



Neutral Citation: [2024] UKFTT 00595 (TC)

Case Number: TC09234

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal reference: TC/2021/13433

HICBC – s97 FA 2022 - whether assessments “protected”- yes – matter to proceed to substantive appeal

Heard on: 12 April 2024

Judgment date: 23 May 2024

Before

TRIBUNAL JUDGE BEDENHAM

Between

JONATHON WOODS

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondent

With the consent of the parties, the Tribunal determined without a hearing the issue of whether the assessments were “protected” under s97 of the Finance Act 2022.

DECISION

INTRODUCTION

1. The Appellant has appealed against:
 - (1) assessments made under s29 of the Taxes Management Act 1970 (“TMA”) in relation to the tax years 2014/15 to 2019/20 inclusive in the total amount of £6,392 (“the assessments”); and
 - (2) penalties charged under s41 of the Finance Act 2008 in the total amount of £1,170.80 (“the penalties”).
2. HMRC assessed the Appellant because they formed the view that he was liable to the High Income Child Benefit Charge (“HICBC”). HMRC charged the Appellant with penalties on the basis that he had failed to notify his liability to the HICBC.
3. The parties have agreed that the Tribunal should determine as a preliminary issue whether the assessments are “protected assessments” within the meaning of s97 of the Finance Act 2022. The parties consented to that issue being determined on paper (without a hearing).
4. Whether the assessments are protected or not is important because, as HMRC acknowledged “should the Tribunal decide that the assessments under appeal are not protected assessments...[HMRC] would not be in a position to defend the appeal and the assessments and associated penalties charges would be cancelled”.
5. For the reasons set out below, I have concluded that the assessments are “protected”. The consequence of this is that the decision in *Wilkes* is not determinative of this appeal and the matter should proceed to a full substantive hearing (I do not consider that the substantive appeal is suitable for determination on the papers alone). Nothing I say in this decision should be taken as expressing a view as to the merits of the Appellant’s appeal more generally. The only issue I have determined is whether the assessments are protected.

BACKGROUND

6. On 10 February 2021, HMRC wrote to the Appellant stating that “our records show that the [HICBC] may apply to you. However, you did not register to receive a Self Assessment tax return for the tax years ended 5 April 2020, 2019, 2018, 2017, 2016 and 2015”. The Appellant received this letter (although not until a week or so after it was dated). HMRC also contend that they had sent the Appellant two earlier letters (in November and December 2019) but the Appellant says he did not receive either of those.
7. On 22 February 2021, the Appellant telephoned HMRC to discuss the 10 February 2021 letter he had received. There was a transcript of this telephone call in the hearing bundle. The Appellant did not suggest that the transcript was in any way inaccurate (indeed, he referred to certain parts of it as supporting his submissions).
8. On 9 March 2021, the assessments and penalties were issued to the Appellant.
9. On 24 March 2021, the Appellant appealed to HMRC.
10. On 14 April 2021, HMRC sent to the Appellant a “view of the matter” type letter.
11. The Appellant sent to HMRC further representations which were treated as a request for a statutory review.
12. On 17 September 2021, an HMRC officer telephoned the Appellant to ask him to agree that the deadline for providing the review conclusion could be extended until 31 October 2021. The Appellant asked whether this was related to the *Wilkes* case. The HMRC officer

confirmed it was. The Appellant stated that he did not want his case held up by other decisions. The HMRC officer stated that as the Appellant was not willing to agree to the extension of time for the review conclusion, HMRC would proceed to issue the review conclusion. The Appellant stated that was fine and he would be looking to bring appeal proceedings in the Tribunal.

