Neutral Citation: [2024] UKFTT 00012 (TC)

Case Number: TC09017

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video

Appeal reference: TC/2022/13065

HIGH INCOME CHILD BENEFIT CHARGE – discovery assessments and non-deliberate penalties – whether discovery assessments valid and in time – whether reasonable excuse for failure to notify chargeability – held – appeal against assessments allowed in part – appeal against penalties allowed

Heard on: 6 December 2023
Judgment date: 20 December 2023

Before

TRIBUNAL JUDGE JEANETTE ZAMAN

Between

NEIL WILLS

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS
Respondents

Representation:

For the Appellant: In person, with Mrs Wills

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

DECISION

INTRODUCTION

1. This appeal concerns the High Income Child Benefit Charge ("HICBC"). Mr Wills has been assessed to the HICBC for the tax years 2013/14 to 2019/20 inclusive, together with penalties for failing to notify chargeability under s7 Taxes Management Act 1970 ("TMA 1970"). The penalties have been assessed pursuant to Schedule 41 Finance Act 2008 ("Schedule 41"). The discovery assessments are for the sum of £7,319. The penalties are calculated by reference to the potential lost revenue which is the subject of the assessments and on the basis that the behaviour resulting in the failure to notify was not deliberate and the disclosure was prompted. The penalties have been assessed at 20% for the tax years 2013/14 to 2018/19 and at 10% for the tax year 2019/20, in each case allowing the maximum reduction (the difference between the maximum allowable reduction being a result of timing). The amount of the penalties in total is £1,356.20.

2. Mr Wills has appealed against the assessments and the penalties. His grounds of appeal can be summarised as follows:

   (1) The first letter he received from HMRC about the HICBC is that dated 9 February 2021. He contacted HMRC immediately, and has since been in constant contact.

   (2) Before then, he did not know that earnings above £50,000 meant that he needed to file self assessment returns. He did not know of this between 2013 and 2021.

   (3) His earnings have always been taxed under PAYE.

   (4) It has taken HMRC nearly eight years to contact him. HMRC have recently sent out assessments to thousands of families – why did they not do this seven years ago, when the amounts owed were much less.

   (5) HMRC say they wrote to him in 2013, but he did not receive any letters from them. HMRC should have to prove that he received these letters.

   (6) This is a huge amount of tax to have to repay in a financial crisis.

3. The appeal to the Tribunal was made late. The review conclusion letter was dated 7 September 2022, but the appeal was not made until 14 October 2022. Mr Wills explained that the letter from HMRC was not received until 30 September 2022, as he had had problems with the post due to the postal strike. HMRC did not object to permission being granted for the appeal to be made late, and having regard to the length of the delay and the explanation provided as to the date on which the letter was received, I concluded that it was in the interests of justice to admit the appeal.

4. For the reasons set out in full below, I have decided to allow Mr Wills' appeal against the assessments for the tax years 2013/14 to 2015/16 (inclusive), and against the penalties for all of the tax years in question. I have refused his appeal against the assessments for the tax years 2016/17 to 2019/20 (inclusive).

HEARING AND EVIDENCE

5. With the consent of the parties, the form of the hearing was video using the Tribunal video hearing service. A face-to-face hearing was not held because it was expedient not to do so. I was provided with a hearing bundle of 161 pages specific to this appeal, a generic bundle (which included not only legislation and authorities but also information about the advertising campaign conducted by HMRC in relation to the HICBC) and a supplemental bundle containing various decisions of other compositions of this Tribunal.

6. 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.

7. Mr Wills gave evidence at the hearing, explaining further the matters set out in his grounds of appeal. He said he had been within PAYE for 37 years, and tried to abide by the rules. He had been stunned to receive the letter from HMRC in 2021, and was very disappointed that he had been allowed to get in this position, as a result of the huge gap in time between when HMRC say they first sent out letters to the time they started to make detailed follow-up. The key issue on which his evidence was challenged by Ms Halfpenny was in relation to the timing, namely when he should have become aware of the HICBC and in particular his evidence that he had not received the SA252 in 2013 or the 2019 Letters (as defined below). I address that evidence in the Discussion.

