Neutral Citation: [2023] UKFTT 11 (TC)

Case Number: TC08673

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2021/03182

INCOME TAX – High Income Child Benefit Charge – the Jason Wilkes judgments – Appellant initially told could not appeal assessments – whether appeal "given" to HMRC by the Tribunal – whether Tribunal had jurisdiction to decide appeal against assessments – whether assessments "protected" under FA 2022 – whether Appellant liable to penalties – whether reasonable excuse – appeal against penalties allowed – HMRC invited to exercise care and management power in relation to the assessments

Heard on 24 November 2022
Judgment date: 21 December 2022

Before

TRIBUNAL JUDGE ANNE REDSTON

Between

MATTHEW KENSALL

Appellant

and

THE COMMISSIONERS FOR
HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Kensall in person

For the Respondents: Ms Victoria Halfpenny, Litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION AND SUMMARY

1. On 26 April 2021, HM Revenue & Customs ("HMRC") determined that Mr Kensall was liable to pay the High Income Child Benefit Charge ("HICBC") for the tax years 2016-17, 2017-18 and 2018-19, and issued him with the following:

(1) tax assessments totalling £2,295, raised under s 29 of the Taxes Management Act 1970 ("the TMA"). Assessments raised under that section are known as "discovery assessments"; and

(2) penalties totalling £459 charged under Finance Act 2008, Sch 41, for a failure to notify liability to the HICBC.

2. In relation to the penalties, I found that Mr Kensall had a reasonable excuse, and allowed his appeal. In relation to the assessments, I refused his appeal for the reasons explained in the next following paragraphs. However, HMRC is asked to consider exercising their care and management powers in Mr Kensall's favour.

The assessments

3. On 15 June 2020, another taxpayer, Mr Jason Wilkes, appealed to the Tribunal against HICBC discovery assessments. He won his appeal because the Tribunal found that the legislation did not allow HMRC to issue that type of assessment in relation to a failure to pay the HICBC, see *Wilkes v HMRC* [2020] UKFTT 256 (TC) ("*Wilkes FTT*").

4. HMRC appealed to the Upper Tribunal, which on 30 June 2021 upheld the Tribunal's decision, see *HMRC v Wilkes* [2021]UKUT 150 (TCC) ("*Wilkes UT*"). HMRC made an onward appeal to the Court of Appeal; that appeal was also determined in Mr Wilkes' favour on 7 December 2022, see *HMRC v Wilkes* [2022] EWCA Civ 1612 ("*Wilkes CoA*"). The Court of Appeal judgment was published after the hearing of Mr Kensall's appeal, but before the issuance of this decision.

5. Meanwhile, by Finance Act 2022, Parliament had introduced legislation to change the law on discovery assessments for 2021-22 and subsequent years, so as to prevent taxpayers relying on a similar argument to that put by Mr Wilkes. That new legislation also applies retrospectively, and these earlier assessments are called "protected assessments". Somewhat confusingly, the person "protected" by the legislation is the Treasury, not the taxpayer.

6. In some situations, an assessment for a previous year is not "protected". In particular, a taxpayer is not subject to the retrospective provisions if he (a) appealed to HMRC on or before 30 June 2021, and (b) the Tribunal stayed his appeal behind that of Mr Wilkes before 27 October 2021.

7. Mr Kensall contacted HMRC on 23 April 2021 and was told the amount of the assessments and the penalties; he was also told that he could appeal the penalties but not the assessments, because it was clear from the figures held by HMRC that he was liable to the HICBC.

8. On 10 May 2021 Mr Kensall appealed the penalties. HMRC refused his appeal and that decision was upheld on statutory review. Mr Kensall then carried out some research on the internet, and having identified the *Wilkes* case, realised it was possible to appeal the assessments.

9. On 5 September 2021, Mr Kensall sent a Notice of Appeal to the Tribunal; he stated that he was appealing both the assessments and the penalties. There were some complicated technical issues about the making of the appeal against the assessments, see §74 and §84, but

HMRC accepted that the Tribunal had the relevant jurisdiction. On 21 October 2021, the Tribunal stayed his appeal behind *Wilkes*.

10. Mr Kensall thus met one of the conditions for his assessments not to be protected, namely that his appeal had been stayed behind *Wilkes* before 27 October 2021. However, he did not meet the other condition. Although he had appealed against the penalties on 10 May 2021, he did not appeal to HMRC against the assessments until after 30 June 2021.

11. Mr Kensall's position was that he would have appealed both the assessments and the penalties on 10 May 2021, had he not been incorrectly told by HMRC that he was unable to appeal the assessments. Had he appealed both assessments and penalties on that date, his assessments would not be "protected", and he would be in the same position as Mr Wilkes. If the Court of Appeal judgment is the final position, Mr Kensall's assessments would be cancelled.

12. However, the Tribunal only has the jurisdiction (broadly speaking, that means "the power") to decide his appeal on the basis of what actually happened, and cannot take into account whether HMRC acted fairly when they misdirected Mr Kensall by telling him there was no right of appeal against the assessments. Since Mr Kensall did not make his appeal to HMRC against the assessments before 30 June 2021, the assessments are "protected" and the Tribunal cannot allow his appeal.

13. HMRC have a care and management power which give them more flexibility, and are invited to consider using that power to put Mr Kensall in the position he would have been in, had he not been misdirected by HMRC

14. I now explain the Tribunal's decision in more detail.

PERMISSION TO MAKE APPEAL LATE

15. HMRC's review decision was issued on 16 July 2021. Under the heading "what happens next", the letter said:

> "If you do not agree with my conclusion you can ask an independent tribunal to decide the matter. You must notify your appeal to the Tribunal in writing. The statutory appeal period is 30 days from the date of this letter. However, in light of Covid-19, HMRC will not object to late appeals made to the Tribunal where the appeal has been made within three months of the end of the 30-day appeal period."

