Neutral Citation: [2024] UKFTT 00121 (TC)

Case Number: TC09063

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video

Appeal reference: TC/2021/11424

HIGH INCOME CHILD BENEFIT CHARGE – discovery assessments and non-deliberate penalties – identification of subject-matter of appeal to Tribunal – whether discovery assessments valid and in time – whether reasonable excuse for failure to notify chargeability – held – Tribunal only has jurisdiction to hear appeal against assessments and penalties which had been appealed to HMRC – Appellant had reasonable excuse for failure to notify – assessments were out of time, and appeal against penalties allowed

Heard on: 15 January 2024
Judgment date: 2 February 2024

Before

TRIBUNAL JUDGE JEANETTE ZAMAN

Between

PAUL BURCHETT

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: In person

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

DECISION

INTRODUCTION

1. This appeal concerns the High Income Child Benefit Charge ("HICBC"). Mr Burchett has been assessed to the HICBC for the tax years 2012/13 to 2018/19 inclusive, together with penalties for failing to notify chargeability under s7 Taxes Management Act 1970 ("TMA 1970"). The penalties have been assessed pursuant to Schedule 41 Finance Act 2008 ("Schedule 41") for the tax years 2012/13 to 2017/18. The assessment and penalty for the tax year 2013/14 were cancelled following the review by HMRC.

2. The parties did not agree as to which of the above assessments had been validly appealed to the Tribunal. (They did agree that all of the penalties were within scope of the appeal.) I heard submissions from both parties during the hearing and explain the reasons for my decision on this issue after making my findings of fact (as that part of this decision includes a summary of the correspondence between the parties, including Mr Burchett's appeal to HMRC).

3. For the reasons set out below, I have decided:

   (1) The appeal to the Tribunal has validly been made only against the assessments for the tax years 2012/13, 2014/15 and 2015/16 (and the penalties for 2012/13 and 2014/15 to 2017/18).

   (2) The appeal against these assessments is allowed on the basis that whilst they are protected assessment they were issued out of time.

   (3) The appeal against the penalties is allowed.

HEARING AND EVIDENCE

4. With the consent of the parties, the form of the hearing was video using the Tribunal video hearing service. A face-to-face hearing was not held because it was expedient not to do so.

5. 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.

6. I was provided with a hearing bundle of 140 pages specific to this appeal, directions of the Tribunal dated 11 August 2013, a generic bundle (which included not only legislation and authorities but also information about the advertising campaign conducted by HMRC in relation to the HICBC), a supplemental bundle prepared by HMRC containing various decisions of other compositions of this Tribunal in relation to s97 Finance Act 2022 ("FA 2022") and an email from Mr Burchett attaching further decisions of this Tribunal.

7. I have considered all of the submissions and evidence when reaching my decision but have not found it necessary to refer expressly to all of the submissions and evidence when making my findings of fact and setting out the reasons for my decision.

8. Mr Burchett had provided a witness statement and gave evidence at the hearing, explaining further the matters set out in his grounds of appeal, and referring to the explanations he had provided in correspondence with HMRC. Mr Burchett's witness statement addressed both matters of fact and his opinion and submissions on matters of law; I have not placed any evidential weight on statements of opinion and submissions but have taken account of them as submissions.

9. Mr Burchett was cross-examined by Ms Halfpenny on his evidence, in particular as to whether he had received the SA252 from HMRC in August 2013, whether he had discussed

such a document with his wife which then led to her filing a self assessment return for 2013/14 and notifying her liability to the HICBC for that tax year.

10. There were witness statements from two HMRC officers, both of whom were available to be cross-examined at the hearing:

(1) Officer Hasan Ahmed, a caseworker in the HICBC team, who had received the phone call from Mr Burchett in January 2021 in which he had called to make a disclosure following receipt of a letter from HMRC. Officer Ahmed had recorded all the information provided by Mr Burchett, made the relevant discovery and then sent the file for full disclosure checks, at which point it was taken over by Officer Mumtaz in February 2021. Officer Ahmed was not cross-examined on his evidence; and

(2) Officer Steven Thomas, a senior officer providing technical support for the Campaigns and Projects team. Officer Thomas' witness statement did not relate specifically to Mr Burchett but included background information about HMRC's 2012 publicity campaign, subsequent "one to many" letters, nudge letters inviting disclosure and follow-up steps taken by HMRC. Officer Thomas was cross-examined by Mr Burchett, including about SA252s sent to taxpayers, and responded to a question from the Tribunal.

RELEVANT LAW

11. There was no dispute between the parties as to the relevant legislation which is summarised below.

12. By s681B Income Tax (Earnings and Pensions) Act 2003 (which was inserted by Finance Act 2012 with effect for child benefit payments made after 7 January 2013) a person is liable to a charge to income tax, the HICBC, for a tax year if:

(1) their adjusted net income ("ANI") for the year is greater than £50,000;

(2) their partner's ("partner" is defined in s681G) ANI is less than theirs; and

(3) they or their partner received child benefit in the relevant tax year.

13. The assessments to HICBC have been raised pursuant to HMRC's discovery assessment powers as provided in s29 TMA 1970. Accordingly, HMRC bear the burden of establishing that they have discovered that an amount of income which ought to have been assessed to income tax has not been so assessed. In *HMRC v Wilkes* [2020] UKUT 0150 (TCC) ("*Wilkes*") the Upper Tribunal determined that HMRC had no power to make a discovery assessment in respect of the HICBC on the basis that child benefit was not an amount of income which should have been assessed to income tax – the HICBC is a free-standing charge to tax. That decision was subsequently confirmed by the Court of Appeal in *HMRC v Wilkes* [2022] EWCA Civ 1612.

14. Following the decision in *Wilkes*, *s*97 FA 2022 was enacted such that s29 TMA 1970 was amended to provide for a discovery assessment to be issued where "an amount of income tax … ought to have been assessed but has not been assessed". This reversed the decision in *Wilkes*, and allowed HMRC to make discovery assessments in relation to the HICBC.

15. These amendments apply to the tax year 2021/22 and subsequent tax years. However, they also have retrospective effect, but that is subject to exceptions for discovery assessments in relation to which notice of appeal had been given to HMRC on or before 30 June 2021 which met certain conditions. The exceptions thus operate in favour of the taxpayer, whereas assessments which are outside of these exceptions are those to which the legislation applies retrospectively and are defined as "relevant protected assessments".

