Neutral Citation: [2023] UKFTT 312 (TC)

Case Number: TC08769

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2022/12315

LATE APPEAL – High Income Child Benefit Charge – Jason Wilkes judgments – Martland considered – section 97 of the Finance Act 2022 – length of delay serious and significant – whether late appeal appropriate in all the circumstances – no – application refused

Heard on: 27 February 2023
Judgment date: 14 March 2023

Before

TRIBUNAL JUDGE RACHEL GAUKE
SONIA GABLE

Between

JONATHAN MANGUIAT

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Maria Manguiat

For the Respondents: Maria Spalding, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. This is an application by Mr Manguiat for permission to give late notice of appeals against discovery assessments relating to the high income child benefit charge (HICBC).

2. Having heard and considered the evidence and arguments of both parties, we decided to refuse the application. We informed the parties of our decision at the end of the hearing, and set out our reasons in writing below.

THE FORM OF HEARING

3. The hearing was conducted by video link on the tribunal's Video Hearing Service. The documents to which we were referred were HMRC's 17-page objection to the late appeal, and 46 pages of correspondence relating to the appeal which Mr Manguiat had sent to the Tribunal.

4. Mr Manguiat was represented at the hearing by his wife, Mrs Manguiat. Mr Manguiat also appeared at the hearing and gave oral evidence.

5. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

PRELIMINARY ISSUE: ABSENCE OF BUNDLES

6. At the outset of the hearing, both parties raised the issue that the Tribunal had not directed HMRC to produce a bundle of documents, and that therefore no bundle had been prepared.

7. We invited submissions from both parties as to whether the hearing could nonetheless go ahead, without prejudicing the fairness of the proceedings. We allowed a short adjournment so that the Tribunal could consider the matter and to allow Mr and Mrs Manguiat to confer with one another. Both parties confirmed that they were content for us to proceed.

8. We considered the information that had been provided to the Tribunal. This included HMRC's covering letter dated 6 March 2020 that was sent with the discovery assessments, Mr Manguiat's email dated 19 March 2020 appealing against penalties for failure to notify, and HMRC's decision letter in response to that appeal dated 27 March 2020. We also had HMRC's objection to the late appeal which included a number of direct quotations from communications from Mr Manguiat, including his email dated 8 September 2020 entitled "self assessment complaint".

9. We were mindful that this application did not involve complicated areas of law. HMRC's objection to the late appeal included relevant extracts from *William Martland v HMRC* [2018] UKUT 178 (TCC) ("*Martland*"). We did not consider that Mr Manguiat was materially prejudiced by not having been provided with extracts of the relevant legislation, or with copies of other judgments.

10. We further took into account Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, which relevantly provides that dealing with a case fairly and justly includes avoiding delay (so far as compatible with proper consideration of the issues). In this context we also considered the time and associated cost for both parties in preparing for the hearing, and the tribunal resources that had gone into setting up the hearing.

11. The central task of the Tribunal in this case was to carry out the balancing exercise required by *Martland*, and we considered that the information and evidence available was sufficient to enable us to do so.

12. Taking all of this into account, including both parties' willingness for us to proceed, we decided that it was in the interests of justice to continue with the hearing.

BACKGROUND AND FINDINGS OF FACT

13. Mr Manguiat seeks permission to bring late appeals against discovery assessments to the HICBC for the tax year 2015-16 in the amount of £2,549, for the tax year 2016-17 in the amount of £2,501, and for the tax year 2017-18 in the amount of £1,924. The total amount in dispute is £6,974.

14. The facts in this case were not in dispute. Our findings of fact are as follows.

15. In August 2013, HMRC sent Mr Manguiat a letter explaining that he might be liable for the HICBC. Mr Manguiat had moved house in 2012 and he told the Tribunal he did not receive the letter. HMRC's decision letter of 27 March 2020 stated, in the context of communications sent to Mr Manguiat in 2013, that "given your change of address we cannot guarantee the notices were issued to the correct address". We find as a fact that Mr Manguiat did not receive this letter.

