Neutral Citation: [2023] UKFTT 00961 (TC)

Case Number: TC08985

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2021/13084

High Income Child Benefit Charge- appeal against assessment-whether discovery assessment was a protected assessments under section 97(5) Finance Act 2022. No. Appeal allowed.

Heard on: 3 October 2023
Judgment date: 8 November 2023

Before

TRIBUNAL JUDGE GETHING
MEMBER IAN SHEARER

Between

Mr JAMES FERA

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mrs Angela Fera

For the Respondents: Miss Victoria Halfpenny, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. With the consent of the parties, the form of the hearing was V (video) with all parties appearing remotely using the Tribunal video hearing system. The documents to which we were referred are:

(1) Hearing bundle of 128 pages.

(2) Generic bundle of 157 pages.

(3) A statement of case of 11 pages prepared by HMRC which was emailed to all parties during the hearing. HMRC said that this document had been filed with the Tribunal in March 2021 but neither we nor Mr Fera had received a copy at the time of the hearing.

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

3. Mr Fera appeals against four discovery assessments made under section 29 Taxes Management Act 1970 ("*Section 29*") for the years 2016-2017, 2017-2018, 2018-2019 and 2019-2020 ("***the years in question***") in respect of High Income Child Benefit Charge ("HICBC") in the total sum of £4,056.00. All assessments to penalty had been withdrawn.

THE FACTS

4. Mr Fera's daughter was born in 2004. Child benefit was claimed in respect of his daughter by his wife Angela. HICBC was introduced with effect from January 2013.

5. The amount of Mr Fera's salary, bonuses and car benefit, exceeded £50,000 in each of the years in question. Throughout the years in question Mr Fera was employed and paid his tax through the PAYE system. In fact, he had only ever paid tax through the PAYE system. He had never filed a self-assessment return.

6. Mr and Mrs Fera were unaware of the HICBC until they received a "nudge" letter from HMRC dated 18 December 2019, referred to below as the "***nudge letter***". The nudge letter was sent by HMRC's dedicated HICBC team. The letter has a telephone number in the right-hand corner which Mr Thomas of the HICBC team informed us was the number of HMRC's dedicated HICBC team.

7. On 6 January 2020, following receipt of the nudge letter, as Mr Fera has dyslexia, Mrs Fera made a telephone call to HMRC. She does not recall the telephone number she used, but we think it likely that she used the telephone number on the letter. As a result of her call, she stopped receiving child benefit with effect from 6 January 2020 and when she asked whether there was anything further for her to do, she was told there was nothing further, and everything was in hand. In consequence, Mr Fera did not register for self-assessment and file self-assessment returns for the years in question disclosing to HMRC the child benefit claimed by his wife.

8. The Child Benefit Office wrote to Mrs Fera on 14 January 2020 confirming cancellation of the Child Benefit with effect from 6 January 2020.

9. Mrs Fera became self-employed just before the pandemic but her business did not take off because of the pandemic. Mr and Mrs Fera rely on Mr Fera's earnings to cover outgoings and have used their savings to cover the shortfall in Mrs Fera's earnings. Their daughter still lives at home. We accept that Mr and Mrs Fera would struggle to pay the HICBC (and the accruing interest from the date the HICBC was due until the date of payment of the

HICBC)and would need time to pay. HMRC has a dedicated team to agree appropriate time, if necessary.

10. On 3 February 2021 an officer of HMRC discovered that Mr Fera had not registered for self-assessment and had not filed returns disclosing receipt by his wife of Child Benefit, in consequence of which, the HICBC charge, which is an income tax charge of 1% of income between £50,000 and £60,000, had not been paid.

11. On 4 February 2021 HMRC sent an opening letter to Mr Fera concerning the non-registration for self-assessment, failure to file self-assessment returns and pay the HICBC.

12. On 8 February 2021 Mrs Fera called HMRC advising them that she had ceased to claim child benefit with effect from 6 January 2020. Mr Fera also sent an email to HMRC on the same date containing the same information and authorising Mrs Fera to communicate with HMRC on his behalf.

13. On 15 March 2021 HMRC issued discovery assessments under section 29(1) and 34 TMA in respect of each of the years in question. (Appeals were also made against discovery assessments for each of the years ending 5 April 2013, 2014, 2015 and 2016 but were subsequently withdrawn by HMRC following Mr Fera's letter of appeal.) Each discovery assessment stated that,

"*We are sending this assessment to you because we have found that there is additional tax due that you've not previously told us about. This assessment allows us to collect the additional tax.*

We have included this amount on your Self Assessment statement and enclose a copy."