16. A discovery assessment is not a relevant protected assessment if notice of appeal was given to HMRC on or before 30 June 2021 and either:

(1) 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 (ie the *Wilkes* issue), and "the issue was raised on or before 30 June 2021 (whether by the appellant or in a decision given by the tribunal)" (s97(5)); or

(2) the appeal is subject to a temporary pause which occurred before 27 October 2021, and "it is reasonable to conclude that the temporary pausing of the appeal occurred (wholly or partly) on the basis that [the *Wilkes* issue] is, or might be, relevant to the determination of the appeal" (s97(6)).

17. By virtue of s34(1) TMA 1970, HMRC may raise a HICBC discovery assessment at any time within four years of the end of the tax year to which it relates. There are also extended time limits:

(1) HMRC have the power under s36(1), where there is a loss of income tax brought about carelessly by the person, to make an assessment at any time not more than six years after the end of the tax year. By s118(5) TMA 1970, a loss of tax is brought about carelessly if the person fails to take reasonable care to avoid bringing about that loss.

(2) HMRC have the power, under s36(1A) TMA 1970, to raise the assessment within a period of 20 years of the tax year where the loss of tax arises as a consequence of a failure to notify liability to a charge to tax under s7 TMA 1970. That section provides that if a person is chargeable to income tax, they must notify HMRC of that fact within six months after the end of the tax year. In consequence of the provisions of s118(2) TMA 1970, the 20-year assessment provisions do not apply where the taxpayer establishes a reasonable excuse for the failure to notify their liability under s7 and, after the excuse ceased, did the required action (ie notify) without unreasonable delay.

18. Paragraph 1 Schedule 41 provides that a person who has not been sent a tax return is liable to a penalty if he fails to comply with s7 TMA 1970. Paragraph 6 Schedule 41 provides that in the case of a "domestic matter" (which this is) where the failure was neither deliberate or concealed (as HMRC accept), the penalty is 30% of the "potential lost revenue" ("PLR"); but paragraphs 12 and 13 provide for a reduction in that percentage where a taxpayer gives HMRC help in quantifying the unpaid tax, but subject to a minimum penalty rate of 10% if HMRC became aware of the failure less than 12 months after the tax "first becomes unpaid by reason of the failure" (paragraph 13(3)(a)) and 20% otherwise.

19. Paragraph 14 Schedule 41 provides that HMRC may reduce a penalty because of special circumstances (and by paragraph 19 the Tribunal may do so where HMRC's decision in this regard is flawed). Paragraph 20 provides that liability to a penalty does not arise if the taxpayer satisfies HMRC or the Tribunal on an appeal that they have a reasonable excuse for the failure.

FACTS

20. I make the following findings of fact based on the evidence before me:

(1) Prior to 2012/13, Mr Burchett was not within the self assessment regime.

(2) HMRC did not issue Mr Burchett a notice to file a tax return for the tax years in question under s8 TMA 1970, nor did he make voluntary returns under s12D TMA 1970.

(3) Mr Burchett's partner, Mrs Burchett, has received child benefit since February 1999. The claim forms at that time had made no reference to the HICBC (as the charge had not yet been introduced).

(4) In 2012, prior to the introduction of the HICBC, HMRC issued several press releases which detailed the introduction of the charge and advised parents liable to pay the HICBC to register for self assessment. Similar press releases came out in 2014. In 2018 and 2019 HMRC, in response to misgivings raised in connection with reasonable excuse defences, issued a further round of press releases dealing with that issue. There is considerable information about the HICBC on HMRC's website. On the basis of Mr Burchett's evidence, which was not challenged by HMRC, I am satisfied that Mr Burchett was not aware of the HICBC from this publicity.

(5) In each of the tax years 2012/13 to 2018/19 (inclusive), Mr Burchett's ANI exceeded £50,000, and, with the exception of the tax year 2013/14, exceeded that of Mrs Burchett.

(6) Mr Burchett was required to notify HMRC of his chargeability to income tax for 2012/13 by 5 October 2013. He did not do so. He had the same obligation for subsequent tax years (with the exception of 2013/14), with a corresponding deadline of 5 October following the end of the relevant tax year, and on each occasion he did not do so.

21. HMRC submit that they issued a "SA252" to Mr Burchett on 17 August 2013 informing him of the introduction of the HICBC and the relevant criteria. They say this was issued to his address in Bury (which was agreed to have been his address at the relevant time). Their evidence was a "Contact History Detail" specifying the SA252 as a "Document Out" on 17 August 2013, and a "Review Status Summary" which listed this document and did not mark it as returned undelivered. Mr Burchett denied having received a SA252 (or any other communication from HMRC about the HICBC) at this time. I consider this in the Discussion.

22. Mrs Burchett had filed a tax return for 2013/14 on 28 January 2015 confirming that she was the higher earner for that tax year and declaring liability to the HICBC. (This filing date was set out in HMRC's review conclusion letter. HMRC's Statement of Case (the "SoC") (at [11]) sets out this date as 28 January 2021 but I infer that it was the SoC that was incorrect as such a date was out of the chronological order otherwise used therein.) There was no further information in relation to Mrs Burchett's tax affairs in the bundle, in particular no documentary evidence (either produced by Mr Burchett or by HMRC) as to the date on which Mrs Burchett was registered for self assessment or whether she had filed tax returns previously or subsequently. I revert to this in the Discussion in the context of reasonable excuse.

23. HMRC issued a "nudge" letter to Mr Burchett on 6 January 2021, advising him to check whether he was liable to the HICBC and inviting a voluntary disclosure.

24. Mr Burchett called HMRC on 11 January 2021 following receipt of this letter, speaking to Officer Ahmed. Officer Ahmed discovered that Mr Burchett had not notified chargeability to the HICBC for 2012/13 to 2018/19 (inclusive) and that there was a loss of tax for these years.

25. Mr Burchett was registered for self assessment on HMRC's systems on 18 January 2021.

26. HMRC called Mr Burchett on 4 March 2021 asking him to check the figures. He said he might appeal against the penalty after receiving the closure letters.