16. In January 2018, Mr Manguiat found out about the HICBC as a result of a conversation with a colleague. Mrs Manguiat telephoned the Child Benefit Office to stop the payments of child benefit that they had been receiving until that point, but was not advised to contact HMRC about a potential liability to HICBC, and did not do so.

17. HMRC assessed the disputed amounts by three discovery assessments made on 6 March 2020 under section 29 of the Taxes Management Act 1970 ("TMA 1970").

18. At around the same time as making the discovery assessments, HMRC assessed Mr Manguiat with penalties under schedule 41 to the Finance Act 2008 for failure to notify his liability to tax.

19. On 19 March 2020, Mr Manguiat sent an email to HMRC which began with the words "I am writing to make an appeal against the Penalty Charge of £599". There is nothing in his email to indicate that that he was also appealing the discovery assessments, and in the hearing Mr Manguiat accepted that this was solely an appeal against the penalties. We find that the email of 19 March 2020 was not an appeal against the discovery assessments.

20. Mr Manguiat gave information in his email, and also gave oral evidence to the Tribunal, about the difficult circumstances in which Mr and Mrs Manguiat found themselves in March 2020. Mrs Manguiat had been suffering from ill health for a number of years and was in a redundancy notice period, causing stress for Mr Manguiat and leading him to lose track of his financial commitments. HMRC did not dispute these circumstances and we find them to be established as facts.

21. On 27 March 2020, HMRC sent Mr Manguiat a decision letter in which they agreed to cancel the penalties on the grounds that he had a reasonable excuse.

22. On 6 March 2020 HMRC had also assessed Mr Manguiat in respect of unpaid HICBC for the tax year 2014-15. In their letter of 27 March 2020, HMRC informed Mr Manguiat that they would be removing this assessment on the grounds that it had been made out of time. The assessment for the tax year 2014-15 is therefore not relevant to this application.

23. HMRC's letter of 27 March 2020 stated that if Mr Manguiat was unhappy with their decision, he could ask for a review by an HMRC officer not previously involved in the matter, or could appeal to the Tribunal. They further stated that if neither of these actions were taken within 30 days of the date of the letter, the appeal would be treated as settled by agreement under TMA 1970, s 54(1).

24. Following the receipt of HMRC's letter of 27 March 2020, Mr and Mrs Manguiat discussed between themselves whether to make a further appeal but decided not to, on the grounds that this would be an additional source of stress at what was already a difficult time for them.

25. On 8 September 2020, Mr Manguiat sent a further email to HMRC entitled "self assessment complaint". This email began as follows: "I am writing to make a formal complaint against the late payment penalties for tax year ending 2017 of £125 and 2018 of £96". Although referring to penalties, the email later asks for an explanation of how and why Mr Manguiat had been charged interest. At the hearing, Mrs Manguiat on behalf of Mr Manguiat confirmed that the purpose of this email was to obtain an explanation of how interest charges had been calculated. We find that this email was an enquiry about interest and not an attempted appeal against the discovery assessments.

26. On 28 February 2022, Mr Manguiat wrote to HMRC to make a late appeal against the assessments that are the subject of this application (i.e. for the tax years 2015-16, 2016-17 and 2017-18). We find that this was the first occasion on which Mr Manguiat had appealed against the discovery assessments, as opposed to the associated penalties.

27. The reason Mr Manguiat appealed at this time was that he had become aware of the litigation concerning Jason Wilkes: *Wilkes v HMRC* [2020] UKFTT 256 (TC) and *HMRC v Wilkes* [2021] UKUT 150 (TCC). Since then, the Court of Appeal has determined HMRC's appeal in Mr Wilkes' favour: *HMRC v Wilkes* [2022] EWCA Civ 1612.

28. Mr Manguiat considered that it was unfair that HMRC had not informed him about the *Wilkes* litigation because in his view he was in the same position as Mr Wilkes. He was struggling to make the payments he had agreed with HMRC for paying off the HICBC charges and so decided to make a late appeal.

