



Neutral Citation: [2023] UKFTT 1006 (TC)

Case Number: TC09009

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

In public by remote video hearing

Appeal reference: TC/2022/14195

HICBC – application to make a late appeal – application refused

Heard on: 23 November 2023

Judgment date: 01 December 2023

Before

**TRIBUNAL JUDGE NIGEL POPPLEWELL
MR MICHAEL BELL**

Between

CLIVE GREEN

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: In person

For the Respondents: Sawdah Mia litigator of HM Revenue and Customs’ Solicitor’s Office

DECISION

INTRODUCTION

1. This decision deals with an application by the appellant for permission to make a late appeal against discovery assessments issued to him on 9 October 2018 to make good the loss of tax in respect of the High Income Child Benefit Charge (“**HICBC**”) for the tax years 2014/2015 (£336), 2015/2016 (£711) and 2016/2017 (£733) (“**the discovery assessments**”).
2. Notwithstanding that the discovery assessments were issued on 9 October 2018, the appellant did not make an appeal to HMRC against any of them until 10 October 2021 (approximately 1067 days late). HMRC have not agreed that the appellant may bring a late appeal, so the appellant applies to us to exercise our discretion to allow him to do so. HMRC opposes the application.
3. For the reasons given later in this decision, we have dismissed the appellant’s application.

THE LAW

HICBC

4. There was no dispute between the parties as to the relevant HICBC legislation which we summarise below.
5. By section 681B 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) His adjusted net income for the year is greater than £50,000.
 - (2) His partner’s (“partner” is defined in section 681G) adjusted net income is less than his.
 - (3) He or his partner are entitled to child benefit.
6. The assessments have been raised pursuant to HMRC’s discovery assessment powers as provided in section 29 Taxes Management Act 1970 (“**TMA**”). 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 the case of *HMRC v Jason Wilkes* [2020] UKUT 0150 (TCC) (“*Wilkes*”) the UT determined that HMRC had no power to make a discovery assessment in respect of the HICBC on the basis that the 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.
7. Following the decision in *Wilkes* the provisions of section 97 Finance Act 2022 (“**Section 97**”) were enacted such that section 29 TMA was amended providing for a discovery assessment to be issued where “an amount of income tax ... ought to have been assessed but has not been assessed” thereby providing for HICBC to be assessed by way of discovery assessment.
8. Whilst the provision is generally only prospective Section 97 also provides that where a discovery assessment has been made to collect HICBC prior to tax year 2021/22 the provision is retrospective unless 1) pursuant to section 97(5) a notice of appeal was given to HMRC in respect of the assessment prior to 30 June 2021 and the *Wilkes* basis of challenge was asserted in that appeal on a date prior to 30 June 2021; or 2) pursuant to section 97(6) a notice of appeal

was given to HMRC in respect of the assessment prior to 30 June 2021, the appeal was the subject of a temporary pause which occurred prior to 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”.

9. The appeals which are subject to the retrospective statutory amendment are defined as “protected appeals”. In this regard the protection offered is to HMRC and not the taxpayer.

10. By virtue of section 34(1) TMA, HMRC may raise a HICBC discovery assessment at any time within 4 years of the end of the tax year to which it relates. They also have the power, in consequence of section 36(1A) TMA, to raise the assessment within a period of 20 years of the year of assessment where the loss of tax arises because of a failure to notify liability to a charge to tax under section 7 TMA. That section provides that if a person is chargeable to income tax, they must notify HMRC of that fact within 6 months after the end of the tax year. But if their income consists of PAYE income and they have no chargeable gains they are not required to notify their chargeability to income tax unless they are liable to the HICBC. In consequence of the provisions of section 118(2) TMA, the 20-year assessment provisions do not apply where the taxpayer establishes a reasonable excuse for the failure to notify their liability under section 7. However, HMRC will always have a period of 4 years in which to make a discovery assessment for a protected assessment.

11. Section 7 TMA provides that if a person is chargeable to income tax he must notify HMRC of that fact within 6 months after the end of the tax year. But if his income consists of PAYE income and he has no chargeable gains he is not required to notify his chargeability to income tax unless he is liable to the HICBC.

Late appeal

12. When deciding whether to give permission, the tribunal is exercising judicial discretion, and the principles which should be followed when considering that discretion are set out in *Martland v HMRC* [2018] UKUT 178 (TCC), (“*Martland*”) in which the Upper Tribunal considered an appellant’s appeal against the FTT’s decision to refuse his application to bring a late appeal against an assessment of excise duty and a penalty. The Upper Tribunal said:

“44. When the FTT is considering applications for permission to appeal out of time, therefore, it must be remembered that the starting point is that permission should not be granted unless the FTT is satisfied on balance that it should be. In considering that question, we consider the FTT can usefully follow the three-stage process set out in *Denton*:

(1) Establish the length of the delay. If it was very short (which would, in the absence of unusual circumstances, equate to the breach being "neither serious nor significant"), then the FTT "is unlikely to need to spend much time on the second and third stages" - though this should not be taken to mean that applications can be granted for very short delays without even moving on to a consideration of those stages.

