TC07832

INCOME TAX - High Income Child Benefit Charge ('HICBC') – Whether assessment valid - appeal dismissed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2017/09335

BETWEEN

MARTIN RICHARD BOX **Appellant**

-and-

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

TRIBUNAL: JUDGE ABIGAIL HUDSON
MOHAMMED FAROOQ

The hearing took place on 3 August 2020. With the consent of the parties, the form of the hearing was V (video), with all parties attending by Tribunal video platform. A face to face hearing was not held because Covid19 restrictions made it inappropriate. The documents to which we were referred are within a bundle paginated to page 131, and an authorities bundle to page 533. We have also had sight of the speaking notes of the litigator for the Respondent, the written submissions for the Respondent dated 5 August 2020, and written submissions for the Appellant dated 16 August 2020, received by us on 18 August 2020.

I directed that the hearing should be in private on the basis that it was not in the public interest during the pandemic to hold a face to face hearing open to the public and that it was in the public interest for the hearing to go ahead remotely which by necessity meant it must be in private.

Mr Box in person for the Appellant

Connor Fallon, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. The appellant appeals against discovery assessments in the sum of £2,772.00 imposed under section 29 of the Taxes Management Act 1970 (TMA 1970) for the tax years 2013-14 to 2015-16 inclusive.

PRELIMINARY ISSUE

2. At the outset of the hearing Mr Fallon indicated that there was to be an application to stay served imminently in relation to all HICBC assessment cases. That application was to be sought due to conflicting judgments in the cases of *Haslam v HMRC* TC/2018/06267 (FTT) and *Wilkes v HMRC* TC/2019/01613 (FTT). He did not seek a stay in this case but sought guidance on whether he should. He outlined that the *Wilkes* judgment is subject to appeal. Mr Box had not argued the "*Wilkes* point" prior to the hearing but confirmed that he understood that there was dispute as to whether the assessment in his case (and others), was valid. We indicated that we did not agree with the *Wilkes* conclusions and enquired whether he would wish to adjourn to await the decision of the Upper Tribunal. Mr Box said that he understood that we were against him in relation to the "*Wilkes* point", but wished to proceed in any event today. Given the significant age of this case and the value of the appeal, we considered it disproportionate to adjourn the hearing, in particular to await a decision that may not support the Appellant. In proceeding we acknowledge that if the Upper Tribunal did support the Appellant's contentions on the "*Wilkes* point", that would give rise to a further opportunity to appeal should that be appropriate.

BACKGROUND

3. Mr Box was not issued with, nor has he ever filed a tax return for the years under dispute.

4. He has had an ANI exceeding £50,000 throughout the relevant years.

5. On 4 May 2017, HMRC issued income tax assessments (relating to HICB charge liabilities) on Mr Box under s29 TMA as follows:

    (1) 2013-14: £609

    (2) 2014-15: £1,066

    (3) 2015-16: £1,097

6. Although failure to notify penalties were initially raised they were subsequently cancelled and form no part of this appeal.

7. Mr Box notified HMRC of an appeal against these assessments by letter dated 27 May 2017.

8. By letter dated 2 November 2017, HMRC explained their view of the matter to Mr Box, being that the assessments were due and payable.

9. Mr Box notified his appeal to the Tribunal by notice of appeal dated 25 November 2017.

THE LAW

10. The legislation on HICBC is under Schedule 1 to the Finance Act 2012. The enactment amended provisions in the Income Tax (Earnings and Pensions Act) 2003 ('ITEPA') by introducing HICBC in Chapter 8, Part 10 of ITEPA.

11. In summary, with effect from 7 January 2013, households where a parent's 'Adjusted Net Income' ('ANI') exceeds £50,000 in a tax year are affected by HICBC. For each £100 over the threshold of £50,000, a 1% tax liability arises on the amount of child benefit received

in the year. Where a parent's ANI is £55,000, the HICBC equates to 50% of the sum of child benefit received, and when the higher earner of a household has an ANI of £60,000 or above, the HICBC equates to 100% of the child benefit received, with the result that such a household will often opt to stop receiving child benefit altogether.

12. Under s 7(1) of the Taxes Management Act 1970 ('TMA'), an individual who is liable to an income tax or capital gains tax charge for a year of assessment is required to notify HMRC of such a liability within six months of the end of the tax year in question. An income tax liability under s 7(1) TMA includes a HICBC liability.

13. The obligation is on the individual to notify HMRC of the level of income and to register to receive a self-assessment tax return for HICBC to be assessed. A failure to notify the HICBC liability gives rise to a penalty imposable under Sch 41 to FA 2008.