16. Mr Kensall sent a Notice of Appeal to the Tribunal on 5 September 2021, so the appeal was received around three weeks after the 30 day period allowed by statute. Mr Kensall said that he had read the paragraph set out above as meaning he had three months plus 30 days to appeal. HMRC did not object to his late appeal.

17. I applied the three stage test set out in *Martland v HMRC* [2018] UKUT 0178 (TCC). In deciding whether the delay was serious and/or significant, I took into account in particular that HMRC, the other party to the appeal, had given prior notice that it would not object to a late appeal as long as it fell within the following three months, and that Mr Kensall had filed his appeal only three weeks into what he understood to be a three month extension period. I decided that the three week delay was serious but not significant.

18. In considering the third step, I took into account the fact that Mr Kensall had reasonably relied on the statement set out in HMRC's letter, and that the prejudice to him would significantly outweigh the prejudice to HMRC were permission not to be given. Although I gave particular weight to the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected, I found that it was in the interests of justice to give Mr Kensall permission to make a late appeal.

THE LEGISLATION BEFORE FA 2022

19. Section 681B of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA"), inserted by Finance Act 2012, provides as follows:

> "(1) A person ("P") is liable to a charge to income tax for a tax year if
>
> (a) P's adjusted net income for the year exceeds 50,000, and
>
> (b) one or both of conditions A and B are met.
>
> (2) The charge is to be known as a "high income child benefit charge".
>
> (3) Condition A is that
>
> (a) P is entitled to an amount in respect of child benefit for a week in the tax year, and
>
> (b) there is no other person who is a partner of P throughout the week and has an adjusted net income for the year which exceeds that of P.
>
> (4) Condition B is that
>
> (a) a person ("Q") other than P is entitled to an amount in respect of child benefit for a week in the tax year,
>
> (b) Q is a partner of P throughout the week, and
>
> (c) P has an adjusted net income for the year which exceeds that of Q."

20. The meaning of ANI is given by s 58 of the Income Tax Act 2007, and subsection (1) provides as follows:

> "… an individual's adjusted net income for a tax year is calculated as follows.
>
> *Step 1* Take the amount of the individual's net income for the tax year.
>
> *Step 2* If in the tax year the individual makes, or is treated under section 426 as making, a gift that is a qualifying donation for the purposes of Chapter 2 of Part 8 (gift aid) deduct the grossed up amount of the gift.
>
> *Step 3* If the individual is given relief in accordance with section 192 of FA 2004 (relief at source) in respect of any contribution paid in the tax year under a pension scheme, deduct the gross amount of the contribution.
>
> *Step 4* Add back any relief under section 457 or 458 (payments to trade unions or police organisations) that was deducted in calculating the individual's net income for the tax year.
>
> The result is the individual's adjusted net income for the tax year."

21. TMA s 7 is headed "Notice of liability to income tax and capital gains tax", and includes the following provisions:

> "(1) Every person who
>
> (a) is chargeable to income tax or capital gains tax for any year of assessment, and
>
> (b) falls within subsection (1A)…
>
> shall, subject to subsection (3) below, within the notification period, give notice to an officer of the Board that he is so chargeable.
>
> (1A) A person falls within this subsection if the person has not received a notice under section 8 requiring a return for the year of assessment of the persons total income and chargeable gains.
>
> (1B) …

(1C) In subsection (1) "the notification period" means

(a) in the case of a person who falls within subsection (1A), the period of 6 months from the end of the year of assessment…"

22. By TMA s 7(3) and (4), there is no obligation to notify chargeability if (a) all of the person's income is taxed under PAYE, and (b) that person has neither chargeable gains nor other taxable amounts (such as HICBC and various pension-related sums).

23. TMA s 29(1) provides that if an officer of the Board or the Board "discover", as regards the taxpayer:

> "(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
>
> (b) that an assessment to tax is or has become insufficient, or
>
> (c) that any relief that has been given is or has become excessive,
>
> the officer or, as the case may be, the Board may…make an assessment in the amount, or further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax."

24. TMA s 36(1A)(b) provides for a 20 year time limit within which a discovery assessment can be made, if there has been a failure to notify liability under TMA s 7.

25. Finance Act 2008, Sch 41 ("Sch 41") provides for penalties to be levied where a person has failed to notify chargeability under s 7. As the legal provisions contained within that Schedule were not in dispute, I have not set them out in this judgment.

Application to Mr Kensall's case

26. HMRC issued Mr Kensall with discovery assessments under TMA s 29 on the basis that he had not notified his liability to the HICBC within the six months after the end of each relevant tax year as required by TMA s 7; they issued the penalties under Sch 41.

THE EVIDENCE

27. The Tribunal had the benefit of a documents bundle provided by HMRC, which included the following:

(1) correspondence between the parties, and between the parties and the Tribunal;

(2) two letters which HMRC stated had been sent to Mr Kensall, but which he said he had not received, see further below;

(3) a print out of Mr Kensall's partner's child benefit record;

(4) extracts from HMRC's computer system setting out (a) Mr Kensall's income, and (b) the addresses held on that system for Mr Kensall.

28. In addition, Ms Halfpenny handed up the following documents:

(1) a copy of an email dated 21 April 2021 from Mr Craig Butler, the HMRC litigator previously assigned to Mr Kensall's case, together with Mr Kensall's reply the following day; and

(2) a file note made by Ms Allison, an HMRC officer, of a call on 23 April 2021 between her and Mr Kensall.

