



Neutral Citation: [2024] UKFTT 00245 (TC)

Case Number: TC 09114

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2023/00404

HIGH INCOME CHILD BENEFIT CHARGE – discovery assessments in respect of HICBC liability – officer making discovery was not officer making assessment – validity of discovery assessment in absence of evidence as to person making it – whether assessments made in time - penalties for failure to notify liability – effect of failure of HMRC cross-examine appellant - ignorance of the law as a reasonable excuse – error in statement of case on quantum of penalties – consideration of an award of costs - s29 Taxes Management Act 1970 and Schedule 41, Finance Act 2008

Heard on: 22 January 2023

Judgment date: 20 March 2024

Before

**TRIBUNAL JUDGE ALEKSANDER
LESLIE HOWARD**

Between

PAUL BROWN

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: the Appellant in person

For the Respondents: A Aziz, litigator, of HM Revenue and Customs’ Solicitor’s Office

DECISION

INTRODUCTION

1. The form of the hearing was V (video) using the HMCTS video hearing service. The hearing was attended by the Appellant, the witnesses, and HMRC's representative. 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.

2. This is an appeal against the following assessments:

Date	Tax Year	Description	Amount
23 June 2021	2014/15	Discovery Assessment	£724.00
23 June 2021	2015/16	Discovery Assessment	£1097.00
23 June 2021	2016/17	Discovery Assessment	£1076.00
23 June 2021	2017/18	Discovery Assessment	£1076.00
24 June 2021	2014/15	Sch 41 Penalty	£195.48
24 June 2021	2015/16	Sch 41 Penalty	£296.19
24 June 2021	2016/17	Sch 41 Penalty	£290.52
24 June 2021	2017/18	Sch 41 Penalty	£290.52

3. In addition, interest is chargeable.

4. The discovery assessments are made under s29 Taxes Management Act 1970 ("TMA") in respect of the Mr Brown's liability to the High Income Child Benefit Charge ("HICBC"). and penalties were charged under Schedule 41, Finance Act 2008 ("Schedule 41") on the basis that he failed to notify HMRC of his liability to HICBC in accordance with his obligations under s7 TMA.

5. The assessments to HICBC were dated 23 June 2021 and the assessments to penalties were dated 24 June 2021.

6. On 5 July 2021, Mr Brown submitted an appeal to HMRC against both the tax assessments and penalties.

7. Following further correspondence, on 5 January 2023 HMRC wrote to Mr Brown with their view of the matter and inviting Mr Brown to either request a statutory review or to refer the appeal to the Tribunal. Mr Brown did not request a review and on 26 January 2023 filed a notice of appeal against both his liability to HICBC and penalties.

8. Witness statements were submitted from Jonah Pollitt, a caseworker in HMRC's Campaigns & Projects Team, and Richard Lambert a Senior HMRC Officer working in the Campaigns & Projects Team. Their statements were taken as read as their evidence in chief. Mr Lambert's evidence was not challenged, and he was not cross-examined by Mr Brown. Mr Pollitt was asked one question by Mr Brown (about whether Mr Brown's tax affairs would have been reviewed if he had been within self-assessment at the time). This question

was not relevant to the issues before us, and we have not taken it into consideration in reaching our decision.

9. Mr Brown gave oral evidence, but Ms Aziz chose not to cross-examine him.

10. Following the hearing, during our consideration of the evidence and the submissions of the parties, we noted that while there was evidence before us relating to the “discovery” by Mr Pollitt of Mr Brown’s liability to HICBC, there was no evidence relating to the making of the assessment in respect of HICBC. We gave HMRC an opportunity to make written submissions about the making of the assessment (and whether an assessment under s29(1) TMA could be made by someone other than the person making the “discovery”). This decision takes account of HMRC’s written submissions on this issue.

11. We also noted in our review of the evidence that, whilst HMRC’s statement of case and skeleton argument referred to penalties being assessed at 27% of the potential lost revenue. However, in their “view of the matter” letter, HMRC reduced penalties so that Mr Brown was given the maximum reduction as follows:

Tax year ended 5April	Penalty percentage (%)	Penalty amount
2015	20%	£144.80
2016	20%	£219.40
2017	20%	£193.60
2018	20%	£215.20

We asked HMRC to confirm whether they wished to continue to pursue penalties at the 27% rate. In their written submissions, HMRC apologised that there was an error in their statement of case and oral submissions, and confirmed that they were only seeking penalties at the rate of 20%.

12. The electronic documents to which we were referred at the hearing were a documents bundle of 162 pages, and HMRC's September 2023 version of their generic bundle relating to High Income Child Benefit Charge appeals of 865 pages.

BACKGROUND FACTS

13. The background facts are largely undisputed, and we find that they are as follows:

14. Mr Brown is an employee whose salary is subject to withholding of tax under PAYE.

15. In March 1992, Mr Brown's wife claimed child benefit in respect of their first child. Their second child was born in September 1994, and their third child was born in July 2000. The child benefit records included in the documents bundle show that child benefit had ceased to be paid in respect of the first and second children by September 2013, but that child benefit continued to be paid in respect of the third child until 3 September 2018.