27. HMRC issued assessments for the tax years 2012/13 to 2018/19 (inclusive) and penalties for the tax years 2012/13 to 2017/18 (inclusive) on 25 March 2021. The penalties were calculated on the basis of non-deliberate behaviour, with unprompted disclosure, and giving the maximum reduction. The assessment and penalty for 2013/14 were cancelled following HMRC's review. The remaining assessments and penalties which had been issued by HMRC were for the following amounts (as amended, where applicable, following review), although HMRC's position is that this appeal relates only to the assessments for 2012/13, 2014/15 and 2015/16 and all of the penalties.

	Discovery assessment	Penalty
2012/13	£162	£16.20
2014/15	£708	£70.80
2015/16	£1,398	£139.80
2016/17	£721	£72.10
2017/18	£968	£96.80
2018/19	£1,076	None issued

28. Mr Burchett wrote to HMRC on 16 April 2021. In that letter he said he wanted to appeal the assessments for 2012/13, 2013/14, 2014/15 and 2015/16, and to appeal the penalty charge of £438.20. (This amount of £438.20 is the aggregate of all the penalties which had been issued for 2012/13 to 2017/18 (inclusive), ie before the cancellation and amendments at the review stage.) Mr Burchett set out:

(1) He had not considered himself high income, had never been required to complete a tax return and his income had always been dealt with under PAYE.

(2) The first time he became aware of any liability to the HICBC was when he received the letter of 6 January 2021, to which he responded promptly.

(3) They had lived at the same address since 2002. He was certain he did not receive any communication from HMRC concerning the matter in 2013, as he would have responded.

(4) He accepts he is liable for the HICBC and on 9 April 2021 they cancelled their child benefit.

(5) He will pay the tax arrears which he now owes, and has completed a tax return for 2019/20.

(6) He has always taken reasonable care in his financial affairs. He has a reasonable excuse defence against the penalties. The assessments to recover tax before 5 April 2016 are time barred.

29. On 10 May 2021 HMRC replied providing their view of the matter, upholding the assessments and penalties for the years specified by Mr Burchett. That letter offered a review.

30. Mr Burchett accepted the offer of a review on 27 May 2021. He set out his position, re-iterating the history and that he was ignorant of the HICBC until the letter of 6 January 2021. In that letter he asked for evidence that he was issued with a SA252, and for HMRC's notes of the telephone call of 11 January 2021, saying that he would then likely submit further written representations to assist the reviewing officer.

31. HMRC responded on 21 June 2021. HMRC said that the legislation provides that the review period is 45 days, or such other period as agreed between the parties. They continued:

> "HMRC's current approach is to suggest to customers that the review period is extended by 3 months to recognise the additional burden you may face during these unprecedented times. Unless I hear to the contrary from you, I will assume that you have no objection to the review period being extended so that it expires on 13 October 2021.
>
> …If you wish to provide me with any additional information or documentation, please contact me…at your earliest opportunity and, if possible, within 30 days…"

32. Mr Burchett wrote further on 7 October 2021 having listened to an audio transcript of his calls with HMRC. He set out representations in that letter relating to his conduct, and denying

receiving the SA252, and also referred to the Upper Tribunal decision in *Wilkes*, saying he understood it "means that a discovery assessment is not possible in my circumstances, for any period prior to 2019/20".

33. HMRC sent a review conclusion letter on 11 October 2021. That letter lists the matters under review as assessments and penalties for 2012/13 to 2015/16 (inclusive) and penalties for 2016/17 and 2017/18. The outcome of the review was as follows:

(1) assessment for 2014/15 upheld;

(2) penalties for 2014/15, 2016/17 and 2017/18 upheld;

(3) varied assessment for 2012/13 from £118 to £162 and penalty for that year from £11.80 to £16.20;

(4) varied assessment for 2015/16 from £1,412 to £1,398 and the penalty for that year from £141.20 to £139.80; and

(5) cancelled assessment and penalty for 2013/14.

34. Mr Burchett gave notice of appeal to the Tribunal on 8 November 2021 and set out as the "Desired outcome" the cancellation of all penalties and charges. His grounds of appeal were:

(1) He had no knowledge of the HICBC until receiving HMRC's letter in January 2021.

(2) He had not received any correspondence from HMRC about the HICBC prior to then, including a SA252 in August 2013.

(3) HMRC were only in time to issue assessments for the tax years 2016/17 to 2019/20 (inclusive). Assessments for earlier periods should be cancelled.

(4) Relying on *Wilkes* (for all periods), discovery assessments cannot be issued to recover the HICBC and all assessments should be cancelled.

(5) He challenged inconsistencies in the review conclusion letter, including as to information held by HMRC, re-stating his reasonable excuse for not notifying, and challenging HMRC's failure to follow up any non-replies to the SA252 until 2021.

(6) He acted without delay once receiving HMRC's letter in January 2021, including arranging payment for tax liabilities for 2019/20 and 2020/21 and cancelling child benefit payments.

35. On 14 December 2021 the Tribunal issued directions that the appeal be stood over until 60 days after *Wilkes* is finally determined, or settled by the parties.

36. After the stay was lifted, HMRC served their SoC. Mr Burchett's witness statement (of 21 September 2023) includes his submissions, which expand on his grounds of appeal as follows:

(1) The assessments are not protected and had been subject to a temporary pause. His written submissions focused on HMRC's letter of 21 June 2021, at which point he was still waiting for a reply to requests for information. He had agreed the temporary pause as he had no reason to challenge it. The pause was one agreed between him and HMRC. Further, this was highly likely to have been connected at least in some part with the matters in *Wilkes*. The Tribunal later stayed his case.

(2) The assessments for 2012/13 and 2014/15 are out of time as they were issued more than four years after the relevant tax years.

(3) He questioned why HMRC had not followed up on the letter they say was sent in 2013 for eight years.

(4) He has not been unreasonable in his actions, and there should be no penalties. He has done what any reasonable person would have done and could have done no more since receiving HMRC's letter in January 2021.