29. Mr Kensall gave oral evidence, was cross-examined by Ms Halfpenny and answered questions from the Tribunal. He was an entirely honest and credible witness.

30. Ms Michelle Larkin, the HMRC officer who opened the compliance check into Mr Kensall, provided a witness statement. At the beginning of her oral evidence, she asked to make two corrections to that statement:

(1) The final sentence of her witness statement read "On 19 July 2019, the appellant appealed further to HM Courts and Tribunals Service". This was clearly incorrect, as the assessments and penalties were not issued to Mr Kensall until 26 April 2021. Ms Larkin explained that she had cut and pasted parts of her evidence from a statement given in another appeal, and had omitted to change the date. Mr Kensall accepted that this was a simple oversight and I agreed.

(2) Paragraph 16 of her witness statement began (emphasis added) "In a letter dated 10 May 2021 the appellant appealed against the HICBC assessments and FTN [failure to notify] penalty charges".

(a) Ms Larkin said that she had again cut and pasted this part of her witness statement from one given in another appeal, in which the appellant had appealed both the assessments and the penalty. She said that she had made a mistake, and that it was clear that Mr Kensall's letter of 10 May 2021 did not encompass the assessments; she added that this had always been HMRC's position.

(b) Since one of the key issues in this case was when Mr Kensall appealed the HICBC assessments to HMRC, this amendment to Ms Larkin's witness statement was more contentious. Mr Kensall doubted whether she had made a mistake, given the importance of the issue in the context of his appeal.

(c) However, I agreed with Ms Larkin that Mr Kensall's letter of 10 May 2021 made reference only to the penalties, and it was also clear from later correspondence that HMRC had taken this to be the position, see §57. I accepted Ms Kensall had made this mistake because she had used "cut and paste", and had failed to make the relevant change to reflect Mr Kensall's factual position; this was also consistent with her evidence about the other error in the final line of her witness statement.

31. After making those corrections to her witness statement, Ms Larkin gave evidence-in-chief led by Ms Halfpenny and was cross-examined by Mr Kensall. She was an entirely honest and credible witness.

32. HMRC also provided a witness statement from Mr Stephen Thomas. Since 2019 his role has been to provide technical support about the HICBC to HMRC staff. I noted that:

(1) his witness statement was generic, and did not relate specifically to Mr Kensall's case;

(2) the first part of this witness statement was also hearsay, because it contained information about HMRC's HICBC communication strategies in 2012, some seven years before Mr Thomas took on his current role; and

(3) Mr Thomas did not attend the Tribunal to be cross-examined.

33. However, as none of the evidence in his witness statement was in dispute, I accepted it.

34. On the basis of the evidence provided to the Tribunal, I make the findings of fact in the next following section of this judgment; there are further findings about two letters at §64 and about misdirection at §93(6).

FINDINGS OF FACT

35. Mr Kensall works in the packaging industry. He is not financially sophisticated and has no knowledge of the tax system. Before the events with which this appeal is concerned, he had been a PAYE taxpayer for over forty years, and throughout all that time his only interactions with HMRC had been about changes to his coding notices. In Mr Kensall's words, he "believed HMRC absolutely" and had "unwavering trust" in them.

36. Since 2002, Mr Kensall has lived at an address which includes the word "Westminster", but post addressed to "West borough" is frequently misdelivered to him. Mr Kensall said that the reverse must also be true: post addressed to him must also be misdelivered to "West borough". I accept that this is a reasonable inference and find it to be a fact.

37. Mr Kensall and his partner had a child in 2002, and his partner claimed child benefit. At that time, child benefit was not relevant to a person's tax liability. The law changed with effect from 7 January 2013, so over a decade later.

38. HMRC publicised this change via advertisements and articles in broadcast media, and via daytime TV. There was information about the HICBC on their website, and it was discussed in Parliament. However, Mr Kensall was unaware of the media coverage.

39. HMRC's records show that on 17 August 2013, HMRC issued a letter known as a "SA252" to Mr Kensall's address. Although HMRC have not retained a copy of that letter, they provided their internal records showing its issuance, and a template copy of the text. Although Mr Kensall challenged whether this letter was in fact sent, I find on the basis of HMRC's evidence that it was issued to his address on 17 August 2013.

40. The SA252 outlined the HICBC, explaining that it applied where a person's income was over £50,000, and told the recipient to register for self-assessment if that was the case. The parties disagreed as to whether Mr Kensall had received this letter, and I return to this at §64 below.

41. On 21 October 2019, so over six years later, , HMRC sent a second letter (known as a "nudge letter") to Mr Kensall. This summarised when a person was liable for the HICBC, and asked Mr Kensall to check his liability for tax years beginning with 2012-13. The parties disagreed as to whether Mr Kensall received this letter, and I return to this too at §64 below.

42. On 19 November 2019, HMRC sent Mr Kensall a letter headed "Final reminder: important information about the High Income Child Benefit Charge"; this essentially repeated the contents of the nudge letter.

43. Mr Kensall received that letter on 21 November 2019, and immediately rang HMRC's helpline. He expected to be told whether he was required to pay the HICBC. His description of the call, which was not challenged by HMRC, was as follows:

> "In my first interaction with HMRC, which was immediately on receipt of my first letter from them on this subject, the person I spoke to was very cagey as to whether I did or did not owe any money. I was confused, as I was expecting this interaction to be exactly as all my others with HMRC, i.e. they tell me how much I have over or under paid and my tax code is adjusted accordingly (this happens most years). But instead I was given a list of websites and contacts and told to go away and work out if I owed them anything."

