Neutral Citation: [2024] UKFTT 00119 (TC)

Case Number: TC09061

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video

Appeal reference: TC/2022/14142

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: 15 January 2024
Judgment date: 2 February 2024

Before

TRIBUNAL JUDGE JEANETTE ZAMAN
TRIBUNAL MEMBER DR CAROLINE SMALL

Between

MATTHEW GRIMMER

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: In person

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 Grimmer has been assessed to the HICBC for the tax years 2015/16 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 £6,620. 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 2015/16 to 2018/19 and at 10% for the tax year 2019/20, in each case allowing the maximum reduction (the difference between these maximum allowable reductions being a result of timing of disclosure). The amount of the penalties in total is £1,145.20.

2. Mr Grimmer 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 in relation to the HICBC was in April 2021. He had not received any prior communication from them (in particular the 2019 Letters, as defined below) – whether by letter, email, phone call, or through the Government Gateway.

(2) Mrs Grimmer receives child benefit payments. The paperwork they receive in relation to child benefit does not make any mention of the HICBC, eg letters from HMRC about whether named children aged 16 or over are staying in full-time non-advanced education.

(3) It has taken HMRC a number of years to make contact and issue the assessments and penalties.

(4) His case is no different to that of the taxpayer in *Wilkes*.

(5) The HICBC is unfair for single income households, when dual income households can each earn £49,500 without being liable for the HICBC.

(6) His salary only exceeds the £50,000 threshold once bonus and benefits are added.

3. Mr Grimmer's appeal to the Tribunal was made late. The review conclusion letter was dated 17 January 2022, but the appeal was not made until 20 December 2022. HMRC had set out in their Statement of Case ("SoC") dated 26 April 2023 that they did not object to permission being granted for the appeal to be made late. The notice of appeal did not set out any reasons for the lateness of the appeal (stating instead that the appeal was in time). At the hearing we asked Mr Grimmer to explain to us the delay. He explained he had called HMRC after receiving the review conclusion letter and his recollection was that he had been told not to do anything as *Wilkes* was still ongoing. He had continued to communicate with HMRC during this time (eg on 6 February 2022). He had been very busy at work and home, and had thought he had done what he needed to do.

4. The decision as to whether to admit a late appeal is one for the Tribunal, and we must exercise our discretion in accordance with the overriding objective to deal with matters fairly and in the interests of justice, and the approach to take when considering whether to give permission for a late appeal has been set out by the Upper Tribunal in *Martland v HMRC* [2018] UKUT 178 (TCC). The delay (of ten months) in this case is serious and significant, and we were not persuaded that Mr Grimmer had a good reason for such a delay. The correspondence from HMRC clearly and repeatedly sets out that if he wished to pursue matters he needed to

appeal to the Tribunal – this is in the review conclusion letter, was repeated by the reviewing officer on 28 February 2022 and in HMRC's letter of 16 November 2022. We do recognise that Mr Grimmer had not ignored the review conclusion letter – we accept that he rang HMRC after this, and wrote again to HMRC on 6 February 2022. The difficulty is that this was not what HMRC were telling him, in writing, to do at this stage.

5. However, whilst we recognise the particular importance of the need for litigation to be conducted efficiently and for time limits to be complied with, we take account of HMRC's position in not objecting to the late appeal. Moreover, the fact that HMRC's position was set out in the SoC and the appeal was listed by the Tribunal as a hearing of the substantive appeal means that we have not seen any subsequent indication to Mr Grimmer that he would need to explain the lateness to the Tribunal and obtain permission to make his appeal. We considered it would be procedurally unfair for us at the hearing to decide to refuse permission in these circumstances, and that this outweighed the factors which might otherwise have supported refusing permission. We announced this decision at the hearing, and proceeded to hear the substantive appeal.

6. For the reasons set out in full below, we have decided to allow Mr Grimmer's appeal against the assessments for the tax years 2015/16 and 2016/17, and against the penalties for all of the tax years in question. We have refused his appeal against the assessments for the tax years 2017/18 to 2019/20 (inclusive).

HEARING AND EVIDENCE

7. 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.

8. 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.