14. The first tax year for HICBC to arise was 2012-13, and the charge was applied with reference to the amounts of child benefit received from the week beginning after 6 January 2013. A couple can choose whether to claim child benefit, but if they do, and one partner has an ANI over £50,000, that partner will be liable to HICBC.

15. Under s 29 TMA, HMRC are purportedly empowered to raise a discovery assessment to recover the amount of HICBC that would have been payable for a relevant tax year.

16. In *Charlton v HMRC* [2012] UKFTT 770 (TCC) (a decision of the Upper Tribunal), the Upper Tribunal stated at paragraph 37:

> "In our judgment, no new information, of fact or law, is required for there to be a discovery. All that is required is that it has newly appeared to an officer, acting honestly and reasonably, that there is an insufficiency in an assessment. That can be for any reason, including a change of view, a change of opinion, or correction of an oversight. The requirement for newness does not relate to the reason for the conclusion reached by the officer, but to the conclusion itself..."

17. Paragraph 37 of *Charlton* was cited with approval by the Court of Appeal in *Tooth v HMRC* [2019] EWCA Civ 826 at [60]. The Court of Appeal in *Tooth* also held that it was possible for a discovery to become "stale" such as to render invalid an assessment under s29(1) TMA 1970.

18. As to the validity of assessments, and in particular how interpretation of the statute should be approached, in the case of *Inco Europe Ltd v First Choice Distribution (a firm)* [2000] 2 All ER 109 (page 115), Lord Nicholls of Birkenhead recognised that the relevant provision in the Schedule to the Arbitration Act "read literally and in isolation from its context" precluded any right of appeal. His Lordship held that "Several features make it plain beyond a peradventure that on this occasion … something had gone awry in the drafting". He went on to conclude that "in suitable cases, in discharging its interpretative function the court will add words, or omit words or substitute words" (page 592C-D). However, he further held that the power was strictly confined "to plain cases of drafting mistakes":

> "The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that

by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation ..."

19. Lord Nicholls went on to say that even where these three conditions were met the court may find itself inhibited from interpreting the statutory provision in accordance with what it is satisfied was the underlying intention of Parliament."

FINDINGS OF FACT

20. The facts of this case were agreed. We find as follows:

- Ms Deborah Holmes was in receipt of child benefit prior to 2013.
- That child benefit was in relation to her daughter Grace.
- Mr Box moved in to 42 Maudesley Avenue on 6 September 2013, and Ms. Holmes moved in a few days later with her daughter.
- They lived together as 'partners' in a joint household.
- From 4 October 2013 Ms Holmes was registered to receive child benefit at 42 Maudesley Avenue.
- Mr Box' adjusted net income for income tax purposes ("ANI") exceeded £50,000 for each of the three years in question.
    - For 2013-14 it was £80,988.08;
    - For 2014-15 it was £77,742.18; and
    - For 2015-16 it was £78,052.10
- It was greater than Mrs Holmes' ANI throughout that period.
- Mr Box did not submit a tax return, and HMRC did not issue him a notice to file.
- Upon Mr Box receiving notification of the HICBC, Ms Holmes cancelled her Child Benefit claim.
- Mr Box and Ms Holmes continue to live together as partners in one household.

21. Mr Box is father to Charlie – born in 1995 and Harry – born in 1997. Their mother is his ex-wife Mrs Karen Box. Mrs Box was in receipt of child benefit until September 2013 in relation to Charlie and until September 2015 in relation to Harry. During the relevant years neither she nor those children resided with Mr Box. The assessments subject to this appeal are not related to Mrs Karen Box or her children.

22. HMRC wrote to Mr Box at 42 Maudesley Avenue in an "opening letter" dated 7 April 2017, explaining the HICB charge and asking him to contact HMRC.

23. Mr Box phoned HMRC on 21 April 2017 in response to their letter. He confirmed that his ANI exceeded £50,000. By letter dated 25 April 2017 the Appellant asked for information about the partner and about the child. HMRC responded by letter dated 8 May 2017 declining to give details due to the Data Protection Act.

24. HMRC did initially charge a "failure to notify" penalty, but this has been subsequently withdrawn as they considered that Mr Box had a reasonable excuse for not notifying them of his income tax chargeability under s7 TMA.

25. On 4 May 2017, HMRC issued a decision letter, together with a discovery assessment charging HICBC in the total sum of £2,772 for the years in question.