8. There were witness statements from two HMRC officers, both of whom were available to be cross-examined at the hearing:

(1) Grant Adams' evidence, so far as it comprised matters of fact, related to his role in HMRC's HICBC project team and being allocated Mr Wills' case file on 8 February 2021, making checks which resulted in his making a discovery related to the failure to notify HMRC of liability to the HICBC and issuing the letter to Mr Wills on 9 February 2021. Officer Adams' evidence was that the issue of that letter was the end of his direct involvement in the case. The remainder of the witness statement then summarised the various communications between Mr and Mrs Wills and HMRC, as they appeared from HMRC's file. That evidence was not challenged, and Officer Adams was not called to be cross-examined. I accept his evidence.

(2) Richard Lambert worked in HMRC's Campaigns and Projects team, and is now a senior officer providing technical support. He has worked on HICBC in different capacities since 2012. His witness statement made it clear that he had not had case ownership. Instead, his evidence addressed HMRC's approach and processes. Officer Lambert did attend the hearing and was questioned about HMRC's records, and evidence of letters being sent or returned. I accept that Officer Lambert gave his evidence honestly and sought to assist the Tribunal, but his evidence was necessarily hampered in its usefulness by the fact that he had no direct involvement with Mr Wills' file. I have taken it into account when assessing all of the evidence as to the SA252 and 2019 Letters.

RELEVANT LAW

9. There was no dispute between the parties as to the relevant legislation which is summarised below.

10. By s681B Income Tax (Earnings and Pensions) Act 2003 (which was inserted by Finance Act 2012 with effect for child benefit payments made after 7 January 2013) a person is liable to a charge to income tax, the HICBC, for a tax year if:

(1) their adjusted net income for the year is greater than £50,000;

(2) their partner's ("partner" is defined in s681G) adjusted net income is less than theirs; and

(3) they or their partner received child benefit in the relevant tax year.

11. The assessments to HICBC have been raised pursuant to HMRC's discovery assessment powers as provided in s29 TMA 1970. Accordingly, HMRC bear the burden of

establishing that they have discovered that an amount of income which ought to have been assessed to income tax has not been so assessed. In *HMRC v Wilkes* [2020] UKUT 0150 (TCC) ("*Wilkes*") the Upper Tribunal determined that HMRC had no power to make a discovery assessment in respect of the HICBC on the basis that child benefit was not an amount of income which should have been assessed to income tax – the HICBC is a free-standing charge to tax. That decision was subsequently confirmed by the Court of Appeal in *HMRC v Wilkes* [2022] EWCA Civ 1612.

12. Following the decision in *Wilkes, s*97 Finance Act 2022 ("FA 2022**"**) was enacted such that s29 TMA 1970 was amended to provide for a discovery assessment to be issued where "an amount of income tax … ought to have been assessed but has not been assessed". This reversed the decision in *Wilkes*, and allowed HMRC to make discovery assessments in relation to the HICBC.

13. These amendments apply to the tax year 2021/22 and subsequent tax years. However, they also have retrospective effect, but that is subject to exceptions for discovery assessments in respect of the HICBC in relation to which notice of appeal had been given to HMRC on or before 30 June 2021 which met certain conditions. The exceptions thus operate in favour of the taxpayer, whereas assessments which are outside of these exceptions are those to which the legislation applies retrospectively and are defined as "relevant protected assessments".

14. A discovery assessment is not a relevant protected assessment if notice of appeal was given to HMRC on or before 30 June 2021 and either:

(1) 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 (ie the *Wilkes* issue), and "the issue was raised on or before 30 June 2021 (whether by the appellant or in a decision given by the tribunal)" (s97(5)); or

(2) the appeal is subject to a temporary pause which occurred before 27 October 2021, and "it is reasonable to conclude that the temporary pausing of the appeal occurred (wholly or partly) on the basis that [the *Wilkes* issue] is, or might be, relevant to the determination of the appeal" (s97(6)).

15. By virtue of s34(1) TMA 1970, HMRC may raise a HICBC discovery assessment at any time within four years of the end of the tax year to which it relates. There are also extended time limits:

(1) HMRC have the power under s36(1), where there is a loss of income tax brought about carelessly by the person, to make an assessment at any time not more than six years after the end of the tax year. By s118(5) TMA 1970, a loss of tax is brought about carelessly if the person fails to take reasonable care to avoid bringing about that loss.

