2007, governing how income tax is to be calculated, assists in, or at least restricts, our understanding of what is meant by the word 'income' in section 29(1)(a) TMA 1970 (as is relied upon at [47] of *Wilkes*).

238. We have come to a different view from that expressed in [49] of *Wilkes* that:

'Assessing income to income tax, it seems to us, is the first six steps, [of section 23 ITA 2007] 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.'

239. We are of the view that the liability to income tax under step 7 of section 23 ITA 2007, the calculation of HICBC under section 681B & 681C ITEPA following an assessment of a taxpayer's income under the steps set out in section 58 ITA 2007, still requires an assessment of a taxpayer's income for the purposes of calculating their income tax and should not be disregarded. The taxpayer's ANI for the purposes of step 7 of section 23 ITA 2007 is not unrelated to their total income in Step 1 because they cannot be liable to HICBC without the assessment pursuant to the steps set out in section 58 ITA 2007 and that the income meets or exceeds the threshold for the purposes of section 681B ITEPA 2003.

240. Thus, we do not agree that HICBC is the addition of a 'self-standing liability' under step 7 which does not require an assessment of income for the purposes of income tax. The addition of HICBC to the income tax calculation is not unrelated to the assessment of income to income tax. It is not free-standing nor unrelated. HICBC can be conceived of as an additional surcharge to income tax based upon calculating a taxpayer's ANI under the steps set out in section 58 ITA 2007 and the threshold for liability under section 681B ITEPA 2003. The assessment of the income of a taxpayer to income tax is not unrelated to the assessment to a further income tax charge under HICBC. Liability to HICBC still requires an assessment of a person's

income (their ANI) for the purposes of determining the additional charge to income tax (HICBC).

241. Therefore, we are of the view that while section 23 ITA 2007 sets out the steps by which liability to income tax is to be calculated, we do not agree that the first six steps therein are determinative of what is to be understood or defined as 'income which ought to have been assessed to income tax' for the purposes of section 29(1)(a) of the Taxes Management Act 1970.

242. Our view is that the existing phrase in section 29(1)(a) suffices because HICBC is a charge to income tax (in layperson's terms, HICBC is a form of income tax). HICBC is already defined as being 'a charge to income tax' – see section 681B(1) ITEPA 2003. Section 3 of ITA 2007 provides that income tax can be charged on social security income under the relevant part of ITEPA 2003 and sections 23 (step 7) and 30 of ITA 2007 provide that HICBC forms part of the income tax calculation.

243. Likewise, we respect the careful reasoning in the Tribunal's decision in *Haslam* but do not agree that we need to add to the phrase '*which ought to have been assessed to income tax*' the additional words '*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'.* We are satisfied that this is an unnecessary addition to the statutory language of section 29(1)(a) to HICBC given our interpretation above.

244. Therefore, we have concluded that we do not need to follow the decisions in either *Wilkes* or *Haslam*. We have decided that there is no need to adopt a purposive interpretation of section 29(1)(a) TMA 1970 because a literal and natural reading of the words '*income*' and '*income tax*' in the phrase '*income which ought to have been assessed to income tax'* provides for a discovery assessment to be made in respect of HICBC. We hope this is a straightforward answer to the perceived problem of the statutory language.

245. The simple conclusion we have to come to is that where there has been a failure to notify HMRC of a liability to HICBC and failure to file a self-assessment return, discovery assessments are nonetheless available to HMRC on a straightforward and literal reading of section 29(1)(a) TMA 1970. There is no reason to adopt a purposive approach as urged upon us by HMRC. The natural and ordinary meaning of the provision empowers HMRC to make discovery assessments in respect of HICBC.

246. The income which ought to be assessed is the person's high income which has not been included on a return or otherwise notified to HMRC for assessment to HICBC (it is not the income from income from child benefit, which the taxpayer may themselves not have received). The person's income is to be assessed for HICBC (a charge to income tax) as both section 3 of the ITA 2007 defines taxes under Part 10 of ITEPA as income taxes and section 681B(1) itself makes clear that the higher income child benefit charge is a form of income tax - 'a charge to income tax'.