ASSESSMENTS AGAINST WHICH AN APPEAL HAS BEEN MADE TO THE TRIBUNAL

37. The assessments and penalties which have been issued by HMRC are set out at [27] above. Mr Burchett's notice of appeal to the Tribunal attaches, as is required, the review conclusion letter (which itself sets out the assessments and penalties which the reviewing officer had been asked to review following the appeal to HMRC) and asks that all assessments and penalties are cancelled. The grounds of appeal include not only that the assessments for tax years prior to 2016/17 were out of time and should be cancelled, but also broader grounds, relying on *Wilkes*, that are said to apply to assessments for "all periods". HMRC's SoC states at [1] that the appeal is against discovery assessments for the tax years 2012/13, 2014/15 and 2015/16 (amounting to £2,268 following the review) and against penalties for the tax years 2012/13 and 2014/15 to 2017/18 (inclusive). Mr Burchett's witness statement then includes submissions which extend beyond the earlier periods.

38. I need to determine the scope of the appeal which is before the Tribunal. The notice of appeal was unclear in this regard (as references to "all periods" could have been read as references to all periods which had been specified earlier in the grounds), but by September 2023 it was apparent that Mr Burchett was seeking to appeal against all assessments. However, this is not a question of clarity but one of jurisdiction.

39. The statutory provisions relevant to appealing to a Tribunal are within s49A to 49I TMA 1970. Section 49A TMA 1970 applies where notice of appeal has been given to HMRC (s49A(1)). The following sections then address the position where an appellant notifies HMRC that they require HMRC to review the matter in question, HMRC notify the appellant of an offer to review the matter in question, or the appellant notifies the appeal to the Tribunal (ie without accepting the offer of a review). Sections 49G and 49H then deal with notifying appeals to the Tribunal after a review has been required by the appellant or offered by HMRC. Section 49G deals with notifying an appeal to the Tribunal after HMRC have given notice of the conclusions of a review (which is the position which occurred here). Section 49G(4) provides that if the appellant notifies the appeal to the Tribunal, the Tribunal is to determine the matter in question. Section 49I(1)(a) provides that "matter in question" means the matter to which an appeal relates.

40. These provisions thus require identification of the matter to which an appeal relates. Here, Mr Burchett appealed to HMRC (on 16 April 2021) against the assessments for 2012/13 to 2015/16 (inclusive) and the penalties for 2012/13 to 2017/18 (inclusive). This is clear from the express terms of his letter, and supported by his grounds set out therein. HMRC's response of 10 May 2021 is clearly confined to those tax years of assessment – there is a list of the assessments and penalties against which he has appealed on the first page. Mr Burchett's letter of 27 May 2021 accepting the offer of a review referred again to the assessments for the years 2012/13 to 2015/16 and the penalties for all years. The review conclusion letter refers to the appeal to HMRC of 20 April 2021 and the tax years specified therein, setting out the conclusion reached for each of those tax years.

41. It is clear that the matter to which the appeal relates is the assessments for 2012/13, 2014/15 and 2015/16 and the penalties for 2012/13 and 2014/15 to 2017/18 (inclusive) (the assessment and penalty for 2013/14 having been cancelled following the review). No appeal has been made to HMRC against the assessments for 2016/17 to 2018/19 (inclusive) and an

appeal cannot be made directly to the Tribunal in respect of those years (even if it were clear that the notice of appeal to the Tribunal sought to appeal against these years). This decision does not therefore address any challenge to those assessments.

ISSUES AND BURDEN OF PROOF

42. The burden of establishing that valid in time discovery assessments were issued lies with HMRC. If HMRC meet this burden, then the burden shifts to Mr Burchett who must establish that the tax is overstated (a matter which was not in issue here as the quantum was not challenged) and (where HMRC rely on the extended time limit in s36(1A) TMA 1970) that he has a reasonable excuse for the failure to notify.

43. The burden of establishing that valid in time penalties were issued lies with HMRC. If HMRC meet this burden, then the burden shifts to Mr Burchett to establish that he has a reasonable excuse for the failure to notify, or that there are special circumstances.

44. The standard of proof is the balance of probabilities.

DISCUSSION

45. I address the issues in relation to the discovery assessments and the penalties separately.

Discovery assessments

46. Two issues arise in relation to the assessments, namely whether a discovery can be made under s29 TMA 1970, ie whether they are protected assessments (which for this purpose means protected in favour of HMRC) and whether they were issued in time.

Whether protected assessments

47. I am satisfied that Officer Ahmed made a discovery that Mr Burchett was liable to the HICBC but, in accordance with *Wilkes*, this is not a discovery of income which ought to have been assessed to income tax but which had not been so assessed. HMRC need to rely on the amendments made to s29 by s97 FA 2022.

48. HMRC's position is that the discovery assessments are protected, on the basis that although Mr Burchett appealed to HMRC on 16 April 2021, ie before the cut-off date specified in s97 FA 2022 of 30 June 2021, he did not raise the issue of an invalid assessment on the basis of the *Wilkes* decision before that date, and there has been no temporary pause as described in s97(8).

49. The relevant sub-sections of s97 are as follows:

> "(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."

50. Section 97(5) requires at s97(5)(a) that 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. This condition is met in the present appeal – it relates to the validity of the assessments which have been issued to Mr Burchett (and Mr Burchett raised the question of *Wilkes* in his notice of appeal to the Tribunal and it is addressed in the SoC).

51. The question is then whether the condition in s97(5)(b) is met, namely whether "the issue was raised on or before 30 June 2021 (whether by the appellant or in a decision given by the tribunal)". The Tribunal had not sent any substantive correspondence by that time (although it did direct a stay in December 2021), so it can only have been raised for this purpose by Mr Burchett.

52. I have summarised the correspondence between Mr Burchett and HMRC above when making my findings of fact. HMRC state at [58] in the SoC that the first time Mr Burchett made reference to *Wilkes* was within his notice of appeal to the Tribunal on 8 November 2021 (ie after the required date). As a matter of fact, that is not correct – Mr Burchett expressly referred to the decision in *Wilkes* in his further representations of 7 October 2021. In any event, I bear in mind that s97(5)(b) does not necessarily require express reference to be made to *Wilkes*; it requires that "the issue" whether an 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 was raised.

53. I have considered what it means for the issue to have been "raised on or before 30 June 2021" and the timing of the communications between the parties.