44. On the basis of information taken from HMRC's system (as she did not take the call from Mr Kensall), Ms Larkin said:

> "Mr Kensall contacted the helpline on 21 November 2019 where general advice was given and he said he was going to collate P60 and Child Benefit

> information, he was also given the PAYE helpline number so that he could request this information."

45. Mr Kensall did as he was instructed. He looked at the websites, checked his P60 and child benefit information, and entered his and his partner's details into HMRC's online HICBC calculator. This required Mr Kensall to identify and understand the various elements of what is included in ANI. He completed the calculation to the best of his knowledge and ability, and received the outcome that he had no liability to the HICBC.

46. That outcome was incorrect. Mr Kensall said that he was not surprised that he had made one or more mistakes, because he was wholly unfamiliar with financial and tax matters. In a later letter to HMRC, he said:

> "As I have been PAYE for 45 years and never had any income other than my salary, this is not something I have ever had to do and, as such, am not equipped to do…I did my very best to ascertain if I did or didn't need to pay anything back. I can only assume that these resources are designed for people who have a better grasp of finance and taxation than myself, as I found them cripplingly difficult to understand and navigate."

47. The statement in that letter that Mr Kensall had done his "very best to ascertain if [he] did or didn't need to pay anything back" was not challenged and I find it to be a fact.

48. When Mr Kensall was later told by HMRC that he had a liability (see the next following paragraphs), he revisited the calculation. He identified two areas where he had probably gone wrong – he may have failed to include the tax value of his company car in his earnings, and he had deducted certain pension payments. However, as his employer operated a salary sacrifice arrangement for employees, Mr Kensall said he may have misunderstood how to deal with his pension in the context of ANI and the child benefit calculator. I return to the pension payments at §96.

49. On 16 April 2021, Ms Larkin selected Mr Kensall for a compliance check. She entered data provided by his employer into the HICBC calculator, and having done so, identified that he owed HICBC of £785 for the tax year 2016-17; £1,076.40 for the tax year 2017-18 and £434 for the following tax year, so a total of £2,295.

50. On 19 April 2021, Ms Larkin sent Mr Kensall a letter stating that he was liable to HICBC for the years 2016-17 through to 2018-19 in the above amounts. At the top of the letter was an HMRC telephone number; in the body of the letter, Ms Larkin told Mr Kensall to use that specific number.

51. Mr Kensall received this letter on 23 April 2021, and called HMRC on the specified telephone number immediately. He spoke to a Ms Allison. Mr Kensall's account of this call in his grounds of appeal (filed with the Tribunal on 5 September 2021) was as follows:

> "I again called HMRC immediately and found the second person I spoke to [to] be much more helpful. In this instance, they took me through exactly what the charge was and explained that the figures I had calculated myself did not take into account the cash value of the benefits I received from my employer. She calculated there and then exactly how much I owed and let me know that she would write to me explaining the exact charges. She also explained that I could appeal any penalty but would need to pay the amount of HICBC I owed."

52. Mr Kensall confirmed in oral evidence that in this call he had been told he could only appeal the penalties, but could not appeal the HICBC, because it was clear from the figures calculated that he was liable to that tax.

53. As noted at §28(2), at this point in the hearing, Ms Halfpenny handed up Ms Allison's note of the same call. This set out the amounts due; said that Mr Kensall "agrees the figures", and recorded that he would have to pay penalties because HMRC had sent him previous letters about HICBC. It did not refer to Mr Kensall's appeal rights in relation to either the assessments or the penalties.

54. However, I accepted Mr Kensall's evidence as to what had been said during this call, because:

(1) he was a patently honest and straightforward witness;

(2) HMRC were aware from Mr Kensall's grounds of appeal that reliance was being placed on what had been said to him during this telephone conversation, but they did not tender Ms Allison as a witness. This meant that the only evidence provided by HMRC was the telephone note, and Ms Allison could not be cross-examined on its contents;

(3) Mr Kensall appealed the penalties on 10 May 2021 (see §55), soon after the conversation with Ms Allison. In that letter:

(a) he said she had informed him he "had wrongly calculated [his] taxes due and would need to pay back [child] benefits with interest". That statement is consistent with his evidence that he had been told he could not appeal the assessments, because he was liable to the HICBC in those three years; and

(b) there was no reference to an appeal against the assessments; this is consistent with his evidence that he had been advised by Ms Allison that he could appeal only the penalties.

55. On 26 April 2021, HMRC issued Mr Kensall with the assessments and penalties set out earlier in this judgment. He paid the HICBC but not the penalties. He appealed to HMRC on 10 May 2021: the letter begins "I am writing to dispute penalty reference []…which relates High Income Child Benefits".

56. It was Mr Kensall's evidence that he appealed only the penalties because he had relied on Ms Allison's statement that the assessment was not appealable. I accept that evidence, which is consistent with my findings about what happened during the call. It is also consistent with the "unwavering trust" which Mr Kensall had in HMRC at that time, see §35.

57. On 26 May 2021, HMRC issued a "view of the matter" letter which also referred only to the penalties. By that letter, HMRC confirmed the penalties and offered a statutory review. Mr Kensall accepted that offer. On 16 July 2021, the HMRC review officer rejected Mr Kensall's appeal: his letter began by saying that the HMRC decision he was reviewing related to "penalty assessments" under Schedule 41, Finance Act 2008 for failure to notify chargeability.