16. Mr Brown’s evidence was that he asked to be registered into self-assessment from 5 April 2018 (after the periods under appeal) because his employer no longer provided a company car, but instead paid a car allowance – this meant that employees had to register for self-assessment in order to be able to claim their car expenses against their employment income. It is not disputed that Mr Brown was only registered for self-assessment for two tax years, as he found that the amount of tax relief he could claim was small and he concluded that the amount of tax that he saved was not worth the time and trouble (and risk of exposure to penalties) of filing a self-assessment return. Mr Brown did not receive notices to file tax returns under s8 TMA for any of the periods under appeal.

17. The amount of Mr Brown's adjusted net income for HICBC purposes is not disputed and was as follows:

Tax Year	Adjusted Net Income (“ANI”)	Child Benefit received	HICBC liability
2012/13	£33,064.60		£0.00 as ANI not over £50,000
2013/14	£49,655.50		£0.00 as ANI not over £50,000
2014/15	£58,845.96	£1066.00	£724.00
2015/16	£61,937.96	£1097.10	£1097.00
2016/17	£59,020.80	£1076.40	£1076.00
2017/18	£61,052.25	£1076.40	£1076.00

18. It is not disputed that Mr Brown failed to notify HMRC of his liability to HICBC for any of the tax years under appeal.

19. Mr Lambert’s witness statement described the extensive Government campaign in 2012 and 2013 to raise awareness of HICBC and its consequences using advertisements, television adverts and letters/mail shots to customers who would be affected. Of course, at that time, Mr Brown's income was below the HICBC threshold, and we consider that it is unlikely that he or his wife paid much attention to the campaign. Mr Lambert also described the “briefing” that was issued by HMRC in November 2012 to over a million higher rate taxpayers. His witness statement was very similar to witness statements given by other HMRC officers in other HICBC appeals. As it was entirely generic and focused mainly on attempts by HMRC to publicise HICBC to higher rate taxpayers in 2012 and 2013, and Mr Brown was not a higher rate taxpayer at that time, we did not find Mr Lambert’s evidence about these campaigns of any material assistance in this case.

20. On 2 January 2021, HMRC's computer system allocated Mr Brown's case to Mr Pollitt (Mr Pollitt’s witness statement says that he took up the case on 2 January 2019, but we assume that this is a typographical error). Mr Pollitt reviewed HMRC's records which showed that Mr Brown was sent "nudge" letters. dated 11 November 2019 and 10 December 2019. Mr Pollitt noted that Mr Brown had not responded to either of the nudge letters. Mr Pollitt’s witness statement did not address whether he checked HMRC’s records to see if these letters had been returned as undelivered. Mr Brown's unchallenged evidence was that he did not receive either of these letters.

21. Mr Pollitt’s review of HMRC’s records showed that Ms Brown had claimed Child Benefit and that Mr Brown's adjusted net income for 2014/15 to 2017/18 inclusive exceeded £50,000.

22. There is no evidence (whether from Mr Pollitt’s witness statement or otherwise) that Mr Brown had been sent any of the other targeted compliance letters that are mentioned in Mr Lambert’s witness statement. We infer, and find, that Mr Brown had not been sent any of the letters mentioned in Mr Lambert’s evidence – presumably because neither he nor Ms Brown were higher rate taxpayers at the time those targeted letters were sent.

23. Mr Pollitt issued an "opening letter" to Mr Brown on 11 February 2021 in respect of HICBC for the tax years 2014/15 to 2017/18. At this point, Mr Pollitt's involvement in Mr Brown's case ended, and neither Mr Pollitt's nor Mr Lambert's witness statements address what then happened.

24. Mr Brown telephoned HMRC on 17 February 2021, and told HMRC that he was not liable to HICBC after 2016 as his child benefit would have stopped as a result of his child having started work. Mr Brown was advised by the HMRC officer to contact the Child Benefit Office to obtain confirmation that the benefit payments had stopped, and then to revert back to HMRC so they can check this.

25. On 21 May 2021, a letter was sent to Mr Brown signed by the "HICBC Team" confirming the telephone call of 17 February, but noting that Mr Brown had not reverted back to HMRC with the result of his call with the Child Benefit Office. The letter states that HMRC agree that there is no liability for HICBC for "previous tax years", but that there is a liability to penalties for failure to register for self-assessment by 5 October 2021. The letter states that HMRC have decided that Mr Brown's behaviour was "non-deliberate" and "prompted". As Mr Brown had not provided all of the information sought in the 11 February letter, he would not be given full reduction in the penalty for "telling or helping" and that the penalty will be assessed at the rate of 27%.

26. On 26 May 2021 at 11:45 Mr Brown telephoned HMRC about the 21 May letter. Mr Brown kept a note of this conversation which was with an HMRC officer called "Henry". He was told by the officer that he owed no tax to HMRC. Ms Aziz explained to us that this would have been because no assessments for HICBC had been raised at that point – so no liability for the HICBC charge would be shown on HMRC's systems.

27. On 23 June 2021 HMRC raised assessments for HICBC, and assessments for penalties were issued on 24 June 2021. Mr Brown's behaviour was considered by HMRC to be "non-deliberate", and that any disclosure of his liability to HICBC was prompted, as he had made no attempt to notify HMRC of his liability prior to the February 2021 letter. Under paragraph 6 of Schedule 41, the minimum level of penalty for non-deliberate prompted disclosure (where the disclosure was made more than 12 months after the tax was due) is 20% of the potential lost revenue (in this case HICBC liability). A 27% penalty was assessed as Mr Brown had not given all the information requested in the 11 February letter, and so full mitigation for "telling" or "helping" was not given. The HICBC assessment letter is signed by the "HICBC Team". The penalty assessment and the penalty explanation letters are unsigned.