(2) HMRC have the power, in consequence of s36(1A) TMA 1970, to raise the assessment within a period of 20 years of the tax year where the loss of tax arises as a consequence of a failure to notify liability to a charge to tax under s7 TMA 1970. That section provides that if a person is chargeable to income tax, they must notify HMRC of that fact within six months after the end of the tax year. In consequence of the provisions of s118(2) TMA 1970, the 20-year assessment provisions do not apply where the taxpayer establishes a reasonable excuse for the failure to notify their liability under s7 and, after the excuse ceased, did the required action (ie notify) without unreasonable delay.

16. Paragraph 1 Schedule 41 provides that a person who has not been sent a tax return is liable to a penalty if he fails to comply with s7 TMA 1970. Paragraph 6 Schedule 41

provides that in the case of a "domestic matter" (which this is) where the failure was neither deliberate or concealed (as HMRC accept), the penalty is 30% of the "potential lost revenue"; but paragraphs 12 and 13 provide for a reduction in that percentage where a taxpayer gives HMRC help in quantifying the unpaid tax, but subject to a minimum penalty rate of 10% if HMRC became aware of the failure less than 12 months after the tax "first becomes unpaid by reason of the failure" (paragraph 13(3)(a)) and 20% otherwise.

17. Paragraph 14 Schedule 41 provides that HMRC may reduce a penalty because of special circumstances (and by paragraph 19 the Tribunal may do so where HMRC's decision in this regard is flawed). Paragraph 20 provides that liability to a penalty does not arise if the taxpayer satisfies HMRC or the Tribunal on an appeal that they have a reasonable excuse for the failure.

ISSUES AND BURDEN OF PROOF

18. The burden of establishing that valid in time discovery assessments were issued lies with HMRC. If HMRC meet this burden, then the burden shifts to Mr Wills who must establish that the tax is overstated (a matter which was not in issue here as the quantum was not challenged) and (where HMRC rely on the extended time limit in s36(1A) TMA 1970) that he has a reasonable excuse for the failure to notify.

19. The burden of establishing that valid in time penalties were issued lies with HMRC. If HMRC meet this burden, then the burden shifts to Mr Wills to establish that he has a reasonable excuse for the failure to notify, or that there are special circumstances.

20. The standard of proof is the balance of probabilities.

FACTS

21. I make the following findings of fact (and make additional findings of fact in relation to whether certain letters were sent by HMRC and received by Mr Wills in the Discussion).

(1) From the time the HICBC was introduced up to and including the tax years in question, Mr Barrett was not within the self assessment regime. HMRC did not issue to him a notice to file a tax return for the tax years in question under s8 TMA 1970, nor did he make voluntary returns under s12D TMA 1970.

(2) Mr Wills partner, Mrs Wills, has received child benefit since October 2000. The claim forms at that time had made no reference to the HICBC (as the charge had not yet been introduced).

(3) In 2012, prior to the introduction of the HICBC, HMRC issued several press releases which detailed the introduction of the charge and advised parents liable to pay the HICBC to register for self assessment. Similar press releases came out in 2014. In 2018 and 2019 HMRC, in response to misgivings raised in connection with reasonable excuse defences, issued a further round of press releases dealing with that issue. There is considerable information about the HICBC on HMRC's website.

(4) On the basis of Mr Wills' evidence, I am satisfied that he was not aware of the HICBC from these press releases.

(5) In 2013/14 Mrs Wills received child benefit for two children. This remained the case in subsequent tax years, although payments for the eldest child ceased in 2017/2018. Mr Wills has agreed the quantum of child benefit received with HMRC.

(6) In each of the tax years in question, Mr Wills' adjusted net income exceeded £50,000, which exceeded that of Mrs Wills. His adjusted net income had been below this threshold in 2012/13.

(7) Mr Wills was required to notify HMRC of his chargeability to income tax for the first tax year by 5 October 2014. He did not do so. He had the same obligation for each of the following tax years, with a corresponding deadline of 5 October following the end of the relevant tax year, and on each occasion he did not do so.