58. Mr Kensall then carried out some research on the internet, and identified the *Wilkes* case; he realised it was possible to appeal the assessments. On 5 September 2021, he sent a Notice of Appeal to the Tribunal in which he stated that he was appealing both the penalties and the assessments. In his grounds of appeal, he referred to *Belloul v HMRC* [2020] UKFTT 312 (TC), where Judge Popplewell had held that the appellant had a reasonable excuse for the late notification. He then said:

> "I have also since found other rulings against HMRC which I also feel echo my circumstances most notably that of Jason and Samantha Wilkes in July of this year. The Upper Tribunal stated that HMRC cannot issue an HICBC via Discovery Assessments where the individual being charged did not file a self-

> assessment tax return. I have not filed a self assessment tax return in relation to this matter so feel this ruling applies in my case too."

59. On 21 October 2021, the Tribunal directed that Mr Kensall's appeal be stayed behind *Wilkes,* unless HMRC objected within 14 days. HMRC did not object. Mr Kensall then received a series of contradictory and confusing letters and calls from HMRC's Solicitor's Office, including one sent on 9 February 2022 stating that if he didn't settle ahead of his Tribunal appeal, he would have to pay the tax twice. When Mr Kensall asked whether it was legal for HMRC to charge him the same tax twice, the HMRC officer said he wasn't sure but would check with his manager and would get back to him in a few days.

60. No such call was ever made: HMRC instead issued Mr Kensall with a letter dated 15 March 2022 stating that he would be taxed twice if he didn't contact them by 24 February 2022. Mr Kensall immediately contacted HMRC, but was told that the information on his file did not make sense and that someone would phone him back. Later that day, an HMRC officer called and informed Mr Kensall that the self assessments were being issued to ensure HMRC got paid. Mr Kensall again asked for this to be explained in writing, but this has not happened.

61. On 21 April 2022, Mr Craig Butler, the HMRC litigator then assigned to Mr Kensall's case, emailed Mr Kensall saying:

> "Your appeal to the Tribunal has been deemed to be an appeal against the following six decisions [set out in two boxes, the first of which listed the assessments and the second, the penalties].
>
> There is a legal requirement that any decision which is being appealed to the Tribunal, must have first been appealed to HMRC. In your case you have only appealed to HMRC against the penalties (decisions in the second box above). In order for the Tribunal to have jurisdiction to consider the assessments (decisions in the first box above), you must now make an appeal in writing to HMRC. You can do this by return email directly to myself, and this will get us over this administrative hurdle. It does not need to be war and peace, and I am happy if you simply want to re-iterate or copy what you have previously provided on your official notice of appeal to the Tribunal.
>
> I appreciate that this may seem a strange scenario but can assure you this is a necessary step in order for your appeal to proceed correctly. Without an appeal in writing to HMRC the Tribunal simply does not have jurisdiction to consider the appeal against the assessments."

62. On 22 October 2022, Mr Kensall replied, copying and pasting the grounds of appeal he had sent to the Tribunal, and he followed that text with a passage about HMRC's subsequent confusing and contradictory demands that he complete a self-assessment return as otherwise he "would have to pay the tax twice". He then said "I am no longer convinced that HMRC have calculated the taxation correctly, or the legality of how they have calculated the tax owed".

63. On the same day, Mr Butler filed an application at the Tribunal asking for the *Wilkes* stay to be lifted in relation to Mr Kensall's appeal, on the basis that his assessments were "protected" because the appeal had been made after 30 June 2021. On 8 June 2022, the Tribunal lifted the stay, and the case proceeded to this hearing.

Findings of fact about the earlier letters

64. As noted above, there was a dispute between the parties as to whether Mr Kensall received the SA252 letter sent out on 17 August 2013, and/or the "nudge" letter sent out on 21 October 2019.

65. Mr Kensall relied on the following:

(1) his post was frequently misdelivered to a similar address, see §36;

(2) he called HMRC immediately on receipt of the letters dated 19 November 2019 and 19 April 2021; had he received the earlier letters, he would similarly have taken immediate action; and

(3) he is a compliant and honest taxpayer who has always paid what he owes and has never sought to evade his fiscal obligations.

66. Ms Halfpenny submitted that Mr Kensall had not provided supporting evidence to show that any action had been taken in relation to the wrongly addressed mail, and asked the Tribunal to find that the letters had been received.

67. I have no hesitation in finding that had Mr Kensall received the SA252 and the nudge letter, he would have taken immediate action in the same way he did when he received the later letters. In both cases he called HMRC straight away to seek to establish the position. As he said in his appeal letter: "every time HMRC have contacted me I have responded immediately and honestly to the best of my ability". I find as a fact that Mr Kensall received neither the SA252 or the nudge letter.

THE *WILKES* CASE AND FA 2022

68. On 15 June 2020, Mr Wilkes appealed to the Tribunal against his HICBC discovery assessments. He won his appeal because the Tribunal found that the legislation did not allow HMRC to issue this type of assessment in relation to a failure to pay the HICBC, see *Wilkes FTT*. HMRC appealed to the Upper Tribunal, and then to the Court of Appeal. Mr Wilkes succeeded in both of these onward appeals, see *Wilkes UT* and *Wilkes CoA*. At the time that this Tribunal heard Mr Kensall's appeal, the Court of Appeal judgment was awaited; it was issued on 7 December 2022, before the issuance of this decision.

69. Meanwhile, Parliament had legislated to change the law on discovery assessments for 2021-22 and subsequent years, so as to prevent taxpayers making a similar argument to that put by Mr Wilkes, see Finance Act 2022, s 97. That legislation also applies retrospectively to assessments for previous years ("protected assessments") unless certain conditions were satisfied.

70. The relevant provisions 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).
>
> (b)-(d)
>
> (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.