The appellant's case

26. From the Notice of Appeal and the appellant's representations at the hearing, his grounds of appeal are as follows:

    (1) He did not receive any child benefit payments into his own account and therefore the HICBC is not relevant to him.

    (2) He did not receive any child benefit payments into his own account and therefore the money cannot be classed as his income.

    (3) HMRC were not willing to provide a partner name and child name in relation to the case, and thus made it impossible for him to understand the charge.

    (4) the time taken to inform him of HICBC from when it became law is excessive and unreasonable.

HMRC's case

Validity of assessments made under s29(1) TMA: was there a valid discovery?

27. HMRC submitted that there had been a valid discovery by Officer Kimiti:

    (1) Discovery looks at an HMRC officer's subjective state of mind, requiring the officer to have reached a conclusion of tax loss on the basis of the evidence as regards an individual's liability for a year of assessment. When this conclusion of tax loss is satisfied, a discovery is made. This conclusion must be one which is objectively justifiable.

    (2) The fact that an outside observer could or would conclude HMRC had the information some time earlier to make a discovery or could have obtained that information, is not relevant.

    (3) Discovery was made by Officer Kimiti on 21 April 2017. The assessments were raised under s29(1) TMA and notified to the appellant on 4 May 2017: the discovery cannot be said to have become "stale", having been made only two days after the discovery.

Responses to criticisms of HMRC's administration and conduct

28. The appellant may feel that HMRC could or should have acted sooner and notified Mr Box of his liability, but there is no obligation in law for HMRC to take action any sooner than they did.

Validity of assessments made under s29(1) TMA: what was discovered?

29. Where s29(1)(a) TMA 1970 refers to "income", HMRC's view was that this means any amount liable to income tax; this requires a purposive, as opposed to a literal interpretation to be applied. They contend that the word "income" should be read as "any amount liable to income tax", as opposed to the words read into the act in the judgment of *Wilkes* "by adding in the following underlined words "that any income which ought to have been assessed to income tax, <u>or any high income child benefit charge under section 681B of the Income Tax (Earnings and Pensions) Act 2003 which ought to have been charged</u>, or

chargeable gains which ought to have been assessed to capital gains tax have not been assessed...")."

30. HMRC argued that such an approach to statutory interpretation was common practice and in line with Parliament's intention. They made the following submissions as regards Parliament's intention when enacting the legislation relevant to the appeal.

    (1) Income tax is charged, not just on "income", but also through income tax "charges" such as the HICB charge: this can be seen in s3 Income Tax Act 2007.

    (2) Due to s7(3) TMA, all taxpayers who are liable to a HICB charge and have not been given notice to file by HMRC (s8 TMA) must give notice of their chargeability to HMRC (s7 TMA). Parliament's intention, that everyone liable to an HICB charge notify their income tax chargeability to HMRC, is unequivocal. Once they have notified chargeability, then it can be said to be standard practice for HMRC to issue a s8 TMA notice to file and the taxpayer can expect to receive that notice. The taxpayer is then obliged to self-assess their liability.

31. Here, HMRC argued, Mr Box's failure to notify his income tax chargeability under s7 TMA has led to a loss of tax. Consequently HMRC were empowered to make an assessment under s29(1)(a) TMA.

32. HMRC argued that interpreting "income" literally would not only prevent HMRC from fulfilling their statutory obligation to collect the amount of tax due, but additionally undermine the income tax system. It would provide an advantage (in cases of income tax imposed by "charge") to taxpayers who failed to comply with their s7 TMA obligations by not giving notice of their chargeability, over those who do comply.

33. HMRC argued that Parliament cannot have intended that HMRC be prevented from assessing a liability to income tax - such a situation would lead to an "absurd" conclusion.

Discussion

Validity of assessments made under s29(1) TMA: was there a valid discovery?

34. It is not clear to us that Mr Box in fact disputes that the HICBC is properly assessed, or that he would have been liable to that charge. His case is that the Respondent should not be entitled to pursue the debt so long after the debt was accrued. It is not disputed that Officer Kimiti reached a conclusion that there had been a loss of tax and that she was correct in that conclusion.

35. We do accept that no child benefit was paid into Mr Box's personal account, but the nature of child benefit is that it is paid to one member of a household, and so there is always the potential for there to be another member of the household who does not receive the monies directly. Mr Box explicitly states that the house in which he lives is owned solely by him and therefore it is reasonable to assume that he knows who lives in it at any one time. He clearly knows that during the relevant years Ms Holmes and her daughter Grace lived at 42 Maudesley Avenue with him.