22. HMRC's position is that they sent the following letters to Mr Wills, but he denies having received them:

(1) on 17 August 2013, a HICBC awareness letter, which HMRC refer to as "SA252", and which term I also use in this decision. The SA252 informed taxpayers of the introduction of the HICBC, and that if it applied to them, they must register for self assessment for 2012/13 by 5 October 2013;

(2) on 11 November 2019, a "nudge" letter, advising Mr Wills to check whether he was liable to the HICBC; and

(3) on 10 December 2019, a "final reminder" letter, reminding him to check whether he was liable to the HICBC. I refer to these final two letters as the "2019 Letters".

23. On 8 February 2021, Officer Adams discovered that Mr Wills had not notified chargeability to the HICBC for the tax years 2013/14 to 2019/20 (inclusive) and that there was a loss of tax in these tax years. The fact of such a discovery having been made was not in dispute.

24. On 9 February 2021 HMRC wrote to Mr Wills at his address in Stoke Heath, informing him that he had not notified his liability to the HICBC. Mr Wills accepts he received this letter. Mrs Wills telephoned HMRC on 15 February 2021 (although HMRC were not authorised to discuss the matter with her then), and on 18 February 2021 Mr Wills telephoned HMRC to authorise his wife to speak to HMRC about his tax affairs. Mrs Wills called HMRC on 10 March 2021, and Mr Wills called on 12 March 2021, confirming that he agreed with the amounts calculated.

25. HMRC registered Mr Wills for self assessment on their system on 12 March 2021.

26. The discovery assessments were issued by HMRC on 22 March 2021. The amounts for each tax year are show below, alongside the amount of the penalty issued for each year (although such penalties were not issued until 6 May 2021). The penalties were calculated on the basis that the behaviour was not deliberate, disclosure was prompted, and giving the maximum reduction available for each tax year.

	Discovery assessment	**Penalty**
2013-14	£122	£24.40
2014-15	£70	£14
2015-16	£1,823	£364.60
2016-17	£1,788	£357.60
2017-18	£1,364	£272.80
2018-19	£1,076	£215.20
2019-20	£1,076	£107.60

27. Mr Wills appealed to HMRC by completion of what was headed a "Mandatory Reconsideration Form". That form is a form produced by HMRC, to be completed by taxpayers who want HMRC to look at a child benefit decision. The form was dated 20 May 2021, but not received by HMRC until 2 June 2021 (although nothing turns on this period of time). In the section for "Why I do not agree with the decision", Mr Wills set out the following:

> "I have received a High Income Benefit Charge for which I had not knowledge of. I have always been in the PAYE scheme and had received no information that I had to file a Self Assessment. I fail to see why it has taken 7 years to notify me of my error when this could have been resolved in 2015. I urge you to reconsider. As soon as I have received notification of this I have contacted you immediately without delay by a number of phone calls. I received no paperwork regarding this over the last 7 years."

28. HMRC issued their view of the matter letter on 17 June 2022, upholding the decisions and informing Mr Wills of the right to request an independent review or appeal to the Tribunal. That letter was enclosed with another letter from HMRC of the same date, which said as follows:

> "We would normally use discovery assessments to assess the [HICBC]….
>
> Last year, the Upper Tribunal decided that discovery assessments cannot be used to assess taxpayers who have to pay the [HICBC] who have not filed a tax return. The decision does not affect whether a customer has to pay the [HICBC].
>
> This decision is under appeal.
>
> We have not written to you while we considered how this decision affects our customers. We are sorry for the inconvenience caused by the delay in dealing with your case.
>
> Since the tribunal decision, the government has amended legislation….
>
> We can now deal with your case…."

29. Mr Wills accepted the offer of a review, responding to the findings set out in the view of the matter letter. The review conclusion letter dated 7 September 2022 upheld the assessments and the penalties. Mr Wills then appealed to the Tribunal.

DISCUSSION

30. I address the issues in relation to the discovery assessments and the penalties separately.

Discovery assessments

31. Two issues arise in relation to the assessments, namely whether a discovery can be made under s29 TMA 1970, ie whether they are protected assessments (which for this purpose is protected in favour of HMRC) and whether they were issued in time.