28. On 5 July 2021 at 15:15, Mr Brown telephoned HMRC. Again, Mr Brown kept a note of this conversation which was with an HMRC officer called "Leonie". Mr Brown was advised that no action was required by him in view of the pending legislation (presumably a reference to the legislation reversing the *Wilkes* decision). There is no record of this conversation on the printout of HMRC's records, but Ms Aziz explained that not all calls with HMRC would appear on "Self-Assessment Notes" – such as calls to the debt management unit. One of the comments made by Mr Brown in the course of giving evidence was that he telephoned HMRC on the various numbers given on their correspondence with him – but he found that he was dealing with different departments, and was constantly being referred by one department to another.

29. Mr Brown wrote to HMRC on 5 July 2021 appealing to the HMRC against the assessments and penalties.

30. On 22 October 2021, HMRC wrote to Mr Brown stating that they had suspended work on his case whilst they considered the impact of the decision of the Upper Tribunal in *Wilkes*

on his case. On 15 November 2022, HMRC wrote to state that they had resumed work on Mr Brown's case in the light of the legislative changes to the provisions for discovery assessments. Another letter was enclosed (of the same date) responding to Mr Brown's appeal letter and reconfirming HMRC's decision.

31. On 21 November 2022 Mr Brown wrote to HMRC confirming his appeal.

32. On 29 November 2022 HMRC replied to Mr Brown's letter, and offered to reduce penalties to 20% on the basis that Mr Brown had contacted HMRC on 17 February 2021, and so maximum reduction would be given for "telling, helping and giving".

33. On 5 January 2023, HMRC wrote to Mr Brown setting out their view of the matter and inviting him either to request a statutory review or appeal to this Tribunal. The letter confirmed the reduction in penalties to 20%. It is against that decision that Mr Brown now appeals. The Notice of Appeal was filed on 26 January 2023 and was in time.

THE LAW

34. HICBC was introduced with effect from 7 January 2013. HICBC is imposed on individuals who have an adjusted net income of more than £50,000 in a tax year where that individual or their partner or spouse is in receipt of Child Benefit. Where liability to HICBC arises in any tax year, the individual who is subject to the charge must notify HMRC of their liability to income tax pursuant to s7 TMA.

35. Until the Finance Act 2022 ("FA 2022") came into force on 24 February 2022, s29(1) (a) TMA 1970 provided, as far as relevant to this appeal, that:

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 chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or

[...]

the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.

36. Subsections (2) and (3) of s29 TMA only apply where the taxpayer has made and delivered a return and do apply in this case as Mr Brown did not make a self-assessment tax return in the years assessed.

37. The ability of HMRC to raise assessments under s29 TMA is subject to time limits set out in ss34 and 36 as follows:

34(1) Subject to the following provisions of this Act, and to any other provisions of the Taxes Acts allowing a longer period in any particular class of case, an assessment to income tax or capital gains tax may be made at any time not more than 4 years after the end of the year of assessment to which it relates.

34(2) An objection to the making of any assessment on the ground that the time limit for making it has expired shall only be made on an appeal against the assessment.

[...]

36(1) An assessment on a person in a case involving a loss of income tax or capital gains tax brought about carelessly by the person may be made at any

time not more than 6 years after the end of the year of assessment to which it relates (subject to subsection (1A) and any other provision of the Taxes Acts allowing a longer period).

36(1A) An assessment on a person in a case involving a loss of income tax or capital gains tax–

[...]

(b) attributable to a failure by the person to comply with an obligation under section 7,

[...]

may be made at any time not more than 20 years after the end of the year of assessment to which it relates (subject to any provision of the Taxes Acts allowing a longer period).

38. Section 7 TMA sets out the requirement for persons who are chargeable to income tax to give notice to HMRC that they are liable to income tax within 6 months of the end of the relevant tax year.

39. Section 118 TMA relevantly provides:

(2) For the purposes of this Act, ... where a person had a reasonable excuse for not doing anything required to be done he shall be deemed not to have failed to do it unless the excuse ceased and, after the excuse ceased, he shall be deemed not to have failed to do it if he did it without unreasonable delay after the excuse had ceased.

[...]

(5) For the purposes of this Act a loss of tax or a situation is brought about carelessly by a person if the person fails to take reasonable care to avoid bringing about that loss or situation

40. In summary, the time limit for HMRC to raise assessments under s29 TMA for loss of tax is four years after the end of the year of assessment to which it relates unless the loss was brought about carelessly, in which case the time limit is six years, or the loss is attributable to a failure to notify liability to income tax under s7 TMA, in which case the time limit for making an assessment is 20 years. However, HMRC cannot rely on the extended six-year time limit under s36(1) unless the person had failed to take reasonable care to avoid the loss, and are not able to rely on the 20-year time limit under s36(1A) if the person had a reasonable excuse for not notifying their liability to income tax.

41. In relation to assessments under s29 TMA to collect HICBC a series of decisions relating to an appeal brought by Jason Wilkes (ultimately confirmed by the Court of Appeal in *HMRC v Wilkes* [2022] EWCA Civ 1612) held that HICBC was “neither ‘income’ nor even charged on income” nor was it “income which ought to have been assessed to income tax” nor an “amount which ought to have been assessed to income tax” (see *Wilkes* at [29]). Accordingly, HICBC could not be assessed under s29(1)(a) TMA.