(2) The reason (or reasons) why the default occurred should be established.

(3) The FTT can then move onto its evaluation of "all the circumstances of the case". This will involve a balancing exercise which will essentially assess the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission.

45. That balancing exercise should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected. By approaching matters in this way, it can readily be seen that, to the extent they are relevant in the circumstances of the particular case, all the factors raised in *Aberdeen* and *Data Select* will be covered, without the need to refer back explicitly to those cases and attempt to structure the FTT's deliberations artificially by reference to those factors. The FTT's role is to exercise judicial discretion taking account of all relevant factors, not to follow a checklist.

46. In doing so, the FTT can have regard to any obvious strength or weakness of the applicant's case; this goes to the question of prejudice - there is obviously much greater prejudice for an applicant to lose the opportunity of putting forward a really strong case than a very weak one. It is important however that this should not descend into a detailed analysis of the underlying merits of the appeal”.

13. In *HMRC v BMW Shipping Agents* [2021] UKUT 0091, the Upper Tribunal relevantly said this:

“52. We will approach the third *Martland* stage by performing, as *Martland* requires, a balancing exercise. In that balancing exercise, the need for litigation to be conducted efficiently and at proportionate cost and for directions to be complied with must be given particular weight. However, it remains a balancing exercise which invites, among other considerations, a consideration of the nature of the reasons for the breach of direction and the results that would follow if the appeal is, or is not, reinstated”.

THE EVIDENCE AND THE FACTS

14. We were provided with a bundle of documents and Mr Green gave oral evidence on his own behalf. From this evidence we find as follows:

- (1) Throughout the three years under appeal, both the appellant and his wife were employees.
- (2) The first time that he or his wife became aware that he might be liable to the HICBC was when he received a letter dated 31 August 2018 from HMRC.
- (3) Following receipt of that letter, in September 2018, the appellant used HMRC’s HICBC online calculator. He realised that he owed HICBC, and telephoned HMRC to tell them that. He in turn was told that it was his responsibility to have made himself aware of the HICBC as it was on the news and in the newspapers. He was also advised to submit self-assessment returns for 2015 to 2019 and was sent instructions by HMRC as to how to do this.
- (4) He stopped claiming child benefit in October 2018.
- (5) On 9 October 2018 HMRC issued the discovery assessments.
- (6) On 1 November 2018 the appellant paid, in full, his liability under those discovery assessments.
- (7) On 10 October 2021 the appellant submitted a late appeal to HMRC to the discovery assessments. He also wanted to appeal against his self-assessment tax returns for the years 2017/2018 and 2018/2019.

(8) HMRC did not accept that the appellant had a reasonable excuse for failing to submit his appeal on time and told the appellant that this was the case. On 14 November 2022, the appellant responded explaining why his appeal should be accepted.

(9) On 26 December 2022, the appellant appealed to the tribunal for permission to bring a late appeal against the discovery assessments.

DISCUSSION

15. As we have mentioned above, when considering whether to allow the appellant to bring a late appeal, we are exercising a judicial discretion, and it is for the appellant to persuade us that we should do so.

16. The relevant principles that we have adopted in considering his position are set out above, and we shall discuss his arguments in the context of the three *Martland* criteria, namely; the length of the delay (and whether it is serious and significant), the reasons for that delay, and an evaluation of all the circumstances of the case.

The length of the delay

17. We start by considering the length of the delay. HMRC have calculated this as being 1067 days. The appellant does not challenge this and we find it as a fact. In both relative terms (the 30 day appeal period) and absolute terms, this is clearly a serious and significant delay.

Reasons for the delay

18. We now move on to establish the reason or reasons why the delay occurred. It is interesting that at this stage, *Martland* does not require us to evaluate whether those reasons are good or bad. We simply need to establish what they are. The consideration of the qualities of those reasons is the function of the third stage of the *Martland* test when they are weighed in the balance and tested against all the circumstances of the case including prejudice and respect for time limits.