Whether protected assessments

32. I am satisfied that Officer Adams made a discovery that Mr Wills was liable to the HICBC but, in accordance with *Wilkes*, this is not a discovery of income which ought to have been assessed to income tax but which had not been so assessed.

33. HMRC's position is that the discovery assessments are protected, on the basis that although Mr Wills appealed to HMRC before the cut-off date specified in s97 FA 2022 of 30

June 2021, he did not raise the issue of an invalid assessment on the basis of the *Wilkes* decision, and there has been no temporary pause as described in s97(8).

34. The relevant sub-sections of s97 are as follows:

> "(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."

35. Section 97(5) requires at s97(5)(a) that 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. This condition is met in the present appeal – it relates to the validity of the assessments which have been issued to Mr Wills, was identified by HMRC as being potentially relevant (in their letter of June 2022) and is addressed in their Statement of Case. The question is then whether the condition in s97(5)(b) is met, namely whether "the issue was raised on or before 30 June 2021 (whether by the appellant or in a decision given by the tribunal)". The appeal had not been heard by the Tribunal by that time, so it can only have been raised for this purpose by Mr Wills.

36. The grounds of appeal put forward by Mr Wills are summarised at [2] above and set out a range of matters on which he relies. They do not specifically challenge the validity of the

assessments on the basis that they did not relate to the discovery of income which ought to have been assessed to income tax but which had not been so assessed, ie the *Wilkes* issue. This is not surprising given that Mr Wills has been representing himself both when communicating with HMRC and before this Tribunal.

37. HMRC had provided a supplemental bundle of decisions of the Tribunal which address the interpretation and application of s97(5)(b). Those decisions illustrate that different Tribunal judges have reached different conclusions on what is required for an issue to have been "raised" for this purpose (eg, different approaches were taken in *Hexstall v HMRC* [2023] UKFTT 00390 (TC) and in *Fera v HMRC* [2023] UKFTT 00961 (TC)). I conclude that s97(5)(b) must be interpreted in a manner which does not result in this sub-paragraph being redundant, such that it must mean something more than that required by s97(5)(a), and that the express reference in s97(5)(b) to the issue being raised either by the appellant or the tribunal means that there should be some express reference which can be identified as a challenge based on the *Wilkes* issue, even if that challenge is imprecise. For this reason, I prefer the approach taken in *Hexstall* to that in *Fera*, and conclude, having reviewed all the communications between the parties before 30 June 2021, that the *Wilkes* issue had not been "raised" by Mr Wills on or before 30 June 2021. The discovery assessments are not excluded from being relevant protected assessments by s97(5).

38. I have also considered whether s97(6) applies. The difficulty for Mr Wills in this regard is that whilst there was, in practical terms, a pause at the relevant time, which was expressly referred to by HMRC as enabling them to consider the decision in *Wilkes*, s97(8) sets out what is required for an appeal to be subject to a temporary pause for this purpose, and none of the (alternative) conditions are met in this appeal.

39. I have therefore concluded that the discovery assessments issued to Mr Wills are relevant protected assessments. They are, therefore, valid, provided that they were issued in time.

Time limits for issuing discovery assessments

40. The time limits for raising a discovery assessment under s29 TMA 1970 are set out in s34 and s36.

41. HMRC can issue a discovery assessment at any time not more than four years after the relevant tax year. The discovery assessments were all issued on 22 March 2021. This means that those for the tax years 2016/17 to 2019/20 (inclusive) were issued in time. HMRC do not need to satisfy any further requirements for these tax years, and submissions by Mr Wills (whether as to knowledge, reasonableness, delays by HMRC or otherwise) cannot affect the validity of these assessments

42. For the assessments issued for the tax years 2013/14 to 2015/16 (inclusive), HMRC rely on the extended time limits in s36(1A). However, as a result of s118(2) TMA 1970, HMRC cannot rely on this 20 year time limit if Mr Wills establishes a reasonable excuse for not notifying his liability to tax within six months of the end of each relevant tax year and, after the excuse ceased, did the required action (ie notify) without unreasonable delay.

43. Mr Wills argues that he did not know of the requirement to notify his liability to the HICBC, not having received the SA252 or the 2019 Letters, such that it was objectively reasonable for him not to have so notified, and that he got in touch with HMRC as soon as he did become aware (on receiving the letter of 9 February 2021).

