[2021] UKUT 0150 (TCC)

Appeal number: UT/2020/000354

INCOME TAX – high income child benefit charge – discovery assessment – whether s 29(1)(a) Taxes Management Act 1970 can be construed as extending to discovery that respondent should have been assessed to income tax in respect of the high income child benefit charge

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS — **Appellants**

- and -

JASON WILKES — **Respondent**

TRIBUNAL: The Hon. Mrs Justice Falk
Judge Timothy Herrington

Sitting remotely via Microsoft Teams on 26 May 2021

Laura Poots, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellants

Richard Vallat QC, Counsel, and Marika Lemos, Counsel, instructed by Collyer Bristow LLP, for the Respondent

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DECISION

Introduction

1. This appeal raises a short point of statutory construction in respect of which there have been conflicting decisions of the First-tier Tribunal. Although the amounts involved are relatively small, the issues raised are of wider significance.

2. The Commissioners for Her Majesty's Revenue & Customs ("HMRC") appeal against a decision by the First-tier Tribunal ("FTT") (Judge Citron and Ms Jane Shillaker) released on 15 June 2020 ("the Decision"). The FTT allowed Mr Wilkes' appeal against income tax assessments issued by HMRC under s 29 Taxes Management Act 1970 ("TMA") for the tax years 2014-15, 2015-16 and 2016-17. The assessments related to the high income child benefit charge (the "HICBC") introduced by s 8 and Schedule 1 Finance Act 2012 ("FA 2012"). They were in the following amounts:

(1) 2014-15: £1,770;

(2) 2015-16: £1,398; and

(3) 2016-17: £1,076.

3. The FTT found that Mr Wilkes was liable to the HICBC for the three years in question, in the amounts assessed by HMRC. However, it concluded that the assessments were not validly raised because the officer in question had not discovered any "income which ought to have been assessed to income tax" within s 29(1)(a) TMA.

4. The FTT granted HMRC permission to appeal against the Decision on 3 September 2020. In their grounds of appeal HMRC contend that on the basis that no return was submitted by Mr Wilkes, his income had not been assessed to a further charge of income tax: the HICBC. Accordingly, HMRC made a discovery that there was income that ought to have been assessed and had not been assessed, and s 29(1)(a) TMA applied. Alternatively, HMRC contend that on a proper purposive construction of s 29(1)(a) TMA, the word "income" is to be read as including any amount liable to income tax. Failing that, there was an obvious drafting error which the FTT failed to correct.

5. We are grateful for the assistance provided by Counsel in this case, and particularly wish to thank Mr Wilkes' legal team, who are acting *pro bono*.

The Facts

6. References to numbered paragraphs in square parentheses are, unless otherwise indicated, references to paragraphs in the Decision.

7. The FTT made its findings of fact at [2] and [7] to [11]. They can be summarised as follows.

8. During the relevant years, Mr and Mrs Wilkes were married, and Mrs Wilkes was entitled to, and did, receive child benefit. Mr Wilkes' adjusted net income for tax purposes exceeded £50,000 and was greater than that of Mrs Wilkes. Mr Wilkes did not submit a tax return, and HMRC did not issue him a notice to file.

9. Following a letter received from HMRC asking him to check if he was liable for the HICBC, Mr Wilkes had two telephone conversations with Officer Pickett of HMRC on 3 and 18 December 2018. After the second of those conversations, Officer Pickett formed the view that Mr Wilkes was liable to the HICBC for the tax years in question that had not been assessed.

10. Mr Wilkes was not charged a "failure to notify" penalty, as HMRC considered that he had a reasonable excuse for his failure to notify them of his income tax chargeability under s 7 TMA.

11. However, on 20 December 2018 HMRC issued discovery assessments under s 29(1)(a) TMA for the HICBC in respect of which Mr Wilkes was liable for the years in question.

Relevant Legislation

The HICBC

12. The taxpayer's liability for the HICBC arises under ss 681B to 681H Income Tax (Earnings and Pensions) Act 2003 ("ITEPA"), the relevant provisions having been introduced by Schedule 1 to FA 2012.

13. Section 681B ITEPA provides for the HICBC, and sets out the conditions that must be met before a taxpayer is liable for it, relevantly 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.
>
> […]
>
> (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."

14. Section 681C ITEPA sets out how the amount of the HICBC is determined, relevantly as follows:

"(1) The amount of the high income child benefit charge to which a person ("P") is liable for a tax year is the appropriate percentage of the total of—

(a) any amounts in relation to which condition A is met, and

(b) any amounts in relation to which condition B is met.

For conditions A and B, see section 681B.

(2) "The appropriate percentage" is—

(a) 100%, or

(b) if less, the percentage determined by the formula—

((ANI − L)/X)%

Where—

ANI is P's adjusted net income for the tax year;

L is £50,000;

X is £100."