42. Section 29(1)(a) TMA 1970 was amended by s97 FA 2022 to read as follows:

that an amount of income tax or capital gains tax ought to have been assessed but has not been assessed

The change in wording introduced by s97 FA 2022 reversed the decisions in *Wilkes* and allowed HMRC to make discovery assessments, subject to the usual conditions, in relation to HICBC and some other tax liabilities.

43. The amended legislation has retrospective effect, but subject to an exception for discovery assessments in respect of HICBC in relation to which notice of appeal had been given to HMRC on or before 30 June 2021 which met certain conditions. The relevant provisions in s97 are as follows:

(3) The amendments made by this section—

(a) have effect in relation to the tax year 2021-22 and subsequent tax years, and

(b) also have effect in relation to the tax year 2020-21 and earlier tax years but only if the discovery assessment is a relevant protected assessment (see subsections (4) to (6)).

(4) A discovery assessment is a relevant protected assessment if it is in respect of an amount of tax chargeable under—

(a) Chapter 8 of Part 10 of ITEPA 2003 (high income child benefit charge),

[...]

(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.

44. In summary, the retrospective changes made by s97 FA 2022 do not apply to an appeal that was notified to HMRC on or before 30 June 2021 which concerned the issue identified in the decisions in *Wilkes* and that issue was raised by a party or this Tribunal before that date, or the appeal was subject to a temporary pause on or before 27 October 2021 because of that issue.

THE ASSESSMENTS TO HICBC

45. We agree with the comments made by Judge Hellier in *Morrow v HMRC* [2020] UKFTT 184 (TC) at [35] *et seq* that:

a taxpayer is potentially penalised for not letting HMRC know that he has chargeable income so that they can send him a tax return in which he can tell them what they already know.

But we are limited by the terms of the statute, which place the onus on the taxpayer to notify their taxability to HMRC.

46. As Mr Brown notified his appeal to HMRC on 5 July 2021, we find that this appeal does not escape the retrospective effect of s97 FA 2022.

47. There is no dispute that Mr Brown’s adjusted net income exceeded £50,000 for each of the tax years 2014/15 to 2017/18 inclusive, and he was therefore within the scope of HICBC for those years. We find that Mr Pollitt made a discovery of Mr Brown’s liability to HICBC for those years for the purposes of s29(1) TMA.

48. There is no evidence before us relating to the making of the assessments to HICBC other than the copies of the assessment letters. These are not signed by an identifiable individual, but are signed by “HICBC Team, HM Revenue and Customs”. The penalty assessments are unsigned.

Discovery Assessment Process

49. Section 29(1) TMA provides:

If an officer of the Board or the Board discover [...] that an amount of income tax or capital gains tax ought to have been assessed but has not been assessed [...] the officer or, as the case may be, the Board may [...] make an assessment [...]

50. This provision was considered in detail by the Supreme Court in *HMRC v Tooth* [2021] UKSC 17. At [68] the Supreme Court held that the provision operates by reference to the state of mind of a particular officer of HMRC, and not collective knowledge on the part of HMRC.

51. We note in HMRC’s manuals at EM3231 it says:

A discovery must be made by an individual officer. A discovery cannot be made by ‘HMRC’ or by a ‘team’ within HMRC.

We agree.

52. The drafting of s29(1) provides that if “an officer” makes a discovery, “the officer” may make an assessment. The use of the definite article carries with it the implication that where an HMRC officer makes a discovery, the power to make an assessment in respect of

the discovery lies with that same officer, and (subject to what we say below in relation to s2(4) Commissioners of Revenue and Customs Act 2005) with no one else – and we so find.

53. This construction is consistent with [69] of the Supreme Court’s decision where it says:

The position remains that, for the “officer” limb of section 29(1) in its current form, the provision is concerned with the state of mind and knowledge of the particular officer who claims to have made a relevant discovery and then purports to exercise the power to make an assessment which arises under that provision when that condition is fulfilled. This is the ordinary meaning of the words used in the provision, and there is good reason to construe them in this way. The officer in question needs to know if a discovery has been made in order to know if they have power under section 29(1) to issue an assessment and reference to their own state of mind enables them to know with confidence whether they have that power. This interpretation also appears to match the way in which the Revenue works in practice, as illustrated by the evidence in this case, where a taxpayer’s file is allocated to a particular officer to review and take relevant decisions and actions, drawing as necessary on advice or submissions presented to the officer by others. The provision contemplates that a particular officer will personally have full decision-making responsibility in relation to a taxpayer’s file.

54. The need for the assessment to be made by the officer who makes the discovery is also confirmed at [82] (where the Supreme Court considers an HMRC investigation being taken over by a new officer):

[...] it will be the second officer who makes the discovery which is relevant to clothe the officer with the power to issue an assessment under section 29(1). This makes the point, again, that section 29(1) contemplates that a particular officer has the responsibility for carrying out the exercise of re-evaluation and then issuing an assessment in light of it, and no one else can do that for the officer [...]

55. The Supreme Court notes at [70] and [71] that the same principles apply where an HMRC officer exercises the functions of the HMRC Board (there is no question, in this case, of the HMRC Board itself having made the assessment).