9. We were provided with a hearing bundle of 177 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.

10. Mr Grimmer gave evidence at the hearing, explaining further the matters set out in his grounds of appeal, and referring to the explanations he had provided in correspondence with HMRC. The only areas where his evidence was challenged by Ms Halfpenny were:

(1) in relation to his calls to HMRC in April 2021 and whether he had mentioned *Wilkes* in those calls (with HMRC's position, with which Mr Grimmer agreed, being that he had not mentioned *Wilkes*); and

(2) in relation to his letters to HMRC in May and June 2021, namely whether the letter of 3 May 2021, which asked for HMRC to review his case, amounted to an appeal to HMRC, and whether those letters had referred to *Wilkes*.

11. We considered that Mr Grimmer was a credible witness. There were areas where his explanations were imprecise as to timings; and occasions where his explanation at the hearing did not accord with the timing set out in the correspondence with HMRC (copies of which were in the hearing bundle). Where this is the case, we have preferred the timing which appears from the correspondence, as this is contemporaneous and presents an internally consistent picture.

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

(1) Officer Asif Khan, who had worked on the ISBC Campaigns and Projects team since 9 November 2020. Officer Khan had made the relevant discovery and sent the opening letter in April 2021.

(2) Officer Jacqueline White, a senior officer in the Campaigns and Projects team, who has provided technical support to the team since March 2017. Officer White's witness statement addresses HMRC's media campaigns, the briefing issued by HMRC to "over a million higher rate taxpayers in November 2012", the intervention process which identifies cases where a child benefit claimant earns in excess of £50,000 or lives in the same house as someone earning above this amount, how initial contact is made and the issue of assessments and penalties.

13. Neither of HMRC's witnesses were cross-examined. So far as his evidence addressed the assessments and penalties issued to Mr Grimmer, Officer Khan's evidence was agreed. Officer White's evidence did not contain any specific information in relation to Mr Grimmer.

RELEVANT LAW

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

15. 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 ("ANI") for the year is greater than £50,000;

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

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

16. 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.

17. 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.

18. 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 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".

19. 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)).

20. 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, under 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.

21. 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.

22. 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

23. 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 Grimmer 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.

24. 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 Grimmer to establish that he has a reasonable excuse for the failure to notify, or that there are special circumstances.

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

FACTS

26. We make the following findings of fact based on the evidence before us.

(1) Mr Grimmer had previously been registered for self assessment, and this was the case at 1 April 2014. His self assessment record was closed by HMRC at that time.

(2) HMRC did not issue Mr Grimmer 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.

(3) Mr Grimmer's partner, Mrs Grimmer, has received child benefit since November 1998. The claim forms at that time had made no reference to the HICBC (as the charge had not yet been introduced). During the first three tax years in question she received child benefit for three children, and for two children in the remaining two tax years.

(4) 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.

(5) On the basis of Mr Grimmer's evidence, we are satisfied that he was not aware of the HICBC from these press releases.

(6) In each of the tax years in question, Mr Grimmer's ANI exceeded £50,000, and exceeded that of Mrs Grimmer.

(7) Mr Grimmer was required to notify HMRC of his chargeability to income tax for the first tax year by 5 October 2016. 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.

27. Whilst for many taxpayers, HMRC's position is that they issued a HICBC awareness letter, which HMRC refer to as "SA252" to the relevant taxpayer during the course of 2012 or 2013, informing them of the introduction of the HICBC and the obligation to register for self assessment, this was not part of HMRC's pleaded case in respect of Mr Grimmer. We infer that this was because he was registered for self assessment at that time (albeit we recognise that the SoC refers only to him being registered at 1 April 2014).

28. The hearing bundle included copies of two letters that HMRC submitted were sent to Mr Grimmer:

(1) on 7 October 2019, a "nudge" letter, advising Mr Grimmer to check whether he was liable to the HICBC; and

(2) on 5 November 2019, a "final reminder" letter, reminding him to check whether he was liable to the HICBC and giving information about how to work this out. We refer to these two letters as the "2019 Letters".