(9) In this section

"discovery assessment" means an assessment under section 29(1)(a) of TMA 1970, and

"HMRC" means Her Majesty's Revenue and Customs, and

"notified" means notified in writing."

71. It can be seen from these provisions that a taxpayer is not subject to the retrospective provisions if he had (a) appealed to HMRC before 30 June 2021 and (b) his appeal had been stayed by the Tribunal behind *Wilkes* before 27 October 2021.

72. Mr Kensall's appeal was stayed by the Tribunal behind *Wilkes* on 21 October 2021. Thus, the key date is when Mr Kensall appealed the assessments to HMRC.

APPEAL AGAINST THE ASSESSMENTS

73. There are a number of issues under this heading:

(1) when Mr Kensall appealed the assessments to HMRC;

(2) whether the Tribunal had jurisdiction to decide his appeal against the assessments; and

(3) whether the assessments were protected.

When Mr Kensall appealed the assessments to HMRC

74. TMA s 49D is headed "Notifying an appeal to the Tribunal", and it begins:

> "(1) This section applies if notice of appeal has been given to HMRC.
>
> (2) The appellant may notify the appeal to the tribunal.
>
> (3) If the appellant notifies the appeal to the tribunal, the tribunal is to decide the matter in question."

75. As is clear from the findings of fact:

(1) Mr Kensall was told by Ms Allison on 23 April 2021 that he could not appeal the assessments but only the penalties.

(2) In reliance on and as a result of that information, he appealed only the penalties on 10 May 2021.

(3) He subsequently did some more research on the internet, and on 5 September 2021 sent a Notice of Appeal to the Tribunal in which he stated that he was appealing both the penalties and the assessments.

(4) Attached to the Notice of Appeal were Mr Kensall's grounds of appeal, which referred to and relied on *Wilkes.*

76. At that time, HMRC's Appeals, Reviews and Tribunals Guidance ("ARTG") said at ARTG2440:

> "Where a customer wants to appeal against HMRC's decision, they must send an appeal to HMRC within 30 days of the date they receive our formal decision notice, such as the notice of assessment, amendment, closure notice or determination.
>
> If the decision maker receives notification from the Tribunals Service that the customer has sent them an appeal form the decision maker should check first whether the customer has already appealed to HMRC.
>
> If the customer has not done so it may be possible to treat this as an appeal to HMRC.
>
> If the decision maker thinks it is appropriate and does not suspect any abuse of the appeal process they may, in the particular circumstances of that case, treat this as an appeal to HMRC."

77. Although I had no submissions on this point, my understanding from earlier cases heard in this Tribunal is that the basis for the approach set out above is as follows:

(1) TMA s 49D specifies that a person can appeal to the Tribunal if "notice of appeal has been given to HMRC";

(2) the section does not specify who has to give that notice; and

(3) where the Tribunals Service has notified HMRC of a person's appeal, the requirement that "notice of appeal has been given to HMRC" has been satisfied.

78. On 15 October 2021, the Tribunal contacted Mr Kensall and asked him to provide the decision letter relating to the assessments, because his Notice of Appeal related to both, and

Mr Kensall complied. On 21 October 2021, the Tribunal directed that Mr Kensall's appeal be stayed behind *Wilkes,* unless HMRC objected within 14 days. HMRC did not object.

79. I infer that at that point both the Tribunal and HMRC had taken the approach set out in ARTG2440. In other words, the parties and the Tribunal had proceeded on the basis that Mr Kensall had made a valid appeal to HMRC against both the assessments and the penalties, and that the date of that appeal was on or soon after 5 September 2021. At the hearing, Ms Halfpenny agreed this was a reasonable inference from the facts.

80. However, on 21 April 2022, Mr Butler asked Mr Kensall to provide HMRC directly with his grounds of appeal against the assessments, apparently on the basis that he now considered that the requirements of TMA s 49D had not yet been satisfied. Mr Kensall copied his earlier grounds of appeal to Mr Butler by email. Having received that email, and on the same day, Mr Butler applied to the Tribunal for the stay to be lifted. Three days later, on 25 April 2022, he filed and served HMRC's Statement of Case in relation to Mr Kensall's appeals. In that document, Mr Butler said that Mr Kensall had appealed to HMRC against both the assessments and the penalties, but that his appeal against the former had only been made on 22 April 2022, the date of Mr Kensall's emailed reply.

81. Some six months later, on 27 October 2022, HMRC changed the text of ARTG2440, so that it now reads:

> "Where a customer wants to appeal against HMRC's decision, they must send an appeal to HMRC within 30 days of the date they receive our formal decision notice, such as the notice of assessment, amendment, closure notice or determination.
>
> If HMRC receive notification from the Tribunals Service that the customer has sent them an appeal form, the assigned litigator in SOLS should first check with the decision maker to see whether the customer has already appealed to HMRC.
>
> If the customer has not appealed to HMRC then the tribunal does not have jurisdiction to consider the matter. The decision maker will need to write to the customer to inform them and ask them to submit an appeal to HMRC.
>
> The SOLS litigator should also write to the Tribunals Service to update them about the status of the appeal.
>
> If the taxpayer does not submit an appeal to HMRC…the SOLS litigator should apply to the Tribunals Service for the proceedings to be struck out."

82. This revised text is in accordance with my own analysis in *Flash Film Transport Ltd v HMRC* [2019] UKFTT 4 (TC) ("*Flash Film"*) at [73]-[77]. Although those passages are *obiter,* they have recently been endorsed in *Rotaru v HMRC* [2022] UKFTT 00080 (TC) (Judge Brannan) at [41].