54. HMRC had provided a supplemental bundle of decisions of the Tribunal which consider the interpretation and application of s97(5)(b). Those decisions illustrate that different compositions of this Tribunal have reached different conclusions on what is required for an issue to have been "raised" for this purpose (eg, different approaches were taken in *Hexstall v HMRC* [2023] UKFTT 00390 (TC) and in *Fera v HMRC* [2023] UKFTT 00961 (TC)). Ms Halfpenny drew to our attention the fact that the decision in *Fera* is being appealed to the Upper

Tribunal; and Mr Burchett submitted that I should adopt the reasoning of Judge Gething in *Fera*.

55. I consider that s97(5)(b) must be interpreted in a manner which does not result in this sub-paragraph being redundant, such that it must mean something more than that required by s97(5)(a), and that the express reference in s97(5)(b) to the issue being raised either by the appellant or the tribunal means that there should be some express reference which can be identified as a challenge based on the *Wilkes* issue, even if that challenge is imprecise (or even, potentially, a slightly inaccurate description of the point in dispute in *Wilkes*). For this reason, I prefer the approach taken in *Hexstall* to that in *Fera*. I do not accept that any appeal against the assessments (other than one which accepts the principle but challenges the computation) "must inherently be challenging the validity of the assessment and that must involve…whether the elements of …[s29(1)(a)]… were satisfied" (at [44] of *Fera*). I have concluded, having reviewed all documentary evidence of the communications between the parties before 30 June 2021 (which for this purpose includes Mr Burchett's call to HMRC in January 2021, his appeal to HMRC in April 2021 and the representations to the reviewing officer in May 2021), that the *Wilkes* issue had not been raised by Mr Burchett on or before 30 June 2021. The discovery assessments are not therefore excluded from being relevant protected assessments by s97(5).

56. I have also considered whether s97(6) applies. Section 97(6)(b) requires that the appeal is subject to a temporary pause which occurred before 27 October 2021, and s97(6)(c) that 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 s97(5)(a) is, or might be, relevant to the determination of the appeal. Section 97(8) then sets out what is meant by an appeal being subject to a temporary pause.

57. In their SoC (at [57]) HMRC state "The Respondents can confirm that there has been no temporary pause as described in Section 97(8)". I treat this as a submission rather than a statement of fact.

58. Mr Burchett submitted that the appeal was subject to a temporary pause within s97(8), relying (alternatively) on HMRC's letter of 21 June 2021 which he said was pivotal in his appeal, and also a recorded message on HMRC's phone system apparently informing callers that the HICBC appeals were on hold. This second submission was based on the findings of the Tribunal in *Ashe v HMRC* [2023] UKFTT 538 (TC); it was not Mr Burchett's case that he had heard this message at any time.

59. Considering the meaning given by s97(8) to an appeal being subject to a temporary pause, s97(8)(a) cannot apply as the appeal was not stayed by the Tribunal before 27 October 2021. The only possibilities are that the parties to the appeal have agreed before that date to stay the appeal (s97(8)(b)) or HMRC have notified the appellant that they are suspending work on the appeal pending determination of another appeal, the details of which have been notified (s97(8)(c)).

60. I remind myself first of the chronology. Mr Burchett appealed to HMRC on 16 April 2021, receiving HMRC's view of the matter letter dated 10 May 2021. He then accepted the offer of a review on 27 May 2021, with HMRC sending a response (considered further below) on 21 June 2021, Mr Burchett sending further representations on 7 October 2021 and HMRC sending the review conclusion letter on 11 October 2021. That review conclusion letter set out the right to appeal to the Tribunal and the time limit for so doing with which Mr Burchett complied by giving notice of appeal on 8 November 2021. The Tribunal then directed the appeal be stayed in December 2021.

61. My view is that this pattern of events does not support the conclusion that either the parties had agreed to stay the appeal or that HMRC had informed Mr Burchett that they were

suspending work on the appeal. Focusing on the language used in the correspondence does not alter this conclusion. In particular, I do not accept that HMRC's letter of 21 June 2021, in which they acknowledged receipt of Mr Burchett's acceptance of the offer of a review and proposed an extension of time for this to be conducted, using the terminology of "unprecedented times" which I take to refer generally to the impact of COVID and resulting lockdowns, is evidence of a temporary pause within either s97(8)(b) or (c). HMRC were proposing an extension of the deadline within which to conduct their review, and they did conduct the review within this extended timeframe.

62. Mr Burchett referred me to the Tribunal decision in *Ashe*, relying not on the legal reasoning but on the evidence and findings of fact in that case. In that case, the findings of fact as set out by the Tribunal included:

> "11…
>
> (13) …[The Appellant] requested an extension of 3 months in order to request the review and a copy of the letter dated 2 June 2021. HMRC apparently confirmed that a pause had been put on "all compliance activities" until 2 October 2021 and that HMRC would "contact [him] regarding this case on or after that date". The email also noted that "you may still need to do certain things to make sure you meet important or legal deadlines" but went on to reference the need to make a payment on account to avoid late payment penalties. This email confirmation was included in the bundle but the date on which it was sent was redacted – it was sent to the correct email address for the Appellant.
>
> (14) Between 21 and 30 June 2021 the Appellant sought to contact HMRC by telephone. In evidence he explained that when calling HMRC's HICBC team there was a recorded message indicating that all HICBC appeals were on hold. The HMRC officers understood that there was such a message but did not know its precise terms.
>
> (15) … HMRC's self-assessment record shows that the Appellant called on 30 June 2021. The note of the call records "TP … stated that he is requesting an independent review through a tribunal. … TP disputes that he owes the outstanding SA balance." The note does not record what was said to the Appellant however, the Appellant's evidence which we accept was that he was told that because of Wilkes all appeals were on hold and that HMRC would contact him when they have decided the next steps. The Appellant also explained that he made further calls to HMRC's HICBC line but upon hearing the same recorded message that all appeals were on hold he did not wait to speak to an advisor. On the basis of these messages we find that the Appellant understood that his appeal was suspended and that he needed to wait to hear from HMRC before there was any need to progress the matter.
>
> ...
>
> (17) The self-assessment notes for the Appellant show as of 7 October 2021 "the taxpayer appealed the HICBC and FTN penalties on SAFE. Assessments and penalties stood over. No reply to our VOM. Holding letter issued as HICBC appeals on hold". We note that at that time there were in fact no penalties.
>
> (18) On 8 October 2021 HMRC issued a further letter which stated as follows:
>
> "We sent you discovery assessments for the tax you owe. …
>
> There has been a recent decision of the Upper Tribunal in [Wilkes]. The Tribunal found against HMRC's use of discovery assessments to claim amounts of HICBC … HMRC do not agree with this decision …

…

Failure to notify penalties are unaffected by the Wilkes decision …

What happens next

We are working to understand if this tribunal decision will affect your case.