29. HMRC relied on these 2019 Letters having been sent to Mr Grimmer in the SoC (although they also submitted that Mr Grimmer should have been aware of the HICBC from the general publicity campaign and that he was responsible for working out his own tax obligations including his obligation to notify HMRC of his liability to the HICBC). Mr Grimmer has denied having received them. He has done so consistently in correspondence (eg in his letters of 14 June 2021 and 21 July 2021, considered further below) and his evidence at the hearing was that he first became aware of the HICBC and his liability when he received the

letter from HMRC in April 2021. Whilst Ms Halfpenny did cross-examine Mr Grimmer at the hearing, she did not put to him any question which challenged his evidence on this point. In this situation, the panel did not ask Mr Grimmer further questions that we had identified from the papers (relating to his access to the Government Gateway, and whether he was set up for paperless communications from his time registered for self assessment in 2014). In the circumstances, we accept as unchallenged Mr Grimmer's evidence that he did not receive the 2019 Letters.

30. On 20 April 2021 Officer Khan discovered that Mr Grimmer had not notified chargeability to the HICBC for the tax years 2015/16 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.

31. On 21 April 2021 HMRC wrote to Mr Grimmer stating that their records show that the HICBC may apply to him but he did not register to receive a self assessment return for the tax years 2015/16 to 2019/20 (inclusive). That letter says that he must contact HMRC by 21 May 2021, and refers to HMRC's contact details on the face of the letter.

32. Mr Grimmer called HMRC on 26 April 2021. HMRC's records of the first call that date show that the line quality was bad and the parties had difficulty hearing each other. HMRC then called Mr Grimmer, and advised him to post information to HMRC about his benefits and expenses and call again within 14 days.

33. Mr Grimmer wrote to HMRC on 3 May 2021. He enclosed details of his earnings, and set out that he had never received information about the HICBC, challenged why child benefit payments had not instead been stopped, and questioned the fairness of his situation compared to dual income households. In that letter he asked if HMRC would review his case, stating that he felt he had been unfairly treated.

34. HMRC replied on 11 May 2021, setting out the information they held about Mr Grimmer's ANI, and enclosing a form to be filled in with information about the failure to notify (in the context of HMRC's ability to issue penalties). Mr Grimmer completed that form, dated 18 May 2021, referring to the stress this had brought to his family, they hadn't been aware of the changes, he is employed and hadn't been told about completing a self assessment return, and he rang HMRC straight away once he received the letter from HMRC and had followed their advice to date.

35. HMRC set up Mr Grimmer for self assessment on 18 May 2021.

36. The discovery assessments and penalties were issued by HMRC on 21 May 2021 in the amounts set out below. 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**
2015/16	£229	£45.80
2016/17	£725	£145
2017/18	£2,090	£418
2018/19	£1,788	£357.60
2019/20	£1,788	£178.80

37. Mr Grimmer appealed to HMRC on 14 June 2021. In that letter he set out:

(1) He had not received any letter relating to the HICBC "until recently" and not from the dates HMRC had said.

(2) If letters were sent to him in 2019, why has it taken this long for HMRC to re-send and make contact.

(3) He has never received any information relating to the change in child benefit. He is registered on the Government Gateway and has not received anything from this route, or by letter or email.

(4) The letters relating to child benefit do not mention the HICBC (and to illustrate he enclosed recent letters in relation to full-time non-advanced education notifications).

(5) It is not fair that other families can receive £49,500 each, having a household income of £99,000, and not be penalised for receiving child benefit whereas he earns just over £50,000 and is.

(6) His basic salary is £45,000 plus bonus and car.

(7) This is causing significant stress, has not been brought about by them, and they cannot afford these payments. He had tried to cancel the child benefit payments, but was told he cannot do so as he is not the person named on the account.

38. HMRC sent their view of the matter letter on 25 June 2021. That letter set out HMRC's position, which included that the 2019 Letters had been sent and were not returned as undelivered. That letter upheld the assessments and the penalties, and offered a review.

39. Mr Grimmer replied on 21 July 2021, accepting the offer of a review, emphasising points made previously, including that he had not previously been contacted by HMRC about the HICBC. According to a letter from HMRC of 9 September 2021, this letter was not received by them until after the deadline for acceptance of 25 July 2021, although HMRC's letter refers to the date of receipt as 27 June 2021 – we infer this should have said 27 July 2021. Nevertheless, HMRC said in that letter that they would accept the late review request and had sent the case for independent review.

40. On 15 September 2021 the reviewing officer wrote to Mr Grimmer. The hearing bundle did not include a copy of this letter. We consider this in the Discussion in the context of *Wilkes* and protected assessments.