36. Mr Box states in letters sent to the Respondent that he has no way of confirming the amounts paid in child benefit. That is not accurate. He could have asked his partner. One of his complaints is that because the Respondent would not initially disclose the identity of the person claiming the benefit or of the child in question that he could not understand the case against him. That is not accurate. He was told that someone in his household was claiming child benefit. He could have asked his partner. Indeed, it was clear that if someone in his household was claiming child benefit and it was not him, it must have been her.

37. He goes on to say that he had no reason to keep abreast of tax changes that may impact him, but he was aware that a child was living in his household with her mother, and he was therefore aware that there was the potential for someone in his household to claim child benefit. He has two children of his own and therefore the child benefit system is not outwith his frame of reference. His case is that he may have been subconsciously aware that his partner may have a child benefit claim, but he had no idea that that could have any impact upon him. However, it did have an impact upon him in that his household was having the benefit of those monies. Mr Box asserts that HMRC informed him of the HICBC on 7 April 2017 and states by implication that he only became aware of the change in the law at that date. We accept that.

38. We make it clear that there is no criticism of Mr Box throughout our conclusions. We fully accept that he did not know about the HICBC and that he had no intention to avoid payment of taxes properly due. However, the fact that he was not aware of the tax is only relevant to the issue of penalties, and of whether he may have had a reasonable excuse for failure to notify. It cannot be relevant to whether the tax is therefore due. To conclude otherwise would mean that anyone who wilfully refused to read letters about child benefit from the Respondent on the grounds that it didn't apply to them, would be able to avoid paying the tax.

Was the discovery upon which the s29(1) TMA 1970 assessments was based had become "stale"?

39. A discovery occurs where it newly appears to an officer, acting honestly and reasonably, that there is an insufficiency in an assessment. Such a threshold is not crossed merely because HMRC are in possession of different pieces of information which, if put together, would justify an assessment being made. "The cohort of taxpayers likely to be affected by HICBC is not readily identifiable from the information held by HMRC, especially when the recipient of the child benefit and the taxpayer liable to HICBC are not the same person, as is the case here" *(Johnstone v HMRC* [2018] UKFTT 689 (TC)). We have no reason to believe that Officer Kimiti was not acting honestly and reasonably.

40. Upon Mr Box confirming his income during a telephone call on 21 April 2017 Officer Kimiti considered that there was an insufficiency in an assessment, and raised discovery assessments issued on 4 May 2017. The assessment was made as soon as discovery occurred. The discovery assessments for the HICBC arrears were raised within the statutory time limits of four years (s 34 TMA). We conclude that the discovery was not stale.

41. Mr Box stresses that in his view HMRC's conduct has been unreasonable and that the system is wholly inefficient. Clearly, the obligation of complying with personal tax liabilities is on the taxpayer, and there is no obligation upon HMRC to notify of the liability at all. There is however a time limit of four years under statute for the Respondent to seek payment, and the Respondent was within those four years.

Can s 29(1) TMA 1970 can properly be used to assess a person to HICBC and in particular whether HICBC is "income" within the meaning of s 29(1) TMA 1970?

42. Although it formed no part of Mr Box's appeal, the Respondent properly drew our attention to the conflicting judgments of *Haslam* and *Wilkes*. Both are judgments of the First-Tier Tribunal and therefore not binding on this Tribunal, however, the judgment of *Wilkes* is under appeal to the Upper Tribunal. Should the Upper Tribunal confirm *Wilkes*, that may

have a direct effect upon the findings herein. However, pending such an appeal, it remains for us to reach our own conclusions. We have therefore considered whether s 29(1) TMA 1970 can properly be used to assess a person to HICBC and in particular whether HICBC is "income" within the meaning of s 29(1) TMA 1970.

43. It seems to us clear in this case (if not common ground between the parties) that on the plain meaning of the statute implementing the HICB charge, Mr Box was liable to that charge for the three years in question, in the amounts assessed by HMRC.

44. For the reasons explained at paragraphs 47-49 of *Jason Wilkes*, both Tribunals in *Wilkes* and *Haslam* agreed that HICBC is not "income" within the meaning of s 29(1)(a) TMA 1970. The Tribunal in *Haslam* concluded that that leads to an absurd and unjust result in that taxpayers who are liable to HICBC but do not file a tax return (despite this being required by s 7 TMA 1970) cannot be issued with a discovery assessment and can only be assessed to HICBC if, within 4 years of the relevant tax year, HMRC issue a notice to file (whereas statute provides for an extended time limit of 20 years to raise discovery assessments if there has been a failure to notify under s 7 TMA 1970). The absurdity is highlighted by the scenario posited by HMRC: a taxpayer who is liable to the HICBC but deliberately fails to file a return is in a considerably better position than a taxpayer who has filed a return but has deliberately (or carelessly) failed to declare liability to HICBC. We agree with this analysis.