44. The legal principles relevant to whether a taxpayer had a reasonable excuse are set out in the Upper Tribunal decision in *Perrin v HMRC* [2018] UKUT 156, and the relevant extract is set out below:

> "81. When considering a "reasonable excuse" defence, therefore, in our view the FTT can usefully approach matters in the following way:
>
> (1) First, establish what facts the taxpayer asserts give rise to a reasonable excuse (this may include the belief, acts or omissions of the taxpayer or any other person, the taxpayer's own experience or relevant attributes, the situation of the taxpayer at any relevant time and any other relevant external facts).
>
> (2) Second, decide which of those facts are proven.
>
> (3) Third, decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default and the time when that objectively reasonable excuse ceased. In doing so, it should take into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times. It might assist the FTT, in this context, to ask itself the question "was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?"
>
> (4) Fourth, having decided when any reasonable excuse ceased, decide whether the taxpayer remedied the failure without unreasonable delay after that time (unless, exceptionally, the failure was remedied before the reasonable excuse ceased). In doing so, the FTT should again decide the matter objectively, but taking into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times.
>
> 82. One situation that can sometimes cause difficulties is when the taxpayer's asserted reasonable excuse is purely that he/she did not know of the particular requirement that has been shown to have been breached. It is a much-cited aphorism that "ignorance of the law is no excuse", and on occasion this has been given as a reason why the defence of reasonable excuse cannot be available in such circumstances. We see no basis for this argument. Some requirements of the law are well-known, simple and straightforward but others are much less so. It will be a matter of judgment for the FTT in each case whether it was objectively reasonable for the particular taxpayer, in the circumstances of the case, to have been ignorant of the requirement in question, and for how long. *The Clean Car Co* itself provides an example of such a situation."

45. The test I adopt in determining whether Mr Wills has an objectively reasonable excuse is that set out in *The Clean Car Co Ltd v C&E Commissioners* [1991] VATTR 234, in which Judge Medd QC said:

> "The test of whether or not there is a reasonable excuse is an objective one. In my judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?"

46. That this is the correct approach has also recently been confirmed by the Court of Appeal in *Archer v HMRC* [2023] EWCA Civ 626.

47. It is clear from *Perrin* that ignorance of the law can, in certain circumstances, comprise a reasonable excuse. It is a matter of judgment as to whether it is objectively reasonable for Mr Wills in the circumstances of this case to have been ignorant of his obligation to notify his

liability to the HICBC. I have already recorded my finding that I am satisfied that Mr Wills was not aware of the HICBC from HMRC's press releases.

48. There have been a number of appeals to the Tribunal against HICBC penalties in recent years, with differing outcomes. I adopt the approach (which has been set out and applied by Judge Popplewell in various cases, eg *Chattaway v HMRC* [2023] UKFF 752 (TC) and followed by other judges) that a taxpayer is likely to have a reasonable excuse where:

(1) they were not under an obligation to complete a tax return up to the tax year prior to that in which the HICBC applied because, primarily, they were paid through PAYE and had no other income justifying a need to notify;

(2) they (or their partner) were in receipt of child benefit payments prior to the introduction of HICBC with the consequence that the application itself made no reference to HICBC (the child benefit claim form since the introduction of HICBC clearly sets out when the charge applies);

(3) they had not received notification from HMRC directly at any point prior to the contact which led to the issue of the tax assessment; but

(4) acted promptly in ceasing to claim child benefit and engaged actively with resolving the historic tax liabilities as soon as HMRC did make contact.

49. This approach recognises the position faced by taxpayers whose claims for child benefit were made before the introduction of the HICBC, but enables consideration of the actual notifications they received from HMRC in relation to their potential liability to the charge.

50. In the present appeal, it is clear that the criteria at (1) and (2) were met. The main issue is whether Mr Wills received notification of the HICBC and the requirement to notify from HMRC directly at any point prior to the letter of 9 February 2021.

51. HMRC's position was that there was no obligation on HMRC to notify taxpayers of their legal obligations, or to keep copies of letters sent to taxpayers, and in any event HMRC had sent the SA252 in 2013 (at a time which was prior to Mr Wills' first obligation to notify, which was on 5 October 2014) and the 2019 Letters (which were before the final obligation to notify, ie that for 2019/20). HMRC submitted that the sending of these letters showed that Mr Wills had failed to act without unreasonable delay, drawing attention to the first contact from him on 18 February 2021.