56. Ms Aziz submits that Mr Pollitt made the “discovery” for the purposes of s29(1), and we so find. However, Mr Pollitt’s own evidence is that he ceased to have any involvement in this case after the dispatch of the opening letter. Mr Pollitt was not the person who decided to make the assessment under s29(1).

57. Of course (as the Supreme Court held in *Tooth* at [78] and [82]) it is entirely possible that the discovery made by Mr Pollitt could subsequently be made (again) by another HMRC officer. In such a case, the other HMRC officer could then raise the s29(1) assessment. We also recognise that an officer making an assessment under s29(1) can legitimately delegate the administrative task of notifying the assessment to the taxpayer to someone else within HMRC.

58. However, in the circumstances of this case, we have no evidence as to the officer within HMRC who made the s29(1) assessment, and whether they made the assessment following their own “refreshed” discovery of Mr Brown’s liability to HICBC.

59. Ms Aziz drew our attention in her written submissions to s2(4) Commissioners of Revenue and Customs Act 2005. The Supreme Court held at [79] that:

This would allow for one officer to begin consideration of a file under section 29(1) of the TMA and make a discovery and then pass it on to another to complete the exercise of assessment without the second having to revisit the opinion of the first officer that there was an insufficient assessment to tax in the return.

60. In other words, s2(4) would allow Mr Pollitt to begin the consideration of a case, making the discovery under s29(1) TMA, and then passing the case on to another officer to complete the exercise by making an assessment.

61. The only evidence before us relating to the making of the s29(1) assessment is the letter notifying Mr Brown of the assessment - which was signed by the "HICBC Team". We note that HMRC in their manuals state that an assessment under s29 cannot be made by a team, but only by an individual officer of HMRC (or the HMRC Board acting as such) – which is consistent with the Supreme Court's decision in *Tooth*. We have no evidence before us as to the circumstances under which the s29(1) assessment was made, and in particular whether the assessment was made by an identifiable individual officer, and whether he made a fresh discovery himself, or whether he took over Mr Brown's file from Mr Pollitt in exercise of the powers in s2(4) Commissioners of Revenue and Customs Act 2005.

62. Although Ms Aziz did not raise the possible application of s103(1) Finance Act 2020 in her submissions, we have considered whether it might apply to a discovery assessment. Section 103(1) provides that anything capable of being done by an officer of HMRC may be done by HMRC (including by means of a computer). Section 103(2) then goes on to list various provisions to which s103(1) can apply. This list is plainly not exhaustive, but it is interesting to note that although the list includes various provisions of TMA (including s30A), it does not include s29(1). We consider that the omission is deliberate, as the making of a discovery (and any consequential assessment) under s29 is evaluative, and must necessarily relate to the state of mind of an individual officer, rather than of "HMRC" as a collective entity. We find that s103(1) cannot apply to discovery assessments made under s29.

63. Ms Aziz submits that if the evidence of Mr Pollitt is to be challenged, he should have been given the opportunity to respond to any such challenge in the course of cross-examination. Ms Aziz cites *Ives v HMRC* [2023] UKFTT 968 (TC) at [215] in support of this submission, although a more authoritative citation might have been *Tui UK v Griffiths* in the Supreme Court [2023] UKSC 48. However, Mr Pollitt's evidence is not disputed. We have found that he made a discovery for the purposes of s29. The open question is who made the assessment.

64. The onus of proof falls on HMRC to demonstrate that the requirements relating to the making of an assessment under s29(1) have been met. In the absence of any evidence about the officer who made the s29(1) assessment, they have failed to do so in this case, and we find that they have failed to meet the burden of proof that the assessments were validly made.

Assessment Time Limits

65. Even if we are wrong about the validity of the assessments, we would have found that only the assessment for the tax years 2017/18 was made within the applicable time limit.

66. In essence, the ordinary time limit under s34(1) TMA is four years but this can be extended to six and 20 years by s36(1) and (1A) respectively.

67. The assessment for HICBC for 2017/18 was made on 23 June 2021, which is within four years of the end of the 2017/18 tax year. If it were valid, it would have been made within the applicable time limit.

68. The assessments for the other tax years were made more than four years (but within six years) from their respective end dates. Accordingly, the assessments for tax years 2014/15, 2015/16, and 2016/17 were invalid unless Mr Brown had failed to take reasonable care to avoid not paying the HICBC (s36(1) TMA) or did not have a reasonable excuse for failing to notify HMRC that he was liable to pay HICBC (s36(1A) TMA).

Careless behaviour

69. HMRC's guidance on careless inaccuracy its Handbook at CH81120 states:

Every person must take reasonable care, but 'reasonable care' cannot be identified without consideration of the particular person's abilities and circumstances. HMRC recognises the wide range of abilities and circumstances of those persons completing returns or claims.

So whilst each person has a responsibility to take reasonable care, what is necessary for each person to discharge that responsibility has to be viewed in the light of that person's abilities and circumstances.

For example, we do not expect the same level of knowledge or expertise from a self-employed unrepresented individual as we do from a large multinational company. We would expect a higher degree of care to be taken over large and complex matters than simple straightforward ones.

70. At CH81140, HMRC acknowledge that:

People do make mistakes. We do not expect perfection. We are simply seeking to establish whether the person has taken the care and attention that could be expected from a reasonable person taking reasonable care in similar circumstances, taking into account the ability and circumstances of the person in question [...]