We have paused the assessment and penalties in your case.

…

We will contact you again when we have more information. …"”

63. Mr Burchett relied in particular on the recorded message on the HICBC helpline, but also on the references to all appeals being on hold. He submitted that the recorded message was not one that was received by Mr Ashe alone, but it was a message heard by any taxpayers who called HMRC's helpline, and represented HMRC's position for all HICBC appeals such that it supported a conclusion that there was a "temporary pause" as defined.

64. It is well-established that the findings of one fact-finding tribunal do not bind another fact-finding tribunal; I have not seen the documentary evidence before the Tribunal in *Ashe*, or heard evidence from the witnesses who gave evidence in that hearing and thus been able to reach conclusions about credibility. The findings made by the Tribunal in *Ashe* are hearsay evidence in this appeal; they are admissible, but I need to assess the weight to be given to this evidence. Mr Burchett had not heard HMRC's recorded message himself, Officer Thomas was not able, when asked at the hearing, to provide any information in relation to it (whether as to existence or content), and it is clear from reading the decision in *Ashe* that the Tribunal had not been provided with a copy of the recorded message. I recognise that there is a risk of unfairness to taxpayers if the conclusion reached as to whether there is a temporary pause differs according to whether or not the taxpayer had called the helpline rather than communicating with HMRC in writing at the relevant time. However, it is clear from s97(8) that I am required to reach a conclusion, not as to HMRC's general approach to HICBC appeals (whether against assessments or penalties) but as to the status of the appeal which had been made by Mr Burchett.

65. It is evident that there was a significant difference in the written correspondence between Mr Ashe and HMRC and that between Mr Burchett and HMRC. In *Ashe*, HMRC had sent an email to Mr Ashe telling him that a pause had been put on "all compliance activities" until 2 October 2021, and HMRC's letter of 8 October 2021 expressly stated that HMRC were working to understand if the decision in *Wilkes* would affect Mr Ashe's case and that they had paused the assessment and penalties. The correspondence with Mr Burchett presents a very different picture – the appeal was made, HMRC's replies (both when rejecting his appeal and sending the review conclusion letter) set out the deadline for next steps, and I have already addressed the letter of 21 June 2021.

66. I have decided that Mr Burchett's appeal was not subject to a temporary pause which occurred before 27 October 2021. I was not satisfied that HMRC and Mr Burchett had agreed before that date to stay the appeal, nor that HMRC had notified him that they were suspending work on the appeal pending determination of *Wilkes*.

67. I have therefore concluded that the discovery assessments issued to Mr Burchett are relevant protected assessments. They are, therefore, valid, provided that they were issued in time.

Time limits for issuing discovery assessments

68. The time limits for raising a discovery assessment under s29 TMA 1970 are set out in s34 and s36.

69. HMRC can issue a discovery assessment at any time not more than four years after the relevant tax year. The discovery assessments were all issued on 25 March 2021. This means that for all of the assessments issued which are the subject of this appeal, ie for the tax years 2012/13, 2014/15 and 2015/16, HMRC rely on the extended time limits in s36(1A).

70. HMRC's SoC sets out at [62] that the time limit for issuing an assessment where a person has failed to notify is set out in s36(1A)(b) TMA 1970 as 20 years, stating that all assessments have been issued within this time limit. The SoC makes no reference to s118(2) and goes on to state at [66] that "there is simply no "reasonable excuse" or other provision, such as "special circumstances", in the legislation for amending or cancelling assessments issued under Section 29". This is not correct. By virtue of s118(2), HMRC cannot rely on this 20 year time limit if Mr Burchett establishes a reasonable excuse for not notifying his liability to tax within six months of the end of each relevant tax year and, after the excuse ceased, did the required action (ie notify) without unreasonable delay. Ms Halfpenny acknowledged this; it was HMRC's case that there was no such reasonable excuse.

71. The legal principles relevant to whether a taxpayer had a reasonable excuse are set out in the Upper Tribunal decision in *Perrin v HMRC* [2018] UKUT 156, and the relevant extract is set out below:

> "81. When considering a "reasonable excuse" defence, therefore, in our view the FTT can usefully approach matters in the following way:
>
> (1) First, establish what facts the taxpayer asserts give rise to a reasonable excuse (this may include the belief, acts or omissions of the taxpayer or any other person, the taxpayer's own experience or relevant attributes, the situation of the taxpayer at any relevant time and any other relevant external facts).
>
> (2) Second, decide which of those facts are proven.
>
> (3) Third, decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default and the time when that objectively reasonable excuse ceased. In doing so, it should take into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times. It might assist the FTT, in this context, to ask itself the question "was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?"
>
> (4) Fourth, having decided when any reasonable excuse ceased, decide whether the taxpayer remedied the failure without unreasonable delay after that time (unless, exceptionally, the failure was remedied before the reasonable excuse ceased). In doing so, the FTT should again decide the matter objectively, but taking into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times.
>
> 82. One situation that can sometimes cause difficulties is when the taxpayer's asserted reasonable excuse is purely that he/she did not know of the particular requirement that has been shown to have been breached. It is a much-cited aphorism that "ignorance of the law is no excuse", and on occasion this has been given as a reason why the defence of reasonable excuse cannot be available in such circumstances. We see no basis for this argument. Some

> requirements of the law are well-known, simple and straightforward but others are much less so. It will be a matter of judgment for the FTT in each case whether it was objectively reasonable for the particular taxpayer, in the circumstances of the case, to have been ignorant of the requirement in question, and for how long. *The Clean Car Co* itself provides an example of such a situation."