RELEVANT LAW: LATE APPEALS

29. TMA 1970, s 31A(1) provides that an appeal must be made within 30 days of the date of issue of an assessment.

30. TMA 1970, s 49(2) provides that notice of an appeal may be given after the relevant time limit if HMRC agree, or where HMRC do not agree, the Tribunal gives permission.

31. We have found that Mr Manguiat did not appeal against the discovery assessments (as opposed to the penalties) until 28 February 2022. Therefore, by applying for permission to make a late appeal, Mr Manguiat is inviting us to exercise our discretion under TMA 1970, s 49(2)(b) to permit him to make late appeals to HMRC.

32. In *William Martland v HMRC* [2018] UKUT 178 (TCC) ("*Martland*"), the Upper Tribunal provided guidance to the First-tier Tribunal (FTT) on the approach to adopt when considering whether to admit a late appeal. The Upper Tribunal said at paragraph [44]:

> "When the FTT is considering applications for permission to appeal out of time, therefore, it must be remembered that the starting point is that permission should not be granted unless the FTT is satisfied on balance

that it should be. In considering that question, we consider the FTT can usefully follow the three-stage process set out in *Denton*:

> (1) Establish the length of the delay. If it was very short (which would, in the absence of unusual circumstances, equate to the breach being "neither serious nor significant"), then the FTT "is unlikely to need to spend much time on the second and third stages" – though this should not be taken to mean that applications can be granted for very short delays without even moving on to a consideration of those stages.
>
> (2) The reason (or reasons) why the default occurred should be established.
>
> (3) The FTT can then move onto its evaluation of "all the circumstances of the case". This will involve a balancing exercise which will essentially assess the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission."

RELEVANT LAW: THE HICBC

33. The HICBC is imposed under section 681B of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA 2003") and has applied since the tax year 2012-13. Section 681B is set out in the Appendix to this decision.

34. As at 6 March 2020 (the date of the disputed discovery assessments), TMA 1970, s 29(1)(a) provided that HMRC could make an assessment if they discovered "that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed".

35. Mr Wilkes appealed to the Tribunal against his HICBC discovery assessments in June 2020 (*Wilkes v HMRC* [2020] UKFTT 256 (TC)). His appeal was successful because the Tribunal decided that TMA 1970, s 29(1)(a), as it was at the time, did not allow HMRC to make discovery assessments in relation to the HICBC (because, broadly speaking, the Tribunal found that unpaid HICBC does not involve HMRC discovering "income which ought to have been assessed to income tax"). HMRC appealed to the Upper Tribunal and then to the Court of Appeal. Mr Wilkes won both of these appeals (*HMRC v Wilkes* [2021] UKUT 150 (TCC) and *HMRC v Wilkes* [2022] EWCA Civ 1612).

36. While the *Wilkes* litigation was proceeding, Parliament changed the law. The effect of section 97 of the Finance Act 2022 ("FA 2022") is that taxpayers cannot succeed on an argument similar to that used in *Wilkes* in respect of discovery assessments for the tax year 2021-22 and later years. The change in law made by FA 2022, s 97 also applies to earlier years unless the disputed assessment was the subject of an appeal that had been notified to HMRC on or before 30 June 2021, and certain other conditions were satisfied.

37. FA 2022, s 97 is set out in the Appendix to this decision. The provision that applies most relevantly to Mr Manguiat is FA 2022, s 97(5), which states:

> "(5) But a discovery assessment is not a relevant protected assessment if it is subject to an appeal notice of which was given to HMRC on or before 30 June 2021 where—

> (a) an issue in the appeal is that the assessment is invalid as a result of its not relating to the discovery of income which ought to have been assessed to income tax but which had not been so assessed, and
>
> (b) the issue was raised on or before 30 June 2021 (whether by the appellant or in a decision given by the tribunal)."

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

DISCUSSION AND DECISION

39. We have set out above the three-stage *Martland* test that we must apply in deciding whether to grant an application for a late appeal.