14. On 15 March 2021 HMRC also sent an explanatory letter which explained that HMRC had issued the assessments under section 29 TMA 1970 because Mr Fera had not registered and filed self-assessment returns and had therefore failed to inform HMRC of the tax due under the HICBC. On the second page it states:

"*You should have registered for Self-Assessment by 5 October 2013. Because you did not register by this date and tell us about the High Income Child Benefit amount you need to pay, we can charge you a penalty*."

The initial total amount of penalties assessed for all years was £1,331.20.

15. By a letter dated 29 March 2021 Mr Fera appealed to HMRC against the discovery assessments. The letter states that:

"*We are writing to formally appeal your decision regarding the repayment of the High-Income Child Benefit Charge totalling £7070 and subsequent penalty charges of £1331.20. ….."*

16. As Mrs Fera believed she had done all she was required to do following receipt of the nudge letter 18 December 2019 both she and Mr Fera were in shock upon the receipt of the discovery assessments. Mrs Fera would never have claimed the child benefit had she been aware of HICBC. Mr Fera explained his anxiety and mortification at being involved in this dispute as he has always paid his taxes in full via the PAYE system.

17. A review was undertaken by HMRC of the decision to issue assessments and charge penalties. As a result of the Review the penalties were substantially cancelled but the assessments to HICBC were maintained for the years in question. The Statement of Case provided to the Tribunal at the hearing shows that the remaining penalty for the final year had also been cancelled. The appeal is concerned only with HICBC for the years in question.

THE LEGISLATION

18. The Taxes Management Act 1970, Section 29 ("*Section 29*") provides that in certain circumstances HMRC may issue a discovery assessment outside the normal time frame for issuing assessments if at least one of a number of conditions in section 29(1) is satisfied.

19. In March 2021, Section 29(1) relevantly 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 income which ought to have been assessed to income tax, or chargeable gains which ought to be assessed to capital gains tax, have not been assessed, or*
> >
> > *(b) that an assessment to tax is or has become insufficient, or*
> >
> > *(c) that any relief which has been given is or has become excessive,*
> >
> > *the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.* "

20. Subsections (2) and (3) operate only where the taxpayer has actually filed a self-assessment return and so are not in point in this case.

21. Section 29(1)(a) TMA was modified by section 97 Finance Act 2022 to read as follows:

"(a) That an amount of income tax or capital gains tax ought to have been assessed but has not been assessed,"

This amendment was introduced following a decision of the Upper Tribunal the case of ***HMRC v Jason Wilkes*** [2021] UKUT 150 (TCC) ("**Wilkes**") which decision was upheld by the Court of Appeal in December 2022.

22. In Wilkes, The Court of Appeal held that section 29(1)(a) (as it was pre FA 2022) referred to an amount of "income" that has not been assessed and child benefit is not income. The HICBC imposes a liability to income tax at 1% of child benefit claimed for each £100 of adjusted net income over £50,000 a person receives in a year of assessment but the charge to HICBC is not based upon an amount of income. Section 23 of the Income Tax Act 2007 ("**ITA 2007**") clearly identifies the steps to be taken in computing liability to income tax of an individual. It deals with the computation of income and deductions therefrom in Steps 1 to 3, rates are determined by steps 4 and 5, step 6 deducts any applicable tax deductions and step 7 requires an addition of any amount of tax for which the taxpayer is liable under a number of provisions set out in section 30 ITA 2007 including that relating to HICBC.

23. The amendment made by FA 2022 to section 29(1) has retrospective effect under section 97(3)(b) but only if the discovery assessment is a "*relevant protected assessment*" as defined in sections 97(4) to (7) Finance Act 2022 as set out below. Otherwise it only has effect for the tax year 2021-22 and subsequent years, i.e. would not apply to the assessments under appeal.

"(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) ….

(c) ….

(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)."

24. Section 34 TMA 1970 provides for the periods for which HMRC may issue a discovery assessment as follows:

> *(1) "Subject to the following provisions of this Act, and to any other provisions of the Taxes Acts allowing a longer period in any particular class of case, an assessment to income tax or capital gains tax may be made at any time not more then 4 years after the end of the year of assessment to which it relates."*

HMRC'S CASE

25. HMRC consider that, as the facts set out in [26] are not disputed for each of the years under appeal, the officer of HMRC made a "discovery" in February 2021 for the purposes of Section 29(1) TMA as amended by Section 97 FA 2007, that income tax had been under assessed for each of the four years of assessment under consideration and HMRC were entitled to raise assessments for the four years in question under section 34 TMA accordingly.

26. The undisputed facts are:

(1) Mr Fera received adjusted net income in excess of £60,000 and his wife received Child Benefit in each of the years in question.

(2) Mr Fera's adjusted net income exceeded his wife's for all the years in dispute.

(3) Mr Fera was not required by HMRC to file nor did he voluntarily file a self-assessment return for each of the years.