45. In *Reeves v HMRC* [2018] STC 2056, the Upper Tribunal summarised the case law on statutory construction as follows:

> " The role of the court in correcting anomalies created by the literal wording of tax legislation has been considered on many occasions. In *Jenks v Dickinson* (HM Inspector of Taxes) [1997] STC 853, Neuberger J cited passages from earlier authorities including *Mangin v Inland Revenue Commissioner* [1971] AC 739 where Lord Donovan had said that the object of the construction of the statute being to ascertain the will of the legislature, it may be presumed that neither injustice nor absurdity was intended. If therefore a literal interpretation would produce such a result, and the language admits of an interpretation which would have avoided it, then such an interpretation may be adopted. Further the history of an enactment and the reasons which led to it being passed may be used as an aid to its construction..."

46. The difference then between the two judgments is that in *Haslam*, the Tribunal concluded that it is possible and permissible to rectify this absurdity and injustice by reading words into s 29(1) TMA 1970. The reasoning given in *Haslam* is as follows:

> "67. Applying the three-stage approach set down in *Inco Europe:*
>
> (1) We are abundantly sure that the intended purpose of s 29(1)(a) TMA 1970 is to allow HMRC to make good a loss of tax to the exchequer where under-assessed tax is discovered. The intended purpose of s 36 TMA 1970 is to allow HMRC 20 years to issue assessments where chargeability (including to HICBC) has not been notified as required by s 7 TMA 1970.
>
> (2) We are abundantly sure that Parliament's failure to amend s 29(1)(a) TMA 1970 so as to include within it the HICBC was due to inadvertence. Having determined that liability to HICBC should be notified to HMRC by way of filing a tax return (and amending s 7 TMA 1970 accordingly), we find it inconceivable that Parliament

intended that HMRC be prevented from assessing a taxpayer that failed to comply with that obligation unless and until HMRC issued to that taxpayer a notice to file given that such an approach would lead to the absurdities and injustice referred to …

(3) We are abundantly sure that, but for this inadvertence, Parliament would have added to s 29(1)(a) TMA wording to the effect that the HICBC could be assessed under that provision (e.g. by adding in the following underlined words "that any income which ought to have been assessed to income tax, or any high income child benefit charge under section 681B of the Income Tax (Earnings and Pensions) Act 2003 which ought to have been charged, or chargeable gains which ought to have been assessed to capital gains tax have not been assessed...")."

47. We agree that a purposive interpretation must be preferable to a literal interpretation. We are then left with two suggested purposive interpretations:

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

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

OR

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

(a) that any income which ought to have been assessed to income tax, or any high income child benefit charge under section 681B of the Income Tax (Earnings and Pensions) Act 2003 which ought to have been charged, *or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed,*

48. One way of avoiding the absurdity and injustice would be to read "income" as meaning "any amount liable to income tax" . HMRC contend that this is the correct approach. The Respondent's reasoning for seeking this interpretation is as a means of insuring other legislation has the benefit of that interpretation, however, we have not heard submissions on other legislation and for the purposes of this case, it is unnecessary for us to go beyond whether the legislation should be read in such a way as to make HICBC 'income' for the purposes of s29. In addition the Tribunals in *Wilkes* and *Haslam* did consider the broader interpretation contended for by the Respondent, and we agree with their conclusion. Neither Tribunal considered that this was an appropriate course for the reasons set out at paragraph 52(4) of *Jason Wilkes*:

"Our most profound doubt is as to whether the statutory language would admit of the interpretation HMRC propose - or indeed any other interpretation that would eliminate the anomaly identified at [50] above. It is in our view impossible to conflate, as HMRC propose in interpreting "income which ought to be assessed" as meaning "amounts which ought to be assessed", two quite different figures: the figure for the overall income tax liability, and the figure for the income which is adjusted for various matters, and then subjected to a rate of tax, before emerging as an amount of tax due. In our view the statutory language does not admit of such conflation."

Disposition

49. The appeal is accordingly dismissed; the assessments in the sum of £2,772 are confirmed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

50. 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.

ABIGAIL HUDSON
TRIBUNAL JUDGE

RELEASE DATE: 07 SEPTEMBER 2020