13. On 20 September 2021, HMRC sent the review conclusion letter to the Appellant. HMRC's decision on review was to uphold the assessments and penalties. At the end of the review conclusion letter, HMRC stated:

“Although in the recent decision of the Upper Tribunal (UT) in *HMRC v Jason Wilkes* [2021] UKUT 150 (TCC) (‘*Wilkes*’), the UT found against HMRC's use of discovery assessments to reclaim amounts of HICBC due where no return had been filed, HMRC do not agree with this decision and have sought permission to appeal to a higher court. As such HMRC's current view is that the assessments are valid and remain due. The penalties are unaffected, as confirmed, in the decision of the UT in *HMRC v Robertson* [2019] UKUT 0202 (TCC). The UT confirmed that it was not necessary for the HICBC to be assessed for it to be treated as potential lost revenue (PLR) for a failure to notify penalty, as per paragraphs 7 and 16 schedule 41 FA08. Any contentions you have as a result of *Wilkes* are therefore not relevant to the consideration of the penalties.”

14. The Appellant appealed to the Tribunal on 25 November 2021. In his grounds of appeal, the Appellant *inter alia* stated “my case is the same as the *Wilkes* case and so I wish for the same outcome to be applied as per the recent Upper Tribunal binding decision in this case – *Wilkes v HMRC*”. The Appellant also appended to his Notice of Appeal his letters to HMRC dated 24 March 2021 and 22 April 2021.

15. On 25 January 2022, the Tribunal directed that (subject to objection from either party within 14 days), the Appellant's appeal was to be stood over until 60 days after the *Wilkes* case was finally determined.

16. On 25 July 2022, HMRC applied for the stay to be lifted on the basis that, as a result of s97 FA 2022, “the UT's findings in *Wilkes* are not applicable in this case. There has been no issue regarding the validity of the assessments raised on or before 30 June 2021, so the Appellant cannot rely on *Wilkes* at all”.

17. On 28 July 2022, HMRC filed their Statement of Case.

18. On 1 September 2022, the Tribunal directed that unless the Appellant objected within 28 days, the stay of the Appellant's appeal behind *Wilkes* would be lifted.

19. On 24 September 2022, the Appellant objected to the stay being lifted and stated:

(1) his appeal was made before 30 June 2021.

(2) When he spoke with HMRC on 22 February 2022, he “asked how they could use this method of collecting the amounts, when my understanding was it should have been done via Self Assessment” and that the HMRC agent had replied “that was how they collected the HICBC and that the 3 year rule didn't apply”. He “naively believed what the agent told me, and so didn't reference this in my letters...However...I believe that the issue of validity was raised by myself but dismissed by the agent.”

(3) The Self-Assessment (SA) notes provided by HMRC record “FTN penalties also considered to be in dispute as they are based on the validity of the assessments and the taxpayer has also referenced them on the appeal”.