(4) Mr Fera did not notify HMRC of his liability to income tax under the HICBC.

27. HMRC consider that the calculation of the HICBC is correct for each year and cannot be challenged following the Court of Appeal in ***Norman v Goulder (Inspector of Taxes)*** [1945] 1AER 352.

28. HMRC consider that the discovery assessment made in February 2021 for each of the years 2016-17, 2017-18, 2018-19 and 2019-20 is a protected discovery assessment under section 97 FA 2007 because the conditions of section 97(5) are not satisfied by Mr Fera. HMRC consider that Mr Fera did not raise as an issue in his appeal to HMRC in March 2021, the invalidity of the discovery assessments as a result of the assessments not relating to the discovery of income and the issue was not subsequently raised by Mr Fera or on his behalf by

Mrs Fera on or before 30 June 2021. This was so notwithstanding that the case of *Wilkes* was well publicised.

29. HMRC consider that the appeal should be dismissed.

MR FERA'S CASE

30. Mr Fera's case as set out in his notice of appeal to HMRC reads as follows:

"We are writing to formally appeal your decision regarding the repayment of the High-Income Child Benefit Charge totalling £7070 and subsequent penalty charges of £1331.20.

Upon receiving the letter dated 4/2/21 received 11/2/21 we immediately contacted you to understand this and log our concerns that we had never been made aware nor were we aware that this would be repayable.

We have only ever received 1 document, dated 18/12/19 to explain that due to James earnings we may no longer be entitled to child benefit, upon receiving this letter on the 6th of January 2020 we immediately contacted you and stopped the payment as we understood we were no longer eligible. Not once during this call were, we advised that James should have been submitting self-assessments or that the previous year's payments may be repayable. As James has always been PAYE, he has had no reason to submit self-assessments and we had no awareness that receiving Child Tax Credit meant we needed to do so.

Our daughter Ellie was born in December 2004 and so we would have been claiming the monthly child tax for many years before this charge was introduced in 2013, we were never aware or made aware that as James salary increased this could have impacted the benefit payment. As explained to your advisor on the 11th February 2021, the income shown for James is much higher due to the company car and bonus (bonus was never a guaranteed payment that he received at the time, his basic salary was under 50k for many of the years.

In the penalty explanation stage, you state that we failed to contact after being issued previous communications, this is incorrect. As confirmed by two of your advisors we have only ever received one letter dated 18/12/19 which was acted upon immediately and cancelled the benefit as per the explanation as above.

In 2017 Angela took the decision to leave her PAYE employment and set up her own business so our family earnings took a decrease and we relied solely on James salary as the business built up, now due to Coronavirus her business has suffered financially over the last 12 months and continues to do so, we have had to rely upon our savings to supplement her regular salary, we are not in a financial position to be able to repay this amount in full. We therefore ask that the disputed payments are postponed until the matter is resolved.

We would ask that you reconsider this decision due to the facts above and that we simply were not aware that we were not entitled to the benefit when the changes happened.

Should you wish to discuss our reasons in more detail please contact Angela on 07……."

31. Neither Mr nor Mrs Fera are lawyers or tax advisers. Neither of them had access to such an adviser unlike Mr Wilkes.

DISCUSSION

32. The first issue for this Tribunal has to consider whether the discovery assessments issued in March 2021 for each of the years in question were validly issued. The onus is on HMRC to demonstrate that the discovery assessments were validly issued.

33. When the discovery assessments were issued in February 2021, section 29(1) provided that where an officer of the Board, discovers as regards any 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 be assessed to capital gains tax, have not been assessed, or*

(b) that an assessment to tax is or has become insufficient, or

(c) that any relief which has been given is or has become excessive,"

the officer may make an assessment in the amount, or the further amount, which ought in his opinion to be charged in order to make good to the Crown the loss of tax.

34. The discovery assessments issued in 2021 did not refer to the failure to include an amount of **income** in a return. They refer to an amount of income **tax** that was due and that the taxpayer had not previously told HMRC about and HMRC issued discovery assessments to collect that tax.

35. As child benefit is not and was not taxable income, the condition in section 29(1)(a) TMA as it stood in 2021 could not have been satisfied. The assessments were not therefore validly issued discovery assessments under section 29(1)(a). No discovery assessment could have been made under section 29(1)(a) in consequence, following the Court of Appeal in *Wilkes* which decision is binding on us and with which we specifically agree. We understand HMRC accept this.

36. Although HMRC's statement of case states at paragraph 27(ii) that section 29(1) (b) and (c) are incapable of applying, during the hearing HMRC stated that they were also relying on those two subsections. We consider HMRC's Statement of Case sets out the correct position. Section 29(1)(b) was inapplicable because Mr Fera's income had never been assessed to tax and section 29(1)(c) was inapplicable as no relief had been granted to Mr Fera.

