



Neutral Citation: [2023] UKFTT 868 (TC)

Case Number: TC08945

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2022/13603

HIGH INCOME CHILD BENEFIT CHARGE – discovery assessments in respect of HICBC liability – retrospective effect of amendments to s29 TMA 1970 relating to discovery assessments – whether there was a “temporary pause” for the purposes of s97 FA 2022 - failure by HMRC to include copies of relevant cases in “generic bundle” - costs

Heard on: 19 September 2023

Judgment date: 29 September 2023

Before

**TRIBUNAL JUDGE ALEKSANDER
JANE SHILLAKER**

Between

JOANNE ROBSON

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

The Appellant in person

For the Respondents: Anika 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 witness, and the representatives. 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
13 May 2021	2017/18	Discovery Assessment	£1076.00
13 May 2021	2019/20	Discovery Assessment	£1076.00

3. In addition, interest is chargeable.

4. The discovery assessments are made under s29 Taxes Management Act 1970 ("TMA") in respect of the Ms Robson's liability to the High Income Child Benefit Charge ("HICBC").

5. Originally Ms Robson had also been assessed to HICBC for tax years ended 5 April 2014, 2015, 2016, and 2017. In addition, penalties for failure to notify had also been assessed.

6. The assessments to HICBC and penalties were dated 13 May 2021. Ms Robson requested a review, and the review conclusion letter dated 22 September 2022 upheld the liability to HICBC for the tax years ended 5 April 2018 and 2020, but the assessments for the earlier years, and all of the penalties were cancelled.

7. Ms Robson now appeals against her liability to HICBC for the tax years ended 5 April 2018 and 2020.

8. Witness statements were submitted from Elizabeth Butler, a tax professional caseworker in HMRC's HICBC Team, and Jacqueline White a Senior HMRC Officer working in the Campaigns & Projects Team. Ms Butler was unable to attend the hearing for reasons given to the Tribunal. Ms Butler's evidence was addressed to whether HMRC had made a "discovery" for s29 TMA purposes. As Ms Robson did not challenge Ms Butler's evidence, the hearing proceeded in her absence. The statements of the witnesses were taken as read as evidence in chief. For the reasons that will become apparent below, Ms White was not cross examined. The electronic documents to which we were referred were documents bundle of 156 pages, and HMRC's generic bundle relating to High Income Child Benefit Charge appeals of 808 pages.

BACKGROUND FACTS

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

10. Ms Robson is an employee whose salary is subject to withholding of tax under PAYE. Ms Robson was never asked by HMRC to file self-assessment tax returns for the periods under appeal.

11. Ms Robson's first child was born in 2007, and Ms Robson claimed child benefit shortly thereafter. This was before the introduction of HICBC, and the Child Benefit claim form in use at that time would therefore have made no reference to HICBC.

12. Ms Robson first came within the scope of HICBC in the tax year 2013/14, when her income exceeded £50,000 for the first time. She was not sent HMRC's SA252 letter which would have advised her of the introduction of HICBC.

13. No claims for Child Benefit were made by Ms Robson after the introduction of HICBC in 2012/13.

14. "Educational" letters were sent by HMRC to Ms Robson at the address on HMRC's file on 7 October 2019 and 5 November 2019. However, these were not received by Ms Robson as she had moved away from that address in August 2016. Although she had notified HMRC of her move, HMRC had not updated their records to reflect this change.

15. Ms White'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, Ms Robson was not a higher-rate taxpayer, and we consider that it is unlikely that she paid any attention to the campaign. Ms White also described the 'briefing' that was issued by HMRC in November 2012 to over a million higher rate taxpayers. As her evidence was entirely generic and focused mainly on attempts by HMRC to publicise HICBC to higher rate taxpayers in 2012 and 2013 and as Ms Robson was not a higher rate taxpayer at that time, we did not find Mrs White's evidence about these campaigns of any material assistance in this case.

16. On 10 April 2021, HMRC's computer system allocated Ms Robson's case to a caseworker in HMRC's HICBC Appeals and Complaints team. The caseworker reviewed HMRC's records. These showed that Ms Robson had apparently been sent the "educational" letters mentioned above. The records indicated that Ms Robson had claimed Child Benefit and that Ms Robson's adjusted net income for 2013/14 to 2017/18 inclusive and for 2019/20 exceeded £50,000.

17. HMRC wrote to Ms Robson on 10 May 2021 in respect of her liability to HICBC. Ms Robson telephoned HMRC on 12 May 2021 and on 13 May 2021, HMRC raised the assessments to HICBC and penalties.