83. The position is thus as follows:

(1) if TMA s 49D can be satisfied by a person (a) appealing to the Tribunal, and the Tribunal then giving notice to HMRC, Mr Kensall appealed to the Tribunal on 5 September 2021; but

(2) if TMA s 49D requires that the *taxpayer* must give notice to HMRC, the appeal was made to HMRC on 22 April 2022.

Whether the Tribunal has jurisdiction to decide the appeal against the assessments

84. In *Flash Film* I said that the statute required that the appeal be first given to HMRC and subsequently notified to the Tribunal, adding at [77] that:

> "There are also other reasons why appeals have to be made first to HMRC: the Officer receiving the appeal may consider the reasons and change his position, and the appellant has the opportunity to ask for, or accept, a statutory review carried out by a different HMRC Officer. Appeals made first to HMRC may thus be settled between the parties without reference to the Tribunal."

85. However, HMRC's position, as set out in the Statement of Case drafted by Mr Butler, was that the Tribunal had the jurisdiction to decide Mr Kensall's appeal against the assessments because on 22 April 2022, he had given the appeal to HMRC. In other words, there was no need for the appeal to be given first to HMRC, and only then notified to the Tribunal. Instead, it was sufficient for a person who had already appealed to the Tribunal, subsequently to give notice of that appeal to HMRC.

86. Although I remain of the view set out in *Flash Film,* the Tribunal also has the power to allow a party to amend his grounds of appeal orally at the hearing. In a case such as this, where the parties and the Tribunal have proceeded on the basis that the appellant had validly appealed a decision to the Tribunal, it is clearly in the interests of justice for the Tribunal to exercise its power to allow a late amendment, and I do so.

87. I thus find that Mr Kensall had a valid appeal before the Tribunal against the assessments, and the Tribunal thus had the relevant jurisdiction.

Whether Mr Kensall's appeals against the assessments were "protected"

88. As is clear from the above analysis, HMRC's position as to when Mr Kensall had appealed to HMRC against the assessments changed over time:

(1) Initially HMRC accepted, in line with the then guidance in ARTG2440, that Mr Kensall had made his appeal to HMRC on 5 September 2021.

(2) However, the Statement of Case, drafted by Mr Butler on 25 April 2022, said that Mr Kensall had appealed to HMRC on 22 April 2022 when he sent the email referred to at §62.

89. Ms Halfpenny said that even if Mr Kensall had appealed to HMRC on 5 September 2021, this was still too late. In order to fall outside the retrospective legislation, he would have had to appeal by 30 June 2021, and he had plainly not done so.

90. Mr Kensall accepted that he had not appealed the penalties until 5 September 2021, but said that this was because he had been told by HMRC that they were not appealable.

The Tribunal's view

91. It is common ground, and clearly correct, that Mr Kensall did not make his appeal against the assessments to HMRC before 30 June 2021, and that the assessments are therefore "protected". As a result, Mr Kensall cannot benefit from Mr Wilkes's success at the Court of Appeal.

92. The Tribunal does not have the jurisdiction either:

(1) to decide the appeal on the basis of what might have happened, had Mr Kensall received correct advice from Ms Allison; or

(2) to decide the appeal in Mr Kensall's favour on the basis that he had been treated unfairly because he relied on that incorrect advice.

93. HMRC have a care and management power which gives them more flexibility than the Tribunal, and in that context I make the following observations:

(1) Mr Kensall was instructed by Ms Larkin to call a specific number; when he did so, he reached Ms Allison. It is clear from the details recorded in her note of call, and her

familiarity with the HICBC regime and the related calculations, that Mr Kensall had been directed to call a particular HMRC team with knowledge of HICBC.

(2) Mr Kensall was told by Ms Allison that he could not appeal the assessments.

(3) This was on 23 April 2021, over 10 months after the Tribunal in *Wilkes FTT* had decided that HMRC did not have the power to issue discovery assessments in HICBC cases, and only a month before the UT began to hear HMRC's appeal against that decision. In the period after *Wilkes FTT,* numerous HICBC appeals were stayed by the Tribunal behind that judgment.

(4) It would therefore be surprising if HMRC's specialist HICBC team had no knowledge of Mr Wilkes' success at the FTT; of the imminent hearing at the UT or of the relevance of Mr Wilkes' case to other taxpayers in a materially identical position.

(5) In *Stones v HMRC* [2012] UKFTT 110 (TC), where the appellant had relied on incorrect advice given by an HMRC officer, the Tribunal (Judge Poole) made a finding of fact that there had been "misdirection" by HMRC.

(6) On the facts of this case, I similarly make the finding of fact that there was "misdirection" of Mr Kensall by HMRC.

(7) Had Mr Kensall been advised that the assessments were appealable, it is highly likely that he would have done his internet research earlier and identified *Wilkes FTT*. That judgment had been issued a full year previously on 15 June 2020, and it clearly explained that HMRC did not have the power to issue discovery assessments in relation to HICBC.

94. HMRC are invited to consider using their care and management power in Mr Kensall's case, so as to treat his appeal against the assessments as not being "protected". That is, however, a matter for HMRC.

Other reason for disputing the assessments?

95. In the grounds of appeal attached to Mr Kensall's Notice of Appeal to the Tribunal, and repeated in the grounds sent to Mr Butler on 22 April 2022, Mr Kensall placed most weight on the similarity of his position to that in *Wilkes.*

96. However, in that email of 22 April 2022, Mr Kensall added that he was "no longer convinced that HMRC had calculated the taxation correctly". No further detail was given. In the course of the hearing, Mr Kensall said he was unsure whether his pension payments had been properly taken into account as deductible when arriving at his ANI, and thus whether his HICBC liabilities were correct.