41. HMRC sent a review conclusion letter to Mr Grimmer on 17 January 2022, upholding the assessments and the penalties. That letter sets out that if he does not agree with the conclusion, he can ask the tribunal to decide the matter. He must notify the appeal to the tribunal in writing, and the statutory appeal period is 30 days from the date of the review conclusion letter.

42. Mr Grimmer then replied to HMRC on 6 February 2022, referring to the review conclusion letter and stating:

> "I have subsequently rung in and have spoken to HMRC and stated that I was advised from HMRC that my case will not be reviewed until the outcome of HMRC v Jason Wilkes…I was told that was the case and I needed to write in.
>
> I was notified towards the end of last year that this was the situation with my case as they are very similar and nothing will be completed until that is resolved, as the outcome will affect my case. As you know this is currently being appealed by HMRC.
>
> …
>
> Can you please confirm that my case is on hold until the Wilkes verdict is reviewed?"

43. On 28 February 2022 the reviewing officer of HMRC replied, re-iterating that the review had been concluded, HMRC does not agree with the Upper Tribunal decision in *Wilkes* and is appealing, HMRC's view is that the assessments are valid, and the penalties are unaffected. The review conclusion decision remains unchanged. That letter says it is the final correspondence from HMRC in relation to the concluded review, and repeats that if Mr Grimmer does not agree with the conclusion he can appeal to the tribunal and the appeal period is 30 days from the date of the review conclusion letter.

44. HMRC then sent another letter to Mr Grimmer on 16 November 2022, thanking him for his letter of 6 February and apologising for the late response. HMRC stated that as the appeal process has already been done, it cannot be re-appealed to HMRC and Mr Grimmer's option now is to follow the process set out in the review conclusion letter and appeal to the tribunal. We infer that the author of this letter had not seen the letter of 28 February 2022.

45. Mr Grimmer replied to HMRC on 16 December 2022. That letter included:

(1) He had received a direct phone call from HMRC stating "that my case is on hold until the *Wilkes* trial is finalised as my case will be based on that outcome".

(2) He reiterated points made previously in correspondence as to his case being the same as *Wilkes*, the time taken by HMRC, not having been told he needed to complete a self assessment return, child benefit forms being sent to Mrs Grimmer and not mentioning HICBC or the £50,000 threshold.

(3) He would like the case reviewed by a Tribunal.

46. Mr Grimmer gave notice of appeal to the Tribunal on 20 December 2022.

DISCUSSION

47. We address the issues in relation to the discovery assessments and the penalties separately.

Discovery assessments

48. 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 means protected in favour of HMRC) and whether they were issued in time.

Whether protected assessments

49. We are satisfied that Officer Khan made a discovery that Mr Grimmer 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.

50. HMRC's position is that the discovery assessments are protected, on the basis that although Mr Grimmer appealed to HMRC on 14 June 2021, ie 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).

51. 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."

52. 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 Grimmer, Mr Grimmer raised the question of *Wilkes* in his notice of appeal to the Tribunal and it is addressed in the SoC. 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 Grimmer.

53. The grounds of appeal put forward by Mr Grimmer are summarised at [2] above and referred to in the findings of fact when summarising the correspondence between the parties. They set out a range of matters on which he relies. As referred to above, by the time Mr Grimmer gave notice of appeal to the Tribunal he did raise the applicability of *Wilkes*, although not expressing this in terms of challenging 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. This is not surprising given that Mr Grimmer has been representing himself both when communicating with HMRC and before this Tribunal.

54. We have considered what it means for the issue to have been "raised on or before 30 June 2021" and the timing of the communications between the parties.

55. HMRC had provided a supplemental bundle of decisions of the Tribunal which consider the interpretation and application of s97(5)(b). Those decisions illustrate that different compositions of this Tribunal 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)). Ms Halfpenny drew to our attention the fact that the decision in *Fera* is being appealed to the Upper Tribunal.

56. We 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 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, we prefer the approach taken in *Hexstall* to that in *Fera*. We have concluded, having reviewed all the communications between the parties before 30 June 2021 (which for this purpose comprises the notes of the two phone calls in April 2021 and Mr Grimmer's letters to HMRC in May and June 2021), that the *Wilkes* issue had not been "raised" by Mr Grimmer on or before 30 June 2021. The discovery assessments are not therefore excluded from being relevant protected assessments by s97(5).