247. If HMRC discovers that '*income*' of a taxpayer (from ordinary employment income from or any other source) has not been notified to them under section 7 TMA 1970 or provided to them in a filed self-assessment return and which '*ought to have been assessed to income tax*', because there was a HICBC liability, but where it has not been notified, assessed or paid, for example, because only PAYE income tax has been notified and paid to HMRC or where there has been no assessment of their ANI, then HMRC may make a discovery assessment to income tax. In those circumstances,

the taxpayer's income ought to have been assessed to a further charge to or form of income tax but has not been. The income ought to have been assessed to a further form of income tax (HICBC) than that already notified and paid through PAYE or notified in a self-assessment return.

248. Of course, and in addition, in order to make discovery assessments in respect of HICBC, HMRC must also satisfy the other ordinary statutory and common law criteria for their making.

249. Had we been required to decide whether a purposive interpretation of section 29(1)(a) TMA 1970 was required (as, in our view, HMRC have mistakenly conceded to be necessary) we may have struggled to agree with the interpretation urged upon us by HMRC and accepted in *Hill* that we should substitute the word '*any income*' with the phrase '*any amount liable to income tax*'. Without intending to demean the quality of their argument it might be characterised (perhaps unfairly) as suggesting that Parliament would have intended discovery assessments to apply to HICBC so the Tribunal should re-write the legislation, notwithstanding its ordinary words, to provide the power that the statute did not provide.

250. Without expressing any concluded view, we see some attraction to the reasoning adopted at [52] in *Wilkes* that, if there were a deficiency in the legislation such that s.29(1)(a) TMA 1970 does not apply to HICBC discovery assessments, it cannot be re-written in the significant and substantial way urged by HMRC. The view taken in *Wilkes* was that such a profound re-interpretation to substitute '*amount liable to income tax*' for '*income*' would require parliament's approval and the amendment of the legislation. However, we have decided that the issue does not arise for determination in this appeal so do not go on to consider the competing view expressed in *Haslam* on the application of the tests in *Inco Europe*.

Fulfilment of the statutory and common law requirements to make a discovery assessment

251. The fact that much of the information necessary for HMRC to charge a taxpayer with HICBC may be available to them on their own systems without a taxpayer notifying them of liability and filing a self-assessment form, does not prevent HMRC making a discovery when no notification is given of the liability. HMRC may already hold records of the salary and benefits from employment that a taxpayer receives from PAYE information supplied so that HMRC may be able to calculate the ANI of the taxpayer without any self-assessment return. HMRC may also hold records of the taxpayer's spouse or cohabiting partner, the partner's level of income and records of the child benefit received by the taxpayer or partner.

252. Therefore, HMRC may, in principle, sometimes be able to establish the liability to HICBC of a taxpayer without receiving notification from them or conducting their own enquiry. Nonetheless, taxpayers are required to notify HMRC of liability under section 7 of TMA 170 and if a taxpayer fails to notify, HMRC may discover it through any properly available means. Even if a taxpayer's liability is notified as required by section 7 and placed in a self assessment return, then HMRC may all the same 'discover' the taxpayer's liability to HICBC. Already holding the necessary information to establish a lability and charge to HICBC would not prevent HMRC from yet making a discovery when the information is brought to their attention through some other means.

253. On the facts of this case, we are satisfied that HMRC have proved there was a discovery of a loss of tax. Whatever information they held as regards the Appellant's tax affairs before 23 October 2018, it was only on that date, when he made a voluntary disclosure that he was liable to pay further sums by way of HICBC that HMRC became aware of his income (for which he provided figures sufficient to calculate his ANI) which ought to have been assessed to (further) income tax, namely HICBC, which had not been assessed to HICBC (income tax) because no self-assessment return had been filed.