97. I asked Mr Kensall if he was asking for permission to amend his grounds of appeal so as to add this point, and added that if I were to give permission, HMRC would need time to consider whether Mr Kensall was correct, and it was likely that the hearing would therefore need to be adjourned. Mr Kensall said that he did not wish to amend his grounds so to submit that HMRC had miscalculated his liability based on his pension payments.

98. No other points were raised. Mr Kensall's appeal against the assessments therefore rests on the discovery ground made in *Wilkes.*

Conclusion on the assessments

99. For the reasons set out above, Mr Kensall's appeal against the assessments is "protected" by FA 2022, s 97. As a result, he is not able to rely on the argument put forward in *Wilkes.* It follows that his appeal against the assessments is refused.

APPEAL AGAINST THE PENALTIES

100. Mr Kensall appealed against the penalties on the basis that he had a reasonable excuse. I first set out the legal principles, and then apply those principles to Mr Kensall.

The law on reasonable excuse

101. In *Perrin v HMRC* [2018] UKUT 156 ("*Perrin*") at [81] the Upper Tribunal ("UT") set out a recommended process for this Tribunal to use when considering whether a person has a reasonable excuse:

> "(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, the Tribunal 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 Tribunal, 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. In doing so, the Tribunal 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."

102. At [82] of *Perrin* the UT said:

> "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…"

Application of the law to Mr Kensall

103. The first step set out in *Perrin* is to establish the facts which Mr Kensall considers form his reasonable excuse. Mr Kensall said that:

(1) was unaware of the HICBC until he received the letter of 19 November 2019; he then immediately called HMRC and was told to look at various websites and enter the relevant details into HMRC's online HICBC calculator. Although he failed to get that calculation correct, he had done his best.

(2) When he received the second letter of 19 April 2021, he again called immediately, and as soon as he realised the existence of the HICBC liability, he paid the tax. Until then, he had not known he was liable to the HICBC.

104. The second step is to decide which of those facts are proved. I have found as facts that the points set out in the previous paragraph are true; they are therefore proven.

105. In relation to the third step, HMRC's case rested to a significant extent on the SA252 and the nudge letter, but I have found as facts that these were not received.

106. In my judgment, it was objectively reasonable for a taxpayer in Mr Kensall's position to be unaware of the HICBC until he received the letter of 19 November 2019, and also objectively reasonable for him to be ignorant of this change to the law, because:

(1) he received no earlier direct communication from HMRC;

(2) he was not made aware of the HICBC through other channels;

(3) he is not a financially sophisticated taxpayer;

(4) he was outside self-assessment;

(5) he has never had any involvement with tax matters or with HMRC other than in relation to PAYE coding notices;

(6) he had no reason to look for guidance on HMRC's website; and

(7) his partner began receiving child benefit in 2002, over a decade before the change in the law.

107. In relation to the fourth step in *Perrin*, Ms Halfpenny relied on the fact that sixteen months had elapsed between (a) Mr Kensall getting the letter of 19 November 2019 and checking the HICBC calculator, and (b) his receipt of the further letter of 19 April 2021. She submitted that Mr Kensall should have realised he was liable to the tax when he checked the HICBC online calculator, and he therefore did not remedy the failure without unreasonable delay.

108. I have already found as a fact that when Mr Kensall completed the calculation shortly after 19 November 2019, he did so to the best of his knowledge and ability. In my judgment, it is objectively reasonable for a financially unsophisticated taxpayer in the position of Mr Kensall not to have realised he had to add his benefits-in-kind to the figures shown on his P60, and to have miscalculated and/or misapplied any pension deductions. When Mr Kensall received the letter of 19 April 2021 from Ms Larkin, he called HMRC immediately and paid the tax. I find that he acted without unreasonable delay.

Conclusion on the penalties

109. For the reasons set out above, Mr Kensall's appeal against the penalties is allowed and they are set aside (cancelled).

OTHER MATTERS

110. In his Notice of Appeal to the Tribunal, Mr Kensall raised the following other matters.

Interest

111. HMRC charged Mr Kensall interest on the assessments, and Mr Kensall asked that this be cancelled. However, the Tribunal does not have any jurisdiction to rule on interest, see *HMRC v Neill & Megan Gretton* [2012] UKUT 261(TCC).

112. HMRC's Debt Management and Banking Manual at DMB405030 to DMB405120 sets out the principles applied by HMRC when deciding whether to cancel an interest charge. HMRC are invited to consider whether any of these principles apply to Mr Kensall's case.

HMRC's approach

113. Mr Kensall has also asked that the Tribunal direct HMRC to carry out an investigation into the way it has handled his case, saying that they have caused him unnecessary stress. He also asked for the Tribunal to direct that HMRC:

> "stop assuming that anyone who is PAYE has the same level of understanding in relation to taxation as an individual who regularly submits self assessments."

114. The Tribunal does not have the jurisdiction to direct that HMRC review the way it has approached Mr Kensall's case, or the way in which it has dealt with HICBC liabilities owed by taxpayers under PAYE.

OVERALL CONCLUSION AND RIGHT TO APPLY FOR PERMISSION TO APPEAL

115. For the reasons explained in this judgment:

(1) Mr Kensall's appeal against the penalties totalling £459 is allowed. That HMRC decisions imposing those penalties are set aside (cancelled).

(2) His appeal against the assessments totalling £2,295 is refused. However, HMRC are asked to consider whether to exercise their care and management powers in Mr Kensall's favour.

116. 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.

ANNE REDSTON
TRIBUNAL JUDGE

RELEASE DATE: 21st DECEMBER 2022