52. HMRC relied upon the following in support of the SA252 and 2019 Letters having been sent to and received by Mr Wills:

(1) There is no dispute as to Mr Wills' address. HMRC's records show that they were informed of Mr Wills' address in Stoke Heath in 2002, the file copies of the 2019 Letters had this address printed on them, this was the address used for the letter in February 2021 which Mr Wills did receive and is that used by him on his Notice of Appeal.

(2) For the SA252, HMRC do not have a copy of the letter which they submit was actually sent to Mr Wills, and instead produced a sample copy of such a letter, submitting this is what would have been sent, and by way of evidence produced an extract from HMRC's "Contact History Summary" which records the SA252 as a "Document Out" on 17 August 2013. A "Review Status Summary" for the SA252 also shows the date issued as 17 August 2013 and the box for Undelivered is unchecked, indicating that it was not returned to HMRC as undelivered.

(3) As regards the 2019 Letters, for both of these HMRC produced from their system a copy (addressed to Mr Wills in Stoke Heath) of what they submit was actually sent, together with, for the letter of 11 November 2019, a note on HMRC's "Contact History Detail", identifying as a Contact Channel a "Document Out" and the Actions as being that a "HICBC FTN OTM" was issued on 11 November 2019 (and I infer that the initials refer to a Failure To Notify, and One To Many). I was not taken to any similar note for the second of the 2019 Letters, that said to have been sent on 10 December 2019.

(4) Mr Wills accepted that HMRC were using his correct address, and had received the correspondence from 2021 onwards.

53. I agree with HMRC's submission that they are not required to notify Mr Wills of his legal obligation to notify HMRC of his liability to the HICBC, and that they are not required to retain copies of letters as sent to taxpayers. Here, I need to consider the specific position of Mr Wills, and assess the evidence as to both the sending and receipt of the SA252 and the 2019 Letters in order to make findings as to whether he received this correspondence (which may differ for the various letters) and what this means in terms of actual knowledge and what is objectively reasonable in these circumstances.

54. The evidence adduced by HMRC presents a credible picture of the letters having been sent, but not overwhelmingly so. The limitations include:

(1) the absence of a copy of the SA252 purported to have been sent to Mr Wills;

(2) neither Officer Adams nor Officer Lambert were in a position to confirm that a SA252 was sent to Mr Wills (although their evidence was that it was sent to the cohort of higher rate taxpayers where they or their partner received child benefit). This was in circumstances where the pro forma SA252 to which I was taken referred to checking the position for 2012/13, and stated that the deadline for notifying HMRC was 5 October 2013. Yet HMRC have not issued an assessment to Mr Wills for that tax year, and Officer Adams' evidence includes that Mr Wills' adjusted net income was less than £50,000 in that year. On that basis, it is not obvious that HMRC's parameters for sending SA252s would have identified Mr Wills as an intended recipient (although I do recognise the contact history as set out above, and if it had been sent and received then I agree this would be relevant to knowledge and whether the failure to act was objectively reasonable); and

(3) I was not taken to any record (other than the existence of the copy letter) that the letter of 10 December 2019 was sent.

55. There are also difficulties with evidence supporting actual receipt. Understandably, HMRC do not use recorded delivery for letters sent, instead use the regular postal service, with the consequent inability to evidence actual receipt by way of a proof of delivery. I recognise that there was no record of the SA252, or the 2019 Letters, having been returned to HMRC as undelivered, and accept, generally, that HMRC would have recorded this on their file if this had occurred. Nevertheless, I regard it as significant that HMRC held the correct address on file for Mr Wills, and he received communications similarly sent to this address from 9 February 2021 onwards.