254. We are satisfied that HMRC have proved there was a discovery on 23 October 2018 when the Appellant made the voluntary disclosure to Officer Baik. The discovery is a low threshold to be crossed. The fact that the information came from a voluntary disclosure which then made HMRC aware that income tax had not been assessed, does not prevent HMRC making a discovery.

255. Further, we are satisfied that HMRC made a discovery even if HMRC may have had a record of the Appellant's income and benefits in the form of PAYE return from his employer such that they were already aware of his ANI, and even if they had the information to correctly identify who his partner was and that she had a lesser income and that she received child benefit. HMRC still discovered, upon a voluntary disclosure from the Appellant, that there was income (his income which had not been put in a self-assessment return) that had not been assessed which ought to have been assessed to income tax by way of HICBC.

256. We are satisfied from our findings of primary fact that Officer Baik subjectively believed she had made a discovery on 23 October 2018 that income which ought to have been assessed to income tax had not been assessed. It is the overwhelming inference from her actions in recording the voluntary disclosure made by the Appellant that he was liable to pay HICBC in respect of this tax year and her checking the calculation of the income tax through HICBC was then payable by the Appellant and passing the matter on to others in HMRC in order to make the assessment.

257. It is obvious from these facts that it can be inferred that Officer Baik believed that (a) the Appellant had not previously made a notification under section 7 TMA nor filed a self assessment in respect of the tax year 2013-2014 and no other assessment to HICBC had been made; (b) that the Appellant's ANI exceeded £50,000, (c) that his partner, who lived with him, had been in receipt of Child Benefit, and (d) the partner earned less than the Appellant.

258. The issue that has given us greatest pause for thought is whether Officer Baik's subjective belief was objectively reasonable that she had discovered income which ought to have been assessed to HICBC but which had not been.

259. The undisputed evidence at the hearing was that the Appellant had not notified HMRC nor filed a self assessment tax return for tax year 2013-2014 but had paid income tax through PAYE. It was undisputed he had an ANI of over £50,000 for the relevant tax year, taking into account his employment benefits, and that he had not previously paid HICBC. HMRC provided evidence within the bundle which proved that the Appellant's partner had received child benefit in respect of their children and that it was received to the same address as the Appellant.

260. However, HMRC did not adduce any positive evidence that the Appellant's wife had a lower income than the Appellant nor that any point that they had checked to establish that this was the case.

261. The burden is on HMRC to prove that the Officer's belief that there had been a discovery of a loss of tax was reasonable where they had not independently verified that the Appellant satisfied all the statutory criteria for liability to HICBC under section 681B(1) & (4) of ITEPA 2003.

262. We have concluded nonetheless that Officer Baik's belief that there had been a discovery of a tax loss because the Appellant fulfilled the statutory conditions for liability to HICBC was reasonable.

263. This is because, even though the burden is upon HMRC, it was objectively reasonable to make an inference that he was liable to HICBC from the fact that the Appellant rang HMRC to make a voluntary disclosure in response to the notice from HMRC in September 2018. HMRC's notice by way of letter to the Appellant in September 2018 made clear the circumstances in which the Appellant would be liable to HICBC, including where he had an ANI exceeding £50,000, where he or his partner was in receipt of child benefit and he had the higher income of the couple. Their notice mirrors the statutory conditions under section 681B(1) and (4) ITEPA 2003. The notice stated:

'You have to pay the charge if:

-You have taxable income and benefits over £50,000 in a tax year;

-You or your spouse or partner, got any Child Benefit payments;

-Your income is higher than your spouse or partner's income'

264. We are satisfied that HMRC could reasonably infer that the Appellant would have read and understood these conditions and would not have rung up to make a voluntary disclosure that he was liable to pay HICBC unless he believed he fulfilled each of these criteria. HMRC have proved that the officer's belief she had made a discovery of a loss of tax was objectively reasonable.

265. Despite the absence of further evidence from HMRC, we are fortified in the conclusion that HMRC has discharged its burden of proof by the fact the Appellant does not dispute his liability under the statutory criteria, neither at the time nor during this appeal.