57. We have also considered whether s97(6) applies. Section 97(6)(b) requires that the appeal is subject to a temporary pause which occurred before 27 October 2021, and s97(6)(c) that 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 s97(5)(a) is, or might be, relevant to the determination of the appeal. Section 97(8) then sets out what is meant by an appeal being subject to a temporary pause.

58. In their SoC, at [58], HMRC state "The Respondents can confirm that there has been no temporary pause as described in s97(8), and therefore s97(6) is not engaged." We treat this is a submission rather than a statement of fact, as it purports to be.

59. We have considered whether Mr Grimmer's appeal was subject to a temporary pause. The appeal itself was not made until 14 June 2021 and we therefore look at events after that date.

60. It is clear that s97(8)(a) cannot be engaged (the appeal was not stayed by the Tribunal before 27 October 2021). Mr Grimmer's evidence was that he was told by HMRC in a phone call that his appeal was on hold whilst *Wilkes* was ongoing. He was not able to say when this was, giving a range of between July 2021 and January 2022. Ms Halfpenny did not challenge the fact of such a conversation having occurred. The difficulty with phone conversations is evidencing both when any particular conversation occurred and what was said. As set out above, we considered Mr Grimmer to be a credible witness; we considered his evidence was honestly given, but recognise that it is vague in terms of timing (in circumstances where the timing is important) and have assessed it by reference to all of the evidence before us.

61. Looking at the chronology evidenced by the written correspondence between the parties, Mr Grimmer appealed to HMRC on 14 June 2021. HMRC responded with their view of the matter letter on 25 June 2021 offering a review, Mr Grimmer accepted that offer (by letter dated 21 July 2021 but which was not received until 27 July 2021), HMRC accepted the late review request by letter of 9 September 2021, wrote further to Mr Grimmer on 15 September 2021 and sent their view of the matter letter on 17 January 2022.

62. This exchange of correspondence supports a conclusion that the appeal was being dealt with by both parties after Mr Grimmer appealed to HMRC and during the period until 27 October 2021, and that the parties had not agreed a stay prior to that date.

63. Mr Grimmer's subsequent letter to HMRC (of 6 February 2022) is the first documentary evidence which refers to the appeal being on hold. In that letter he says he had rung HMRC

after 17 January 2022 and told them then that he had been told "towards the end of last year" that his case would not be reviewed until the outcome of *Wilkes*. This could conceivably be referring to a call before 27 October 2021, but similarly could be referring to a call after that date.

64. There is one further piece of correspondence to which we would have wanted to have regard, namely HMRC's letter of 15 September 2021 (ie that which was sent shortly after HMRC accepted a late acceptance of the offer of a review). Notably, the hearing bundle did not include a copy of this letter. In their SoC, HMRC say at [19] and [58] that this letter was sent after both parties agreed to an extension for the review period until 23 January 2022 due to COVID and that this was not a temporary pause. We accept that a letter was sent, but in the absence of a copy of the letter, we do not know what that letter said.

65. We agree with HMRC's submission that a simple extension of time in the light of COVID would not be a temporary pause within s97(8). We have had regard to the full chronology to assess whether this letter represented a temporary pause. We have paid particular attention to the fact that HMRC sent their review conclusion letter on 17 January 2022, ie just over four months after accepting the review request. This supports a conclusion that HMRC had not agreed to a stay of the appeal or suspended work pending the determination in *Wilkes*.

66. Having regard to all of the evidence before us, we have concluded that whilst HMRC did, after Mr Grimmer appealed to them, refer to *Wilkes* in discussions with him, his appeal was not subject to a temporary pause which occurred before 27 October 2021. We were not satisfied that HMRC and Mr Grimmer agreed before that date to stay the appeal, nor that HMRC had notified him that they were suspending work on the appeal pending determination of *Wilkes*.

67. We have therefore concluded that the discovery assessments issued to Mr Grimmer are relevant protected assessments. They are, therefore, valid, provided that they were issued in time.