- (4) In relation to the telephone call on 17 September 2021: “I was caught on the hop at work...and had no time to think or consider my response fully or the implications.” The position was “not clearly explained to me and should have been made in writing.”
20. On 11 October 2022, Judge Fairpo refused HMRC’s application to lift the stay.
21. On 12 December 2022, the Appellant wrote to the Tribunal. The Appellant referred to the Court of Appeal’s decision in *Wilkes* and requested that his appeal now be allowed.
22. On 22 December 2022, HMRC wrote to the Tribunal stating that *Wilkes* does not apply to the Appellant’s appeal because the Appellant did not raise the issue identified in the *Wilkes* case on or before 30 June 2021. HMRC appended a copy of the transcript of the Appellant’s telephone call with HMRC on 22 February 2021, and stated that it demonstrated that the *Wilkes* issue had not been raised by the Appellant with the HMRC agent. As to the SA notes: they simply refer to the fact that the penalties were based on the assessments (which HMRC consider were valid) but the Appellant had not raised issue with whether the assessments were in fact valid.
23. On 23 December 2022, the Appellant wrote to the Tribunal. The Appellant maintained that he had raised the issue considered in *Wilkes* on 22 February 2021 and that the transcript was clear on this point. The Appellant referred to certain parts of the transcript as supporting his case.
24. On 13 January 2023, the Tribunal notified the parties that the Appellant’s appeal would now proceed to a hearing unless the parties consented to the matter being dealt with on the papers.
25. On 24 January 2023, HMRC stated that they consented to the appeal being dealt with on the papers. Alternatively, HMRC suggested that the Tribunal could consider as a preliminary issue whether the assessments were “protected” and this could be done on the papers.
26. On 25 January 2023, the Appellant wrote to the Tribunal as follows:
- “Having read through HMRC’s letter, I am in agreement with their recommendation that the preliminary matter in respect of whether my case is a protected or non-protected asset be decided based on the papers alone. I do not have any further evidence to supply in that respect and I feel that the facts speak for themselves. If I can just confirm that the following dated letters sent by myself to the Tribunal Service are included in the papers that will be put before the judge? As I feel they are important in respect of my evidence for the case on this preliminary matter alone. 24th September 2021 12th December 2021 23rd December 2021 – which included my two appeal letters to HMRC dated 24/03/21 and 21/04/21 In addition, the transcript provided by HMRC of my telephone conversation with them, dated 22nd February 2021.
- Should my case be found to be a protected asset and therefore the outcome of the *Wilkes* case not apply, then I would wish for my appeal to progress either to a hearing or based on the papers alone. As today’s letter from HMRC only gives me two days to make this decision before the 14 day period expires, I am happy to be guided by the judge in this respect, and if based on the papers alone, I would like to submit a written statement and supply copies of correspondence received from HMRC during the appeal period in question as evidence in my case, as I haven’t been afforded this opportunity yet, which is contrary to point 9. in HMRC’s letter.”

RELEVANT LAW

27. In *Wilkes*, the FTT held that whilst Mr. Wilkes was liable to HICBC, HMRC could not use s29 TMA to raise a discovery assessment to collect the HICBC from Mr. Wilkes. The FTT reached that conclusion because of the wording of s29(1)(a) which, at that time, permitted assessments to be raised where there was a discovery of "income". The FTT reasoned that although a person liable to the HICBC is liable to pay income tax because of the HICBC, HICBC is not itself "income". The FTT's decision was upheld by the Upper Tribunal and the Court of Appeal.

28. Following the Upper Tribunal's decision in *Wilkes*, the government introduced the Finance Act 2022 ("FA 2022"). This received Royal Assent on 24 February 2022.

29. Section 97 FA 2022 provide as follows:

(1) In section 29 of TMA 1970 (assessment where loss of tax discovered), in subsection (1), for paragraph (a) substitute—

“(a) that an amount of income tax or capital gains tax ought to have been assessed but has not been assessed,”.

...

(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 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.

(9) In this section— “discovery assessment” means an assessment under section 29(1)(a) of TMA 1970, ...

30. The amended s29(1)(a) applies for the tax years 2021/22 and onwards. However, the amended provision also applies for all earlier tax years where there is a “relevant protected assessment” within the meaning of s97(4)-(8).

31. An assessment will not be “protected” if an appeal was made on or before 30 June 2021 which concerned the issue identified in the decisions in *Wilkes* and that issue was raised by the Appellant or the FTT before that date, or the appeal was subject to a temporary pause on or before 27 October 2021 because of that issue.

32. In *Hextall v HMRC* [2023] UKFTT 00390 (TC), Judge Sinfield and Tribunal Member Leslie Howard considered the wording of s97(5)(b) and concluded that use of the word “raised”:

“cannot simply mean that the issue arose, i.e. fell to be decided, in the appeal as that is the subject of section 97(5)(a). We consider that the words that follow “raised” in parenthesis “whether by the appellant or in a decision given by the tribunal” show that the issue must be one that has been specifically identified by a party or the FTT in those proceedings. It is not necessary, in our view, for the party or the Tribunal to mention *Wilkes* FTT or *Wilkes* UT specifically. The issue may be raised by describing the issue or the *Wilkes* cases in general terms. The reference must be such, however, as to make clear that the point to be considered is whether the assessments under appeal were invalid on the ground that there could not have been a discovery under section 29(1)(a) TMA because the HICBC was not income which ought to have been assessed to income tax.”