266. We are satisfied that it was objectively reasonable for Officer Baik to believe there was a loss of tax despite the fact there is no evidence that any officer of HMRC checked or confirm with the Appellant or HMRC records that the Appellant's wife's income was less than his so that he could be made liable to charge.

267. We are satisfied that Officer Baik would be entitled, reasonably and objectively, to believe she had made a discovery in these circumstances.

268. We are satisfied that the discovery was fresh and not stale. The discovery was made on 23 October 2018 and the assessment was made some six weeks later on 5 December 2018. This is a reasonable time period for the assessment to have been raised.

269. We are also satisfied that made was made within the statutory time limit. In a case where there has been a failure to notify under section 7 TMA 1970 and where no self-assessment return has been filed, the 20 year time limit provided by section 36(1A)(b) TMA 1970 applies. This assessment was made four years and eight months from the end of the tax year in question (from 5 April 2014 to 5 December 2018). It was made well within time.

Validity of the Assessment itself

270. The final issue is whether the Appellant has discharged the burden under section 50 TMA 1970 to prove that the assessment raised by HMRC for 2013-2014 was invalid or wrongly calculated such that it should be cancelled or at least reduced.

271. The essential question is whether the Appellant has proved that the statutory conditions for liability to HICBC under section 681B(1) and (4) ITEPA 2003 have been proved not to apply him for this tax year. We raise this issue as a matter of own initiative. The Appellant did not realistically seek to suggest that the statutory conditions for the liability to HICBC had not been satisfied.

272. In contrast to the position on discovery, the burden at this stage is upon the Appellant to prove that the assessment should be cancelled or reduced.

273. The Appellant accepted his ANI was above £50,000 for the relevant tax year as calculated above – despite his initial grounds querying the extent of treatment of pension contributions, he accepted his total employment benefits took his ANI above £52,000 for the tax year even though his salary was under £50,000.

274. There was evidence provided by HMRC that his partner received child income on behalf of their children and that partner received the child benefit at the same address as the Appellant (ie. sufficient, in the absence of evidence to the contrary, to infer that they were living together – partners throughout the week).

275. The burden would be on the Appellant to prove his partner had a lower income than him in the relevant tax year if HICBC were not to apply to him. The Appellant did not raise this as a ground of appeal and provided no positive evidence that this was the case. For the reasons set out above, we did not permit HMRC to adduce any additional evidence on this topic.

276. Nonetheless HMRC has raised some evidence from which it can be inferred that the Appellant's ANI was higher than his partner's. It can be inferred from Appellant's voluntary disclosure of his liability to HICBC in October 2018, after receipt of HMRC's notice on 28 September 2018, that he would not have made such a disclosure if his partner's income was higher than his, given the requirements set out in the notice.

277. Where the Appellant did not put in evidence that he disputed that this statutory condition had been fulfilled and had not suggested his partner's income was higher we are not satisfied that he has discharged any burden of proof that this statutory condition was not satisfied.

278. On balance, we are satisfied that all the conditions under section 681B(1) and (4) ITEPA 2003 were satisfied in respect of the Appellant for the tax year 2013-2014. We are satisfied that he was liable to an assessment for HICBC and that he had not previously been so assessed.

279. Therefore, for all reasons set out above, we are satisfied that the assessment by HMRC of the Appellant's liability to HICBC for 2013-2014 was valid and lawful.

280. However, as accepted by HMRC, the previous calculations were incorrect and the assessment should be reduced to £563.

Conclusion

281. In light of the above, the Tribunal confirms that HMRC's discovery assessment in respect of the Appellant's liability to pay HICBC for the tax year 2013-

2014 was lawfully made and is valid. However, the appeal is allowed in part because the Tribunal is satisfied that the assessment should be reduced to the sum of £563.

Right to apply for permission to appeal

282. 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.

RUPERT JONES
TRIBUNAL JUDGE
Release date: 29 September 2020