72. The test I adopt in determining whether Mr Burchett has an objectively reasonable excuse is that set out in *The Clean Car Co Ltd v C&E Commissioners* [1991] VATTR 234, in which Judge Medd QC said:

> "The test of whether or not there is a reasonable excuse is an objective one. In my judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?"

73. That this is the correct approach has also recently been confirmed by the Court of Appeal in *Archer v HMRC* [2023] EWCA Civ 626.

74. It is clear from *Perrin* that ignorance of the law can, in certain circumstances, comprise a reasonable excuse. It is a matter of judgment as to whether it is objectively reasonable for Mr Burchett in the circumstances of his case to have been ignorant of his obligation to notify his liability to the HICBC. I have already found, on the basis of Mr Burchett's evidence, which was not challenged by HMRC, that I am satisfied that Mr Burchett was not aware of the HICBC from HMRC's publicity about the HICBC.

75. There have been a number of appeals to the Tribunal against HICBC penalties in recent years, with differing outcomes. I adopt the approach (which has been set out and applied by Judge Popplewell in various cases, eg *Chattaway v HMRC* [2023] UKFF 752 (TC) and followed by some other judges) that a taxpayer is likely to have a reasonable excuse where:

(1) they were not under an obligation to complete a tax return up to the tax year prior to that in which the HICBC applied because, primarily, they were paid through PAYE and had no other income justifying a need to notify;

(2) they (or their partner) were in receipt of child benefit payments prior to the introduction of HICBC with the consequence that the application itself made no reference to HICBC (the child benefit claim form since the introduction of HICBC clearly sets out when the charge applies);

(3) they had not received notification from HMRC directly at any point prior to the contact which led to the issue of the tax assessment; but

(4) acted promptly in ceasing to claim child benefit and engaged actively with resolving the historic tax liabilities as soon as HMRC did make contact.

76. This approach recognises the position faced by taxpayers whose claims for child benefit were made before the introduction of the HICBC, but enables consideration of the actual notifications they received from HMRC in relation to their potential liability to the charge. I take account of HMRC's submissions as to the absence of a legal obligation on them to notify taxpayers of the requirement to notify HMRC of their liability to HICBC (with which I agree), and their submissions as to Mr Burchett's knowledge of his own income position and that of his wife.

77. Mr Burchett submitted that he did not know of the requirement to notify his liability to the HICBC, not being aware of the introduction of the HICBC and not having received the SA252, such that it was objectively reasonable for him not to have so notified, and that he got in touch with HMRC as soon as he did become aware in January 2021.

78. HMRC submitted that they had issued the SA252 to Mr Burchett on 17 August 2013 informing him of the introduction of the HICBC and that in any event it was not objectively reasonable for him to have been unaware of his liability and to have failed to notify. (The next communication after this was HMRC's letter of 6 January 2021, the nudge letter, which Mr Burchett did receive and then called HMRC.)

79. Mr Burchett was not previously under an obligation to complete tax returns, and Mrs Burchett had claimed child benefit before the HICBC was introduced. Whilst I accept HMRC's submission that they are not required to notify taxpayers of their obligations I do consider that it may be objectively reasonable for taxpayers in this position not to be aware or have found out about potential liability to the HICBC.

80. I focus on HMRC's evidence in relation to the SA252 having been sent and received (which included reliance on the subsequent actions of Mrs Burchett). HMRC are not required to keep, and in this case had not kept, a copy of the SA252 said to have been sent to Mr Burchett. Instead, the evidence comprised a sample SA252 (ie what they submit would have been sent), the fact that HMRC's address records for Mr Burchett were correct (which was confirmed by Mr Burchett), and their contact history stating that a SA252 was sent and not returned to HMRC. All of this together presents a plausible picture of the SA252 having been sent to Mr Burchett.

81. Ms Halfpenny also relied on the fact that Mrs Burchett filed a tax return for 2013/14 on 28 January 2015 confirming that she was the higher earner for that tax year and declaring liability to the HICBC, submitting that this was evidence that Mr Burchett had received the SA252, discussed it with his wife, and she had then acted accordingly. As a submission, I found this intriguing but also somewhat troubling. Mrs Burchett did not attend the hearing, and there had been no suggestion in correspondence or the SoC that HMRC would seek to put questions to her. HMRC were relying on her tax position in the context of her husband's appeal; they are separate taxpayers, yet I do recognise that the HICBC itself applies by reference to a comparison between the ANI of two people (and so liability cannot be determined by having regard only to the tax affairs of one person).

82. Mr Burchett denied not only having received the SA252 but also having discussed it (or, I infer, the HICBC) with his wife. I prefer his evidence for the following reasons:

(1) Whilst HMRC's documentary evidence in relation to the SA252 is plausible, it is not compelling, with no witness evidence in relation to the sending of the letter to Mr Burchett at that time (as distinct from HMRC's approach to taxpayers generally) and no copy of a letter as sent to him.

(2) Mr Burchett acted promptly upon receiving the nudge letter in January 2021. This suggests that, had he received the SA252 in 2013, he would also have acted upon it and checked his tax position at that time.

(3) There was no further information in relation to Mrs Burchett's tax affairs, in particular whether she had completed tax returns in prior years or subsequently, and whether she received other non-PAYE income which had necessitated filing a tax return.

(4) There is no necessary correlation between Mrs Burchett's state of knowledge and that of Mr Burchett. Tax returns prompt taxpayers to provide information relevant to determine liability to the HICBC, and a person completing a tax return need not have any

relevant prior knowledge. Furthermore, Mr Burchett had consistently told HMRC that he was the higher earner, suggesting that they had not had detailed conversations about needing to compare ANI, and it was only in the review conclusion letter that HMRC identified that this was not correct for 2013/14 (and cancelled the assessment and penalty issued to Mr Burchett for that tax year).

83. This means that I accept that the first direct contact from HMRC to Mr Burchett in relation to the HICBC was the letter of 6 January 2021, to which he responded by calling HMRC later that month. I accept that he was ignorant of his obligation to notify HMRC of his liability to the HICBC until he received that letter.