40. The first step is to calculate the length of the delay in making the appeal. Mr Manguiat had 30 days after the discovery assessments were raised on 6 March 2020 in which to notify his appeal to HMRC. He made an in-time appeal against the penalties that were imposed at the same time as the discovery assessments. HMRC's response, in their letter of 27 March 2020, was to cancel the penalties and one of the discovery assessments. HMRC's letter informed Mr Manguiat that if he did not agree with their decision, he had 30 days in which either to request a review or appeal to the Tribunal.

41. Given that HMRC were allowing Mr Manguiat's appeal against the penalties, it is not clear why they were telling him what he could do if he disagreed with their decision. The fact that they did so, coupled with the fact that in the same letter HMRC, of their own volition, withdrew one of the discovery assessments, leads us to the view that HMRC were in effect agreeing to allow him a further 30 days from the date of their letter in which to appeal the remaining discovery assessments.

42. This further 30 days gave Mr Manguiat until 26 April 2020 to appeal the discovery assessments. He did not do so until 28 February 2022. This is a delay of over one year and 10 months.

43. In *Romasave (Property Services) Ltd v HMRC* [2015] UKUT 254 (TCC), the Upper Tribunal found that in the context of an appeal right which must be exercised within 30 days, a delay of more than three months was serious and significant. Applying this guidance, a delay of over one year and 10 months is clearly serious and significant.

44. The second step is to establish the reasons for the delay. We have found that the reason that Mr Manguiat appealed the discovery assessments in February 2022 was that he had recently become aware of the *Wilkes* case.

45. We have accepted Mr Manguiat's evidence about the difficulties he faced in 2020, and that after receiving HMRC's letter of 27 March 2020 he and his wife decided against notifying their appeal to the Tribunal because they did not want an additional source of stress. However, Mr Manguiat did not explain on what grounds he would have appealed the discovery assessments at that time, given that he was not aware of the *Wilkes* litigation and at that stage had only appealed the penalties. We also find that the difficulties Mr Manguiat faced in the first half of 2020 did not explain the whole of the delay until February 2022. We therefore find that the primary reason for the length of the delay was Mr Manguiat's ignorance of the *Wilkes* case.

46. Mr Manguiat is not an expert in tax matters and we do not find it particularly surprising or unreasonable that it took him a while to become aware of the *Wilkes* case. For a taxpayer in Mr Manguiat's position, we consider that not knowing about *Wilkes* was a good reason for his failure to appeal until the case had come to his attention. However, this is only one of the factors we must consider in deciding whether to grant permission for a late appeal.

47. The third step in the *Martland* approach is that we must conduct a balancing exercise to assess the merits of the reasons for the delay and the prejudice that would be caused to both parties by granting or refusing permission to bring late appeals. In considering the prejudice to the parties, we take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected.

48. In this context, the Upper Tribunal in *Martland* said that in carrying out the balancing exercise, the First-tier Tribunal can have regard to any obvious strength or weakness in the applicant's case. The Upper Tribunal cited Moore-Bick LJ in *R (Hysaj) v Secretary of State for the Home Department* [2015] 1WLR 2472 ("*Hysaj*"), who at paragraph [46] said:

> "Only in those cases where the court can see without much investigation that the grounds of appeal are either very strong or very weak will the merits have a significant part to play when it comes to balancing the various factors that have to be considered at stage three of the process."

49. The effect of FA 2022, s 97 is that for Mr Manguiat's appeal against the discovery assessments to succeed, he would have had to notify his appeal on or before 30 June 2021, and he would have had to raise the argument that succeeded in the *Wilkes* litigation as an issue in that appeal on or before the same date. There is no provision in FA 2022, s 97 allowing a different treatment if Mr Manguiat had a good reason, or a reasonable excuse, for appealing late.

50. We have found that Mr Manguiat appealed the penalties on 19 March 2020, but did not appeal the discovery assessments until 28 February 2022. He did not, therefore, notify his appeals, still less raise the *Wilkes* argument, before the deadline set by FA 2022, s 97 of 30 June 2021. This means that, if we were to grant Mr Manguiat permission to bring a late appeal against the discovery assessments, his chances of success in that appeal would be negligible. In the language of Moore-Bick LJ in *Hysaj*, we can see without much investigation that his grounds of appeal are very weak.