18. On 25 May 2021 Ms Robson wrote to HMRC to appeal against the HICBC liability and penalties.

19. On 22 September 2021, HMRC wrote to Ms Robson as follows:

Further information about your High Income Child Benefit Charge case

Thank you for your letter received on 3 June 2021.

Upper Tribunal decision

We sent you discovery assessments for the tax you owe. We did this under Section 29 of the Taxes Management Act 1970.

There has been a recent decision of the Upper Tribunal in *HMRC v Jason Wilkes* [2021] UKUT 150 (TCC) ('Wilkes'). The tribunal found against HMRC's use of discovery assessments to reclaim amounts of HICBC. This applies in cases where no return has been filed. HMRC do not agree with this decision and have sought permission to appeal to a higher court.

At this time, HMRC's view is that the assessments issued under Section 29 of the Taxes Management Act 1970 are still valid and due to be paid.

Failure to notify penalties are unaffected by the Wilkes decision. The decision of the Upper Tribunal in *HMRC v Robertson* [2019] UKUT 0202 (TCC) confirms this. The tribunal decided that it was not necessary for HICBC to be assessed for it to be treated as potential lost revenue. Because of this, failure to notify penalties still apply as per paragraphs 7 and 16 Schedule 41 Finance Act 2008.

The Upper Tribunal decision does not affect whether a taxpayer must pay HICBC.

We are committed to working within the law to make sure everyone pays the right amount of tax.

What happens next

We are working to understand if this tribunal decision will affect your case. We have paused the assessments and penalties on your case.

However, the assessments we have raised are still due to be paid. This means that the deadline we gave you for paying us is still correct. We recommend that you pay these amounts by the deadline.

We will contact you again when we have more information.

If you have any questions about this letter, please phone us. Or if you prefer, you can write to us. Our contact details are at the top of this letter.

We apologise for any delay in your case.

[...]

20. On 8 June 2022, HMRC wrote to Ms Robson with their “view of the matter” which confirmed the assessments and penalties. Ms Robson requested a review, and the review conclusion letter dated 22 September 2022 upheld the liability to HICBC for the tax years ended 5 April 2018 and 2020, but the assessments for the other years, and all of the penalties were cancelled.

21. Mr Robson now appeals against the decision in the review conclusion letter.

THE LAW

22. 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.

23. Until the Finance Act 2022 (“FA 2022”) came into force on 24 February 2022, section 29(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.

24. Subsections (2) and (3) of section 29 TMA only apply where the taxpayer has made and delivered a return and do not apply in this case as Ms Robson did not make a self-assessment tax return in the years assessed.

25. In relation to assessments under section 29 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 (“*Wilkes*”)) held that HICBC was “neither ‘income’ nor even charged on income” nor was it “income which ought to have been assessed to income tax” or an “amount which ought to have been assessed to income tax” (see *Wilkes* at [29]). Accordingly, HICBC could not be assessed under section 29(1)(a) TMA.

26. 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 things.

27. The new wording has retrospective effect but that is 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 section 97 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.

28. In summary, the retrospective changes made by s97 FA 2022 do not apply to an appeal that was made 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 ASSESSMENT TO HICBC

29. As Ms Robson’s appeal was notified to HMRC before 30 June 2021, we need to consider whether the exception in s97(6) applies. For this to apply:

- (1) The appeal must be subject to a temporary pause occurring before 27 October 2021 (s97(6)(b))
- (2) It must be reasonable to conclude that the temporary pause relates to the questions raised in the *Wilkes* cases (s97(6)(c)); and
- (3) The HMRC must have notified Ms Robson that they are suspending work on her appeal pending the determination of another appeal, details of which have been notified to Ms Robson(s97(8)c).

30. We find that the exception in s97(6) applies to Ms Robson for the following reasons:

- (1) HMRC wrote to Ms Robson on 9 September 2021, which is before the 27 October 2021 deadline in s97(6)(b).
- (2) HMRC’s letter states that “we have paused the assessments and penalties on your case”, “We will contact you again when we have more information”, and “ we apologise for any delay.”. We find that it is clear on the face of the letter that HMRC are suspending work on her appeal for a temporary period for the purposes of s97(6)(b).
- (3) The letter states that HMRC are working to understand if the decision of the Upper Tribunal in *Wilkes* affects Ms Robson’s case. We find that it is reasonable to conclude that the temporary pause occurred on the basis that the issues arising in *Wilkes* may be relevant to Ms Robson’s case for the purposes of s97(6)(c).
- (4) The letter refers to the fact that HMRC disagree with the decision of the Upper Tribunal and are seeking permission to appeal to the Court of Appeal. We find that HMRC suspended work on Ms Robson’s case pending the determination of *Wilkes* by the Court of Appeal, which satisfies the requirement of s97(8)(c).