71. In *HMRC v Hicks* [2020] UKUT 12 (TCC) (not cited to us), the Upper Tribunal held at [120] that:

Whether acts or omissions are careless involves a factual assessment having regard to all the relevant circumstances of the case. There are many decided cases as to what amounts to carelessness in relation to the completion of a self- assessment tax return. The cases indicate that the conduct of the individual taxpayer is to be assessed by reference to a prudent and reasonable taxpayer in his position: see, for example, *Atherton v HMRC* [2019] STC 575 (Fancourt J and Judge Scott) at [37].

Reasonable excuse

72. The Upper Tribunal considered the correct test for reasonable excuse in *Perrin v HMRC* [2018] UKUT 156 (TCC). At [75], the Upper Tribunal concluded that the FTT in that case had correctly stated that "to be a reasonable excuse, the excuse must not only be genuine, but also objectively reasonable when the circumstances and attributes of the actual taxpayer are taken into account." The Upper Tribunal set out helpful guidance as to how the FTT should approach the issue of reasonable excuse at [81] of *Perrin* as follows:

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.”

73. The Upper Tribunal in *Perrin* then made the following further observation at [82]:

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.

74. The reference to *The Clean Car Co* in [82] of *Perrin* is to the decision of the VAT Tribunal in *The Clean Car Co Ltd v Custom and Excise Commissioners* [1991] VATTR 234. In that case, HH Judge Medd QC held:

[...] 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 in at the relevant time, a reasonable thing to do? Put in another way which does not I think alter the sense of the question: was what the taxpayer did not an unreasonable thing for a trader of the sort I have envisaged, in the position the taxpayer found himself, to do? ... It seems to me that Parliament in passing this legislation must have intended that the question of whether a particular trader had a reasonable excuse should be judged by the standards of reasonableness which one would expect to be exhibited by a taxpayer who had a responsible attitude to his duties as a taxpayer, but who in other respects shared such attributes of the particular appellant as the tribunal considered relevant to the situation being considered. Thus though such a taxpayer would give a reasonable priority to complying with his duties in regard to tax and would conscientiously seek to ensure that his returns were accurate and made timeously, his age and experience, his health or the incidence of some particular difficulty or misfortune and, doubtless, many other facts, may all have a bearing on whether, in acting as he did, he acted reasonably and so had a reasonable excuse.

75. The situation in *The Clean Car Co* was that the taxpayer had wrongly claimed input tax on the basis of an architect's certificate rather than a VAT invoice and became liable to a penalty as a result. The taxpayer appealed on the grounds that it had a reasonable excuse for the error, based upon a genuine belief that recovery of the input tax was permissible on the basis of the architect's certificate and the hospitalisation of the managing director's daughter. The Upper Tribunal in *Perrin*, having quoted the passage from *The Clean Car Co* above at [51], summarised the VAT Tribunal's decision at [52]:

The tribunal therefore decided that, even though the company (through its managing director) honestly and genuinely believed it had complied with its obligations, that was not enough on its own to afford it a reasonable excuse for the failure; but also that bearing in mind the managing director's unfamiliarity with the special rules applied to building contracts by the VAT legislation at the time and his daughter's serious illness, the excuse that was being put forward did satisfy the objective requirement of reasonableness that he had propounded, and did therefore amount to a reasonable excuse in law.

76. Another situation where ignorance of the law may constitute a reasonable excuse was identified by Simon Brown J, as he then was, in *Neal v Customs and Excise Commissioners* [1988] STC 131. The Upper Tribunal referred to this decision in *Perrin*, but the case itself was not cited to us. *Neal* concerned a 19-year-old model with no experience of tax, business or law who was subject to a late registration VAT penalty. She contended that her "total basic ignorance" of the law amounted to a reasonable excuse. The Tribunal disagreed. On appeal, having referred to s61 of Trustee Act 1925 and its predecessor legislation which provided a trustee with relief from a liability for a breach of trust if they had acted "honestly and reasonably and ought reasonably to be excused", Simon Brown J said (at 134-5):

They clearly establish that at least some degree of ignorance of the law may well constitute an exonerating excuse for a trustee. In that context, as in the value added tax legislation, the court is not concerned with ignorance of the law being raised as a defence, let alone to excuse conduct which is intrinsically immoral; rather it is invoked so as to secure relief from penalty in the absence of *mens rea*. The analogy, contends counsel for the taxpayer, is very close in that both trustees and taxpaying traders are concerned with self-administered duties. Indeed, the argument runs, taxpaying traders are more deserving of indulgence even than trustees because their status has been forced upon them and not, as in the case of trustees, voluntarily assumed by people to whom the law ascribes some business knowledge.

[...]

It seems to me essential to recognise a distinction between on the one hand basic ignorance of the primary law governing value added tax including the liability to register and on the other hand ignorance of aspects of law which less directly impinge upon such liability.

[...]

In the result, whilst not accepting the wider submissions of either party, I have decided that the tribunal was right to conclude that they were bound to reject the taxpayer's argument that she could invoke her ignorance of basic value added tax law as reasonably excusing her default. That, it is plain from the context, is all that the tribunal meant when they said that 'ignorance of the law cannot be an excuse'. This case was simply not concerned with the taxpayer's ignorance other than of basic value added tax law let alone ignorance of mixed law and fact. Had it been, then in my judgment the

tribunal ought certainly to take such matter into account as part of the overall facts of the case.