19. The appellant submits that there are a number of reasons for the delay. He and his wife knew nothing of the HICBC, nor of their liability to pay it, until he received the nudge letter of 31 August 2018. The charge operates capriciously and unfairly, in that a couple with incomes each of £49,000 can claim benefit without being liable to the charge, but a couple one of whom earns £51,000, cannot and are so liable. He did not understand the process of filing a self-assessment tax return to report his liability to HICBC online. At the time of receiving the discovery assessments, he thought that there was no legal basis on which he could challenge them. At that time, he thought that the discovery assessments were lawful. He did not discover that they were unlawful until he read of the *Wilkes* decision in October 2021, whereupon he immediately submitted his appeal. Had he realised that he was able to challenge the discovery assessments on the basis of *Wilkes*, he would have done so at the time. He and his wife have always paid tax on time through the PAYE system.

Evaluation of all the circumstances

20. Having rehearsed these reasons, we now need to undertake the final evaluation stage. We must essentially assess the merits of those reasons and balance them against the prejudice which will be caused to the parties by granting or refusing permission. And when undertaking that balancing exercise, we must be conscious of the need for litigation to be conducted

efficiently and at proportionate cost, and for statutory time limits to be respected. We can also have regard to any obvious strengths or weaknesses of the appellant's case.

21. Unfortunately for the appellant we do not consider that his reasons for the delay are sufficiently meritorious.

22. As we explained to the appellant at the hearing, neither we, nor HMRC, can do anything about any perceived inequity which arises by the HICBC. Nor is it relevant that the appellant and his spouse have traditionally paid tax on a timely basis, nor that he found it difficult to complete a self-assessment return to rectify the position regarding HICBC. Furthermore, as HMRC point out, the appellant has no appeal right against his own self-assessment tax returns (and indeed the application for late appeals only relates to the discovery assessments).

23. We fully accept that the first time that the appellant became aware of the potential liability to the HICBC was when he received the nudge letter of 31 August 2018. We accept his evidence that neither he nor his wife had actual knowledge of the charge before that date, and given that he was an employee, it is understandable that he had no constructive knowledge. We accept that he had no obligation to delve into HMRC's electronic vaults to see whether there might have been, buried deep within them, some liability to charge or tax for which he might have become liable.

24. This is something which would have been highly relevant had HMRC assessed the appellant to penalties, or if the discovery assessments had been made more than 4 years after the end of the periods to which they relate. But neither is the case. The discovery assessments were issued on 9 October 2018 and therefore are in time for any period ending on or after 9 October 2014. The first tax year under assessment ended on 5 April 2015, i.e. within the 4 year period.

25. In our view the only reason of substance which was submitted by the appellant was that at the time of receiving the discovery assessments, he did not consider that he had any lawful ground to oppose them.

26. Ms Mia pointed out that the discovery assessments clearly set out, under the heading "**What to do if you disagree**", the fact that if the recipient disagreed with the assessment, he or she had a right to appeal. And that interpreting this does not require any particular degree of technical knowledge and was something which the appellant could have done. But this misses the point. We do not know whether the appellant had actually read this, but he was clearly an intelligent man and we suspect that he had. His issue was that he did not consider that he had a lawful ground of challenge.

27. And as soon as he realised that there was such a lawful ground, on discovery of the *Wilkes* case, he made a prompt appeal.

28. The problem we have with this is that we cannot see why the appellant, in October 2018, thought that he had no lawful ground to make an appeal as he had no idea at that time about the issues in *Wilkes*. And it seems odd to us that he was able to include, in his notice of appeal to the tribunal, in 2022, a number of reasons why he disagreed with HMRC's decision, only one of which relates to *Wilkes*. It seems to us that he could have made them in 2018. Furthermore, our experience is that many taxpayers in the same situation as the appellant made timely appeals against assessments to HICBC well before the *Wilkes* judgment was released.

29. The appellant's appeal was made on 10 October 2021. This was after 30 June 2021, so there is no possibility that the safe harbour from retrospective assessment can apply to him even though he might have raised the *Wilkes* basis of challenge in that appeal.

30. We appreciate that it is for HMRC to establish the validity of the discovery assessments should this matter proceed to a substantive hearing. But we consider that it is likely, given our experience of other HICBC cases, that they will be able to provide evidence of the making of a discovery by an HMRC officer. Given that the appeal was made after 30 June 2021, and the discovery assessments are in time, we consider that the prospects of the appellant succeeding in his substantive appeal are very small.

31. The delay in bringing the appeal is serious and significant. We do not consider that the reasons given for that delay are meritorious. When balanced therefore against the prejudice which will be caused to the parties by granting or refusing permission, the balance weighs very heavily in refusing permission. We do not believe that the appellant has a realistic prospect of succeeding in his substantive appeal.

DECISION

32. For the foregoing reasons we refuse the appellant's application to bring his appeal against the discovery assessments out of time.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

33. 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.

**NIGEL POPPLEWELL
TRIBUNAL JUDGE**

Release date: 01st DECEMBER 2023