84. I consider this was objectively reasonable in all the circumstances. Whilst I accept that HMRC had conducted a publicity campaign at the time the HICBC was introduced and are not obliged to notify taxpayers of their own obligations, many taxpayers were nevertheless unaware of the existence of the HICBC or how it would be assessed (and that this involved notifying HMRC of their liability to the charge).

85. Upon receiving the letter of 6 January 2021, Mr Burchett then acted without unreasonable delay. He thus has a reasonable excuse within s118(2) TMA 1970 such that HMRC cannot rely on the extended time limits in s36(1A). The discovery assessments for the tax years 2012/13, 2014/15 and 2015/16 were issued out of time, and Mr Burchett's appeal against these assessments is allowed.

Penalties

86. A taxpayer is liable to a penalty pursuant to Schedule 41 where, as here, there has been a failure to notify liability to tax. The rate of penalty is prescribed by the statute. The burden is on HMRC to establish that the penalties have been validly issued. Once established, the burden is on Mr Burchett to establish that he had a reasonable excuse for failure to notify.

87. Mr Burchett was liable to pay the HICBC for each of 2012/13 and 2014/15 to 2017/18 (inclusive), and did not notify HMRC of this by 5 October following the end of each tax year. HMRC charged a penalty, on the basis that the behaviour was not deliberate, disclosure was unprompted, and giving the maximum reduction for each tax year.

88. I am satisfied that the circumstances in paragraph 1 of Schedule 41 enabling HMRC to issue a penalty were satisfied, and that the standard amount of the penalty payable was correctly calculated in accordance with paragraph 6, at 30% of the PLR.

89. However, after the hearing I identified a concern as to the reduction which has been given for disclosure. This was not a point argued before me, and I had not asked the parties about this at the hearing. I have concluded that it would not be in accordance with the overriding objective either to reach a decision on this point or to ask the parties for representations given that my determination on this point would not affect my decision on the penalties, which is that they are cancelled on the basis that Mr Burchett had a reasonable excuse for his failure to notify (for the reasons set out in the context of the time limits for issuing assessments).

90. I have set out the concern I identified in case it becomes relevant on any appeal:

(1) Paragraphs 12 and 13 of Schedule 41 provide for reductions in penalties where a taxpayer discloses a relevant act or failure. The level of reduction is based on the quality of disclosure and on whether it is "prompted" or "unprompted".

(2) HMRC have charged penalties to Mr Burchett on the basis that disclosure was unprompted, and have given the maximum reduction available, issuing penalties for 10% of the PLR. (HMRC's SoC states at [75] that they were calculated on the basis that disclosure was prompted, but that is not an accurate description of the penalties as

issued.) HMRC explained the penalty decision in their letter of 25 March 2021 as being that "you voluntarily told us about the [HICBC]" that you need to pay".

(3) Paragraph 12(3) of Schedule 41 provides:

> "12(3) Disclosure of a relevant act or failure –
>
> is "unprompted" if made at a time when the person making it has no reason to believe that HMRC have discovered or are about to discover the relevant act or failure, and
>
> (b) otherwise, is "prompted"."

(4) This definition makes no reference to whether disclosure was voluntary, focusing instead on whether the taxpayer had reason to believe HMRC had discovered or were about to discover the relevant act or failure. It was agreed in this case that Mr Burchett called HMRC after he received the nudge letter. Whilst this did not constitute HMRC opening a check or enquiry, this letter does state "If you have to pay the charge and you do not respond, we may need to open a compliance check into your tax affairs."

91. In these circumstances, my concern it that is at least arguable that Mr Burchett's disclosure to HMRC, whilst voluntary, was prompted; if this were the case, paragraph 13(6) provides that HMRC may reduce the rate to a percentage not below 20% (or 10% where HMRC becomes aware of the failure within 12 months), rather than 10% as has been charged here. The powers of the Tribunal on an appeal are set out in paragraph 17 Schedule 41 and depend on whether the appeal is against a decision that a penalty is payable (where the Tribunal may affirm or cancel HMRC's decision) or against a decision as to the amount of the penalty (where the Tribunal may affirm or substitute another decision HMRC had power to make). Arguably, Mr Burchett's appeal is only against the decision to charge a penalty and this would not enable the Tribunal to substitute another decision that HMRC had power to make (ie 20%) in any event.

92. It is clear to me that the above point is of no practical relevance in the present instance. I have concluded that Mr Burchett has established that he had a reasonable excuse for his failure to notify for each of the tax years in question. This follows from my findings and conclusions above in relation to the assessments. I allow Mr Burchett's appeal in respect of the failure to notify penalties.

93. I have similarly not addressed whether there is an issue as to the time limit for assessing the penalties. The decision of the Upper Tribunal in *HMRC v Robertson* [2019] UKUT 0202 137 (TCC) makes it clear that HMRC need not raise a valid assessment to tax in order for it to represent potentially lost revenue for the purpose of calculating a penalty. The amount of tax must be ascertained, even where it is not or cannot be assessed, and the time limit for raising the assessment is 12 months from the end of the "appeal period" for the assessment or 12 months from the date on which the amount was ascertained if not assessed (paragraph 16 of Schedule 41). For these purposes, "appeal period" is the period in which an appeal could be brought and if an appeal is brought the period until that appeal is determined or withdrawn. Where assessments are issued but are found to have been out of time, I consider that there is a potential question as to the starting-point for the time limits for the assessment of the penalties. However, this point was not argued before me and, in view of my conclusion on reasonable excuse, even though this issue relates to the validity of the penalties, I considered that it would not be in accordance with the overriding objective to seek representations from the parties on this point (thus potentially resulting in additional costs and delays) nor to express any opinion or conclusion on this point.

DECISION

94. A valid notice of appeal to the Tribunal has only been made against the assessments for the tax years 2012/13, 2014/15 and 2015/16 and the penalties for 2012/13 and 2014/15 to 2017/18 (inclusive). Mr Burchett's submission that he is appealing against all of the assessments, ie including those for 2016/17 to 2018/19 (inclusive) is rejected.

95. Mr Burchett's appeal against the assessments for 2012/13, 2014/15 and 2015/16, and the penalties for 2012/13 and 2014/15 to 2017/18 (inclusive) is allowed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

96. 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.

JEANETTE ZAMAN
TRIBUNAL JUDGE

Release date: 02nd FEBRUARY 2024