37. The discovery assessments when issued were invalid unless validated by FA 2022 section 97 (as discussed below).

38. The second issue is whether the retrospective amendments to section 29 (1)(a) made by section 97 FA 2022 can apply to validate the discovery assessments retrospectively. The burden is on HMRC to show that it does apply and for Mr Fera to demonstrate that the conditions in section 97(5) are not satisfied.

39. HMRC claim that Mr Fera has not on or prior to 30 June 2021 raised in his notice of appeal or elsewhere as an issue in this appeal the invalidity of the discovery assessments because the discovery assessments refer to a tax charge and not an income amount. The assessments are therefore protected assessments.

40. The first sentence of Mr Fera's notice of appeal against the discovery assessments dated March 2021 states that he is writing to "*formally appeal your decision regarding repayment of the High-Income Child Benefit Charge totalling £7070 and subsequent penalty charges of £1331.20*"

41. The rest of the appeal notice recounts the history from receipt of the nudge letter and how Mr Fera had no knowledge of the HICBC and acted promptly upon receipt of the nudge letter to cancel the claim to child benefit to which he thought his wife was no longer entitled and believed the earlier benefit payments were repayable. We infer Mr Fera refers to not being eligible for child benefit because the correspondence issued by HMRC prior to the issue of the discovery assessments simply sets out a table showing for each year Mr Fera's adjusted net income, the child benefit claimed and the HICBC due. As Mr Fara's income exceeded £60,000 in each year the child benefit received and the HICBC amounts were identical. Mr Fera's understanding was incomplete.

42. Mr Fera did not challenge the computation of the HICBC but he does formally challenge the decision to charge the HICBC. In view of Mr Fera's lack of legal ability it is unsurprising that the challenge to the assessment is expressed in generic terms.

43. In our view Mr Fera's formal appeal against HMRC's decision to charge HICBC must be a challenge to the **validity** of the discovery assessment because the decision to charge HICBC depends on the terms of section 29(1)(a) being satisfied.

44. Further Section 29(1) (as it was in 2021) is very limited. It provided that an assessment is only valid if one of the subsections (1)(a), (b) or (c) is satisfied. A simple appeal against an assessment made under section 29(1)(a), other than one which accepts the principle behind the assessment but challenges the computation, must inherently be challenging the validity of the assessment and that must involve in this case whether the elements of subsection (1)(a) were satisfied at the date of issue.

45. As section 29(1)(a) refers to a failure to include income in a self-assessment return, an **issue** in this appeal must be that the discovery assessment is invalid because there has been no omission of income in a self-assessment return and as the issue is inherent it must be treated as having been **raised** by Mr Fera before 30 June 2021.

46. We consider that whether the issue has been **raised** is a question of law and we consider that as a matter of law the issue had necessarily been raised before 30 June 2021.

47. Although HMRC did not refer us to the decision of the FTT in the case of *Toby Hextall v HMRC* 2023 FTT a case in which the taxpayer was unrepresented concerning HICBC, in which Judge Sinfield considers that the word "raised" must mean it was specifically identified by a party or the Tribunal. We are with respect not inclined to adopt that position first because to do so would seem to produce a two-tier system one for the well to do who can afford representation or have access to pro bono representation like Mr Wilkes and one for other taxpayers without such access. We find it difficult to accept that Parliament intended such an outcome. Secondly, we note that to construe section 97 in the manner suggested in *Toby Hextall* would be to use formality to thwart a taxpayer's appeal contrary to the thrust of the reform of the Tribunal Rules in 2007. We note Rule 2 of the Tribunal Rules which deals with the overriding objective of the Tribunal to deal with cases fairly requires the Tribunal to avoid unnecessary formality (Rule 2(2)(b)), ensuring, so far as practicable, that the parties are able to participate fully in the proceedings (Rule 2(2)(c)) and to use the expertise of the Tribunal effectively (Rule 2(2)(d).

48. We consider this issue an issue of law but if we are wrong and the issue is one of fact, we find as a fact that the appeal by Mr Fera against assessments made by Mr Fera in March 2021:

> (1) necessarily included as an issue a challenge to the validity of each of the discovery assessments, and
>
> (2) necessarily raised as an issue the invalidity of each discovery assessment as a result of it not relating to the discovery of income which ought to have been assessed to income tax but which has not been so assessed.

49. In consequence, we consider that none of the discovery assessments in this case is a protected assessment because in the case of each of those assessments the conditions of section 97(5) FA 2022 were satisfied.

50. We allow the appeals.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

51. 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.

HEATHER GETHING
TRIBUNAL JUDGE

Release date: 08th NOVEMBER 2023