56. Against this background, I assess Mr Wills' evidence that the first communication he received from HMRC about the HICBC was the letter of 9 February 2021. I am mindful of the passage of time (as by the time of the hearing it was more than ten years' since the SA252 was said to have been sent) and recognise that Mr Wills' evidence could be taken as an honest statement that he did not remember receiving this correspondence from HMRC. I did

consider that Mr Wills was giving honest evidence, and the issue was thus whether it was reliable, assessing it against the documentary evidence (which, as described above, was somewhat mixed) and by reference to his actions throughout. I have, on balance, decided that Mr Wills did not receive the SA252 or the 2019 Letters. In reaching this conclusion, I have placed some weight not only on the limitations of the evidence adduced by HMRC, but also the fact that Mr Wills did take action promptly after receiving the letter of 9 February 2021. The SA252 and the 2019 Letters are clear, and even though the SA252 was, on HMRC's case, sent at a time when Mr Wills's income was under the threshold, it would have put him on notice of what that threshold was and the action to take. The 2019 Letters clearly set out the conditions for the HICBC to apply and that taxpayers must then register for self assessment, or contact HMRC if they have questions. I consider that if Mr Wills had received any of these letters, he would have taken action. That he did not do so forms part of my reasoning for concluding that he did not receive these letters.

57. Having made this finding of fact, I consider that Mr Wills was ignorant of his obligation to notify HMRC of his liability to the HICBC until he received the letter of 9 February 2021 and that this was objectively reasonable in the circumstances. He then acted without unreasonable delay. Mr Wills thus has a reasonable excuse within s118(2) TMA 1970 such that HMRC cannot rely on the extended time limits in s36(1A). The discovery assessments for the tax years 2013/14 to 2015/16 (inclusive) were issued out of time, and Mr Wills' appeal against these assessments is allowed.

Penalties

58. A taxpayer is liable to a penalty pursuant to Schedule 41 where, as here, there has been a failure to notify liability to tax. The rate of penalty is prescribed by the statute. The burden is on HMRC to establish that the penalties have been validly issued. Once established, the burden is on Mr Wills to establish that he had a reasonable excuse for failure to notify.

59. Mr Wills was liable to pay the HICBC for each of the tax years in question, and did not notify HMRC of this by 5 October following the end of each tax year. HMRC charged a penalty, on the basis that the behaviour was not deliberate, disclosure was prompted, and giving the maximum reduction for each tax year. There was no dispute as to the calculation of these penalties or the reduction which had been given.

60. I consider that Mr Wills has established that he had a reasonable excuse for his failure to notify for each of the tax years in question. This follows from my findings and conclusions above in relation to the assessments for the tax years 2013/14 to 2015/16 (inclusive), but applies to all of the years for which penalties were assessed.

61. I allow Mr Wills' appeal in respect of the failure to notify penalties.

62. Finally, I would record that having reached my decision as to the assessments for the tax years 2013/14 to 2015/16 (inclusive) being out of time, I did identify that there is potentially a question as to the time limits for assessing the penalties for these years.

63. The decision of the Upper Tribunal in *HMRC v Robertson* [2019] UKUT 0202 137 (TCC) makes it clear that HMRC need not raise a valid assessment to tax in order for it to represent potentially lost revenue for the purpose of calculating a penalty. The amount of tax must be ascertained, even where it is not or cannot be assessed, and the time limit for raising the assessment is 12 months from the end of the "appeal period" for the assessment or 12 months from the date on which the amount was ascertained if not assessed (paragraph 16 of Schedule 41). For these purposes, "appeal period" is the period in which an appeal could be brought and if an appeal is brought the period until that appeal is determined or withdrawn. Where assessments are issued but are found to have been out of time, I consider that there is a

potential question as to the starting-point for the time limits for the assessment of the penalties. However, this point was not argued before me and, in view of my conclusion on reasonable excuse, even though this issue relates to the validity of the penalties I considered that it is not in accordance with the overriding objective for me to seek representations from the parties on this point (thus potentially resulting in additional costs and delays) nor to express any opinion or conclusion on this point.

DECISION

64. Mr Wills' appeal against the assessments for the tax years 2016/17 to 2019/20 (inclusive) is refused.

65. Mr Wills' appeal against the assessments for the tax years 2013/14 to 2015/16 (inclusive), and against the penalties for all of the tax years in question is allowed, such that the relevant assessments and penalties are cancelled.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

66. 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.

JEANETTE ZAMAN
TRIBUNAL JUDGE

Release date: 20th DECEMBER 2023