Time limits for issuing discovery assessments

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

69. 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 21 May 2021. This means that those for the tax years 2017/18 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 Grimmer (whether as to knowledge, reasonableness, delays by HMRC or otherwise) cannot affect the validity of these assessments.

70. For the assessments issued for the tax years 2015/16 and 2016/17, HMRC rely on the extended time limits in s36(1A). HMRC's SoC sets out that s36(1A)(b) provides that there is a time limit of 20 years for raising an assessment and that there is no reasonable excuse or other provision in the legislation for amending or cancelling assessments issued under s29 TMA 1970 (at [59] and [63]). This is wrong. By virtue of s118(2) TMA 1970, HMRC cannot rely on this 20 year time limit if Mr Grimmer 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.

71. Mr Grimmer argues that he did not know of the requirement to notify his liability to the HICBC, not being aware of the introduction of the HICBC and not having received 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 in April 2021.

72. 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."

73. The test we adopt in determining whether Mr Grimmer 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?"

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

75. 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 Grimmer in the circumstances of his case to have been ignorant of his obligation to notify his liability to the HICBC, which will include having regard to HMRC's general publicity campaign as well as the particular situation of Mr Grimmer. We have already found that we are satisfied that Mr Grimmer was not aware of the HICBC from HMRC's press releases.

76. There have been a number of appeals to the Tribunal against HICBC penalties in recent years, with differing outcomes. We 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 some 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.

77. 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. We do take account of HMRC's submissions as to the absence of a legal obligation on them to notify taxpayers of the requirement to notify HMRC of their liability to HICBC (with which we agree), and their submissions as to Mr Grimmer's knowledge of his own income position and that of his wife.

78. Whilst Mr Grimmer had been registered for self assessment previously, his record had been closed by HMRC on 1 April 2014. He was not required to complete a tax return for 2014/15. Mrs Grimmer had been claiming child benefit since 1998.

79. We thus consider whether there were any direct notifications from HMRC to Mr Grimmer relating to the obligation to notify prior to the letter of 21 April 2021. In this regard:

(1) HMRC had not pleaded that he was sent a SA252 around the time of the introduction of the HICBC. We proceed on the basis that no such letter was sent to him; and

(2) we have accepted Mr Grimmer's evidence that he did not receive the 2019 Letters.

80. The means that the first direct contact from HMRC to Mr Grimmer in relation to the HICBC was the letter of 21 April 2021, to which he responded by calling HMRC on 26 April 2021 and then providing the requested information in May 2021.

81. In this situation, we accept that Mr Grimmer was ignorant of his obligation to notify HMRC of his liability to the HICBC until he received the letter of 21 April 2021. We do consider this was objectively reasonable in all the circumstances, including that he had previously been registered with HMRC for self assessment and had a Government Gateway account which he could expect would be used for direct communications, his earnings were

taxed through PAYE and the letters that he was aware Mrs Grimmer received in relation to child benefit made no mention of the HICBC.

82. Upon receiving the letter of 21 April 2021, Mr Grimmer then acted without unreasonable delay. He 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 2015/16 and 2016/17 were issued out of time, and Mr Grimmer's appeal against these assessments is allowed.

Penalties

83. 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 Grimmer to establish that he had a reasonable excuse for failure to notify.

84. Mr Grimmer 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. We are satisfied that the penalties were validly issued, and calculated correctly.

85. We consider that Mr Grimmer has established that he had a reasonable excuse for his failure to notify for each of the tax years in question. This follows from our findings and conclusions above in relation to the assessments for the tax years 2015/16 and 2016/2017, but applies to all of the years for which penalties were assessed.

86. We allow Mr Grimmer's appeal in respect of the failure to notify penalties.

87. We have not addressed whether there is an issue as to the time limit for assessing the penalties for the tax years 2015/16 and 2016/17. 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, we 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 us and, in view of our conclusion on reasonable excuse, even though this issue relates to the validity of the penalties, we considered that it would not be in accordance with the overriding objective 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

88. Mr Grimmer's appeal against the assessments for the tax years 2017/18 to 2019/20 (inclusive) is refused.

89. Mr Grimmer's appeal against the assessments for the tax years 2015/16 and 2016/17, and against the penalties for all of the tax years in question, is allowed. These two assessments and all of the penalties are cancelled.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

90. 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: 2nd FEBRUARY 2024