31. Ms Aziz submits that the letter of 9 September 2021 did not amount to the notification of a temporary pause as the letter stated that the assessments raised are still due to be paid. HMRC had not therefore suspended work on the appeal for the purposes of s97(8)(c) or paused it for the purposes of s97(6)(b). Ms Aziz referred us to the case of *Niewiarowski* [2023]UKFTT 649 (TC), in which the Tribunal held that a similar letter to the one sent to Mr Robson did not amount to a “temporary pause”. However, in the case of the letter sent to Mr Niewiarowski, the letter only “paused” the liability to penalties (see paragraphs [29] and [30]). This is a critical difference, and distinguishes *Niewiarowski* from this appeal. The letter to Ms Robson does

state that the assessments to HICBC are still due. But we find that this reflects and restates HMRC's view that *Wilkes* was wrongly decided, in order that Ms Robson should not be under a misapprehension that the impact of the decision of the Upper Tribunal was to relieve her of any HICBC liability pending the final determination of *Wilkes*. We find that the letter communicates the fact that HMRC are suspending work on Ms Robson's appeal pending the final determination of the *Wilkes* case. We find that there was a "temporary pause" in relation to both the assessments to HICBC and the penalties in respect of Ms Robson's appeal.

CONCLUSION

32. We find that HMRC's assessments to HICBC are not relevant protected assessments for the purposes of s97 FA 2022. As a consequence, the amendments made to s29 TMA by s97 FA 2022 do not apply to the assessments under appeal.

33. The decision of the Court of Appeal in *Wilkes* is therefore engaged, and the assessments under appeal are therefore invalid.

34. The appeal is therefore allowed.

COSTS

35. We are concerned that the "Generic Bundle" filed with the Tribunal and provided to Ms Robson is out of date, and a number of key Tribunal decisions are missing from it, in particular the decisions of this Tribunal in *Niewiarowski* [2023]UKFTT 649 (TC) and *Hextall* [2023] UKFTT 390 (TC). Although *Hextall* had little relevance to the facts of this appeal, Ms Aziz made express reference to *Niewiarowski* in the course of her submissions. We had to pause the hearing to allow a copy of the decision on *Niewiarowski* to be emailed to Ms Robson and to give her time to consider the decision (we signposted her to the relevant paragraphs). This is unacceptable behaviour on the part of HMRC. The SRA Code of Conduct states the following at paragraph 2.7:

You draw the court's¹ attention to relevant cases and statutory provisions, or procedural irregularities of which you are aware, and which are likely to have a material effect on the outcome of the proceedings.

36. Basic fairness requires HMRC to provide copies of authorities on which they rely to the Tribunal and to the other parties. This is particularly the case in circumstances where the other party is not represented (as is the case in this appeal).

37. Ms Aziz's explanation for her failure to include *Niewiarowski* in the bundles was because the decision had not been released at the time the bundles had been prepared. This is not an acceptable excuse. *Niewiarowski* was not raised by Ms Aziz as a response to an unexpected legal point raised by Ms Robson in the course of her submissions. *Niewiarowski* was raised by HMRC in the course of their submissions on whether their letter gave rise to a temporary pause. We note that Ms Aziz represented HMRC in *Niewiarowski* and so would have been aware of the decision from the moment it was released on 14 July 2023. She had plenty of time to either update her bundle or send a copy of the decision to the Appellant and the Tribunal. This would have avoided the understandable anxiety of Ms Robson when suddenly taken by surprise at Ms Aziz's reference to this decision during the course of the hearing.

38. If Ms Robson had professional representation, we would have considered exercising our powers under Rule 10 to award costs in favour of Ms Robson in respect of the unreasonable conduct of HMRC. However, as Ms Robson was unrepresented, and we were able to deal with the case by pausing the hearing (and the hearing finished within the allocated time), any

¹ "Court" is defined in the Code of Conduct to include any tribunal.

additional costs incurred by Ms Robson would be negligible. In these circumstances, an award of costs would serve no purpose.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

39. 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: 29 September 2023