Discussion

77. The burden of proof falls on Mr Brown to show that he took reasonable care and had a reasonable excuse for his failure to notify.

78. We agree with the decision of this Tribunal in *Hextall v HMRC* [2023] UKFTT 390 at [74] and find that no meaningful distinction can be drawn between the criteria of “reasonable care” and “reasonable excuse”. In assessing whether Mr Brown was careless, we assess his conduct by reference to what would be expected of a prudent and reasonable taxpayer in the same position as Mr Brown, that is to say taking into account Mr Brown’s ability and circumstances. In considering whether Mr Brown had a reasonable excuse for his failure to notify his liability to HICBC, we must consider whether he had an excuse that is objectively reasonable, taking into account his attributes and circumstances. If Mr Brown satisfies us that he took reasonable care, then he will also have satisfied us that he had a reasonable excuse in the circumstances of this case and *vice versa*.

79. We apply the approach set out in *Perrin* in considering whether Mr Brown had a reasonable excuse or took reasonable care.

80. The relevant facts are that Mr Brown's income exceeded HICBC threshold in the 2014/15 tax year - as his adjusted net income for that year exceeded £50,000. Accordingly, he should have notified HMRC by no later 5 October 2015 that he was chargeable to HICBC and thus liable to make a self-assessment tax return for 2014/15. Mr Brown's case is that his wife’s last claim for Child Benefit was made in 2000 at a time when HICBC did not exist, and having never been sent information by HMRC about HICBC, it was reasonable for him in all the circumstances to fail to appreciate that he had become liable to HICBC and thus also liable to notify HMRC of his chargeability to income tax for the years under appeal.

81. Mr Brown's evidence, which was not challenged, was that his wife having last claimed child benefit in 2000, neither he nor she received any further communications from HMRC about HICBC. The first time that Mr Brown became aware that he was liable to pay HICBC was in February 2021 when he received HMRC's opening letter.

82. Ms Aziz submitted that, on the balance of probabilities, Mr Brown would have received the two nudge letters. She referred us to a House of Commons Library Report (included in the Generic Bundle) which stated that 99.8% of letters were correctly delivered by Royal Mail. But she did not cross-examine Mr Brown, and did not put the House of Commons Library Report to him. It is a basic principle of the laws of evidence that when a party intends to challenge the evidence of a witness, they must do so in the course of cross-examination so that the witness had an opportunity to respond to the challenge (see the decision of the Supreme Court in *Tui v Griffiths* [2023] UKSC 48 at [70]). We note that Ms Aziz raised this as an issue in respect of any challenge to Mr Pollitt’s evidence, but did not acknowledge that it was also an issue in respect of her challenge to Mr Brown’s evidence. Mr Brown's evidence that he did not receive the "nudge" letter was not challenged by Ms Aziz in the course of cross-examination, and we have no reason to disbelieve him. Mr Brown is a meticulous and careful individual who kept detailed notes of all his interactions with HMRC and copies of all correspondence. We find his evidence to be reliable and find that he did not receive the nudge letters.

83. In essence, Mr Brown seeks to rely on "ignorance of the law" as a reasonable excuse. On reasonable care, the essence of his case is that a prudent and reasonable taxpayer, having the same state of knowledge and in the same circumstances, would have behaved in the same way.

84. As the Upper Tribunal states in [82] of *Perrin*, it is a matter of judgment 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.

85. Ms Aziz also drew our attention to the fact that Mr Brown's adjusted net income for 2013/14 was only just under £50,000, and submitted that he should have been alert to the possibility that his adjusted net income for 2014/15 was at risk of exceeding £50,000. We do not accept this submission – this is not a case where a taxpayer was aware that HICBC applied if adjusted net income exceeded £50,000, but was not actually aware that his income exceeded that amount (for example because of large fluctuations in his income – perhaps due to the impact of bonuses). Rather Mr Brown's case is that he was not aware of the requirement to notify HMRC of his liability to HICBC, irrespective of the level of his income.

86. Mr Lambert's evidence described HMRC's publicity campaigns in 2012 and 2013 to alert higher rate taxpayers to the existence of HICBC and the consequent need to register for self-assessment. The Generic Bundle also included certain materials from such campaigns. However, we were not shown any evidence of campaigns or materials from 2015 or later which were intended to alert existing claimants of their obligations in relation to HICBC in the event that their income rose above £50,000 after they had begun to claim Child Benefit. And we have found that Mr Brown did not receive HMRC's "nudge" letter.

87. Was it objectively reasonable, in the circumstances of the case, for Mr Brown to have been unaware of the requirement to notify HMRC that he had become liable to HICBC, taking into account the fact that HICBC did not exist when Mrs Brown claimed child benefit and the absence of any subsequent communications, either by way of a general campaign aimed at those in their position or direct correspondence, in the tax years under appeal? We have not found this an easy case to decide. But, on balance, in the particular circumstances of this case, we find that it was objectively reasonable, in the circumstances of the case, for Mr Brown to have been unaware of the requirement to notify HMRC that he had become liable to HICBC for the 2014/15 tax year. We also find that, as nothing changed in relation to Mr Brown's awareness of his obligation to notify until HMRC wrote to him in February 2021. We find that Mr Brown has established that he had a reasonable excuse for failing to notify and did not fail to take reasonable care in relation to that and the subsequent tax years. Accordingly, the assessments in relation to the 2014/15, 2015/16, and 2016/17 tax years (had they been valid) were made out of time.