33. I agree with the reasoning contained in this passage from *Hextall*.

34. I am aware that a different view was taken by the FTT (Judge Gething and Tribunal Member Shearer) in *Fera v HMRC* [2023] UKFTT 00961 (TC). However, as stated above, I agree with the reasoning in *Hextall*. The approach adopted in *Fera* deprives s97(5)(b) of any real meaning.

DISCUSSION AND DECISION

35. The Appellant's appeal to HMRC was made before 30 June 2021 (being made on 24 March 2021).

36. I am satisfied that the issue whether the assessments are invalid as a result of them not relating to the discovery of income is now part of the Appellant's appeal. This results from the fact that the *Wilkes* issue was specifically mentioned by HMRC in the review conclusion letter (dated 20 September 2021) and, in his grounds of appeal, the Appellant specifically relied on the *Wilkes* decision. Accordingly, s97(5)(a) is satisfied.

37. However, s97(5)(b) requires the issue (that the assessments are invalid as a result of them not relating to the discovery of income) to have been raised by the Appellant or the FTT before 30 June 2021. Having reviewed the correspondence, I have concluded that the issue was not raised before 30 June 2021.

38. The Appellant specifically referred to the telephone call with HMRC on 22 February 2021 where he asked HMRC's agent on several occasions to confirm that HMRC could only go back 4 years in terms of recovery (e.g. "My understanding of tax, tax law, I thought you can only go back with a claim over the past four years" and "so HMRC can only pursue an individual back to four years"). The agent replied that for HICBC "that is not the case". Having reviewed the transcript, I have concluded that the Appellant did not raise the issue that the assessments were invalid on the ground that there could not have been a discovery under section 29(1)(a) TMA because the HICBC was not income.

39. The Appellant also specifically referred to the "SA notes" provided by HMRC. These are notes taken from HMRC's internal system. In particular, the Appellant referred to a note from 12 April 2021 which stated:

"Appeal received 29/03/2021, uploaded 30/03/2021. T 7237700 Tech 270000 taxpayer is disputing the revenue assessments. FTN penalties also considered to be in dispute as they are based on the validity of the assessments and the taxpayer has also referenced them in the appeal. View of the Matter required. Interest dispute received - not acceptable as the underlying tax has not been paid. Postponement application received for assessments & penalties. Appeals indicators set - Response in progress"

40. I am satisfied that the reference in the SA Notes to the "FTN penalties also considered to be in dispute as they are based on the validity of the assessments" is simply a note to reflect that HMRC considered the failure to notify penalties to have been appealed because the Appellant was challenging the underlying HICBC liability. I do not accept that the notes demonstrate that the Appellant had raised the *Wilkes* issue on or before 30 June 2021.

41. In relation to s97(6) (temporary pause): On 25 January 2022, the Tribunal directed that (subject to objection from either party within 14 days), the Appellant's appeal was to be stood over until 60 days after the *Wilkes* case was finally determined. However, s97(6)(b) requires the temporary pause to have occurred before 27 October 2021. On 17 September 2021, an HMRC officer telephoned the Appellant to ask him to agree an extension to the deadline for providing the review conclusion (which request the officer confirmed was due to HMRC wanting to see what happened in the *Wilkes* litigation). However, the Appellant refused to agree that extension, and the review conclusion letter was issued a few days later. The Appellant now says that HMRC should have written to him rather than calling him on the telephone (and says he was "caught on the hop"). Regardless of whether it would have been better for HMRC to write to the Appellant about the requested extension, that does not alter the fact that there was not a temporary pause in this case prior to 27 October 2021.

42. In the above circumstances, I have concluded that the assessments are “protected”. This appeal will now proceed to a substantive hearing.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

43. 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.

**DAVID BEDENHAM
TRIBUNAL JUDGE**

Release date: 23rd MAY 2024