51. We repeat that we accept Mr Manguiat's evidence as to the difficulties he and his wife faced in 2020, and we sympathise with these. Unfortunately for Mr Manguiat, the plain language of FA 2022, s 97 means that the Tribunal would have no discretion to cancel the assessments on these grounds.

52. We have taken account of the circumstances that weigh in Mr Manguiat's favour, namely the good reason for the delay and the prejudice that would be caused to him by being unable to challenge the assessments. However, when assessing the circumstances in HMRC's favour, Mr Manguiat's negligible chances of succeeding on appeal must have decisive weight. It is not in the interests of justice, nor even in Mr Manguiat's interests, for both parties to proceed to a further hearing at some date in the future, and expend time and effort in preparing for a case in which the outcome would be in little doubt. The same applies to the time and effort that would be involved for both parties in preparing for the strike-out application that HMRC have said they would make if we were to grant the application for a late appeal.

53. The serious and significant delay in this case, when considered in the context of an appeal right that must be exercised within 30 days and the need for statutory time limits to be respected, would weigh heavily against Mr Manguiat's application even if FA 2022, s 97 were not in point. As it is, FA 2022, s 97 is the decisive factor.

54. Mr Manguiat submitted that his treatment was not fair, in that he was in the same position as Mr Wilkes, and that he considered that HMRC should have informed him about the *Wilkes* litigation so that he could have brought an appeal on the same grounds. We explained to Mr Manguiat at the hearing that the Tribunal's jurisdiction is limited and that if we gave permission for a late appeal, the Tribunal would not be able to consider a general contention that HMRC's behaviour was unfair. We have therefore not included this submission as part of the balancing exercise we have carried out as the third step of the *Martland* approach.

55. For the reasons set out above, Mr Manguiat's application for permission to notify the appeals late is refused.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

56. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

RACHEL GAUKE
TRIBUNAL JUDGE

Release date: 14th MARCH 2023

APPENDIX: RELEVANT LEGISLATION

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

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

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

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

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

(3) Condition A is that—

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

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

(4) Condition B is that—

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

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

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

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

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

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

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

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

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

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

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

> "(1) In section 29 of TMA 1970 (assessment where loss of tax discovered), in subsection (1), for paragraph (a) substitute—
>
> > "(a) that an amount of income tax or capital gains tax ought to have been assessed but has not been assessed,".
>
> (2) […]
>
> (3) The amendments made by this section—
>
> > (a) have effect in relation to the tax year 2021-22 and subsequent tax years, and
> >
> > (b) also have effect in relation to the tax year 2020-21 and earlier tax years but only if the discovery assessment is a relevant protected assessment (see subsections (4) to (6)).
>
> (4) A discovery assessment is a relevant protected assessment if it is in respect of an amount of tax chargeable under—
>
> > (a) Chapter 8 of Part 10 of ITEPA 2003 (high income child benefit charge),
> >
> > (b)-(d) […]
>
> (5) But a discovery assessment is not a relevant protected assessment if it is subject to an appeal notice of which was given to HMRC on or before 30 June 2021 where—
>
> > (a) an issue in the appeal is that the assessment is invalid as a result of its not relating to the discovery of income which ought to have been assessed to income tax but which had not been so assessed, and
> >
> > (b) the issue was raised on or before 30 June 2021 (whether by the appellant or in a decision given by the tribunal).
>
> (6) In addition, a discovery assessment is not a relevant protected assessment if—
>
> > (a) it is subject to an appeal notice of which was given to HMRC on or before 30 June 2021,
> >
> > (b) the appeal is subject to a temporary pause which occurred before 27 October 2021, and
> >
> > (c) it is reasonable to conclude that the temporary pausing of the appeal occurred (wholly or partly) on the basis that an issue of a kind mentioned in subsection (5)(a) is, or might be, relevant to the determination of the appeal.

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

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

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

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

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

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

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

(9) In this section—

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

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

"notified" means notified in writing."