PENALTIES

Reasonable excuse

88. Paragraph 20 of Schedule 41 provides that a penalty will not arise in circumstances where the taxpayer has a reasonable excuse for his default.

89. We have found that Mr Brown had a reasonable excuse for his failure to notify HMRC of his liability to HICBC at [82] above for the purposes of the assessment time limits. The same principles apply as to whether Mr Brown had a reasonable excuse for the purposes of Schedule 41 and the penalty provisions. It therefore follows that we find that Mr Brown had a reasonable excuse for the purposes of paragraph 20. Accordingly, no penalties arise.

Quantum

90. Ordinarily, having found that Mr Brown had a reasonable excuse for his behaviour, we would not need to address the quantum of penalties in our decision – but for the reasons which will become apparent, we consider that it is appropriate to do so in the particular circumstances of this appeal.

91. Paragraph 1, Schedule 41 imposes a penalty in the circumstances listed in that paragraph. These include the failure to give notification under s7 TMA. We have found that Mr Brown did not notify HMRC of his liability to HICBC.

92. Paragraph 5 sets out the "degrees of culpability" – namely "deliberate and concealed" and "deliberate and not concealed". Paragraph 6 then sets out the standard penalty for the different degrees of culpability as follows:

- (a) for a deliberate and concealed act or failure, 100% of the potential lost revenue,
- (b) for a deliberate but not concealed act or failure, 70% of the potential lost revenue, and
- (c) for any other case, 30% of the potential lost revenue.

93. We note that for penalties to arise under (c), HMRC do not need to prove that the behaviour of the taxpayer was careless.

94. Potential lost revenue is defined in paragraph 7 (in the circumstances of this appeal) as being the unpaid income tax to which the taxpayer is liable by reason of his failure to notify HMRC. The definition is not linked to the amount of income tax assessed by HMRC – and so the invalidity of the assessment to HICBC does not necessarily invalidate the assessment to penalties. We find that the potential lost revenue is equal to the amount that was (invalidly) assessed by HMRC, subject to the reduction in the assessment for 2016/17 to £968.00.

95. HMRC levied penalties on the basis that Mr Brown's degree of culpability was "non-deliberate", in other words it falls within paragraph (c) and the standard penalty is 30% of the potential lost revenue.

96. Paragraph 13 provides for a reduction in the amount of the penalty where the taxpayer has provided disclosure to HMRC. HMRC's statement of case, and Ms Aziz's submissions at the hearing, supported penalties at the originally assessed 27% level. However, in HMRC's "view of the matter" letter of 5 January 2023, they gave Mr Brown the benefit of the maximum reduction allowed under that provision and proposed to reduce the penalty to 20% of the potential lost revenue. In her written submissions given after the hearing, Ms Aziz acknowledged that there was a mistake in the statement of case and in her submissions, and confirmed that the assessment to penalties should be reduced to 20%. She apologised for the error.

97. We agree that the maximum reduction should be allowed in this case. Mr Brown contacted HMRC and co-operated with their investigations. It is not his fault that HMRC's systems are not joined-up, and that conversations that he had with one section of HMRC are not visible to other sections. In particular, we can understand his confusion when he telephoned HMRC in May 2021 and was told that he had no outstanding liability. Whilst we appreciate that this was because the formal assessments had yet to be made, this would not be obvious or apparent to a lay taxpayer.

98. If we had not found that Mr Brown had a reasonable excuse, we would have found that the maximum reduction should be allowed in this case, and would have reduced the penalties charged to 20% of the potential lost revenue.

CONCLUSION

99. We have found that HMRC have not satisfied the burden of proof as to the validity of the assessments to HICBC under s29(1). We therefore allow Mr Brown's appeal against the assessments to HICBC.

100. If, on an appeal, we are found to have been wrong about the invalidity of the assessments, we would have found that the assessments for all the tax years under appeal, other than for the tax year 2017/18, were made out of time.

101. We have found that Mr Brown has a reasonable excuse for his failure to notify HMRC of his liability to HICBC. We therefore find that Mr Brown is not liable to any penalties.

102. We therefore allow Mr Brown's appeal in full.

COSTS

103. Even though HMRC's "view of the matter" letter confirmed that penalties would only be assessed at 20%, HMRC's statement of case and oral submissions at the hearing asserted that penalties at 27% (as originally assessed) should apply. This is a serious error that was buried in the documents bundle and had not been brought to our attention during the hearing. Clearly Mr Brown was also unaware of the error. If we had not discovered the error during our detailed reading of the bundles after the hearing, this error would have gone undetected, with the risk that penalties could have been levied at a higher percentage that HMRC had considered appropriate in correspondence. This is an issue of extremely serious concern. If we had found that Mr Brown did not have a reasonable excuse for his behaviour, we would have invited Mr Brown to make an application for costs against HMRC on the basis that their conduct of the appeal had been (as regards the quantum of penalties) unreasonable.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

104. 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.

**NICHOLAS ALEKSANDER
TRIBUNAL JUDGE**

Release date: 20th MARCH 2024