15. Thus, it can be seen that the charge is calculated on a sliding scale. The effect of the formula is to impose a tax charge equal to 100% of the amount of the child benefit if the higher-earning partner has adjusted net income of £60,000 or more per annum. If the higher-earning partner earns between £50,000 and £60,000 per annum, the tax charge is equal to 1% of the amount of the child benefit for each £100 of income over £50,000. In effect, the HICBC claws back child benefit by imposing a tax charge on the higher-earning partner, and does so in full if the level of income is at least £60,000, or on a sliding scale if it is between £50,000 and £60,000.

16. Section 681G ITEPA defines "partner" for the purposes of s 681B(4) ITEPA. In essence, a couple must be either married or in a civil partnership (unless separated), or they must be living together as if they were a married couple or civil partners. Section 681H provides that "adjusted net income" is determined under s 58 ITA. Section 58 is set out with certain other provisions in the Schedule to this decision.

Requirement to notify chargeability to income tax

17. Section 7 TMA imposes an obligation on the taxpayer to notify HMRC if he is chargeable to tax, relevantly as follows:

"(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) or (1B),

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 person's total income and chargeable gains.

(1B) A person falls within this subsection if the person—

(a) has received a notice under section 8 requiring a return for the year of assessment of the person's total income and chargeable gains, and

(b) has received a notice under section 8B withdrawing the notice under section 8.

(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,

[…]

(2A) A person who—

(a) falls within subsection (1A) or (1B), and

(b) is notified of a simple assessment[1] for the year of assessment,

is not required to give notice under subsection (1) for that year unless the person is chargeable to income tax or capital gains tax for the year of assessment on any income or gain that is not included in the assessment.

(3) A person shall not be required to give notice under subsection (1) above in respect of a year of assessment if for that year—

(a) the person's total income consists of income from sources falling within subsections (4) to (7) below,

(b) the person has no chargeable gains, and

(c) the person is not liable to a high income child benefit charge.

(4) A source of income falls within this subsection in relation to a year of assessment if—

(a) all payments of, or on account of, income from it during that year, and

(b) all income from it for that year which does not consist of payments,

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[1] See further [2122] below

have or has been taken into account in the making of deductions or repayments of tax under PAYE regulations.

[…]"

18. Thus it can be seen that sub-sections (1A) and (1B) of this provision ensure that the requirement to notify only applies to persons who are not already required to submit a return pursuant to the provisions of s 8 TMA referred to below. Furthermore, the provisions of sub-section (3) and (4) mean that generally a person whose income is dealt with under the PAYE regime, such as Mr Wilkes in this case, will not be required to notify under s 7 TMA.

19. However, as set out above, s 7(3) TMA was amended by paragraph 2 of Schedule 1 to FA 2012 to provide that a taxpayer is required to notify their liability to the HICBC under s 7 TMA in the same way as they were required to notify any other liability to income tax. The impact of this amendment is that even if a taxpayer's income is dealt with under the PAYE regime, if they are liable to the HICBC they will always be required to notify under s 7 TMA, unless they are required by HMRC to make and deliver a return under s 8 TMA.

Assessments to tax

20. Under s 8(1) TMA, a person may be required by notice given by HMRC to make and deliver a return "for the purpose of establishing the amounts in which [that] person is chargeable to income tax and capital gains tax… and the amount payable by him by way of income tax". Section 9 TMA provides that any such return must contain a self-assessment by the taxpayer, relevantly as follows:

> "(1) … every return under section 8 or 8A of this Act shall include a self-assessment, that is to say—
>
> > (a) an assessment of the amounts in which, on the basis of the information contained in the return and taking into account any relief or allowance a claim for which is included in the return, the person making the return is chargeable to income tax and capital gains tax for the year of assessment; and
> >
> > (b) an assessment of the amount payable by him by way of income tax, that is to say, the difference between the amount in which he is assessed to income tax under paragraph (a) above and the aggregate amount of any income tax deducted at source…"

21. It can be seen that paragraph (a) refers to the total tax chargeable, and paragraph (b) to the tax remaining to be paid after taking account of tax deducted at source.

22. The Finance Act 2016 ("FA 2016") gave HMRC a new power to make a "simple assessment". The power is set out in s 28H TMA and provides, relevantly as follows:

> “(1) HMRC may make a simple assessment for a year of assessment in respect of a person… if, when the assessment is made, the person is not excluded by subsection (2) in relation to that year.
>
> (2) Subsection (1) does not apply to a person at any time in relation to that year of assessment if—
>
> > (a) the person has delivered a return under section 8 for that year, or
> >
> > (b) the person is at that time subject to a requirement to make and deliver such a return by virtue of a notice under section 8.
>
> But nothing in this subsection prevents HMRC from giving the person notice of a simple assessment at the same time as a notice withdrawing a notice under section 8.
>
> (3) A simple assessment is—
>
> > (a) an assessment of the amounts in which the person is chargeable to income tax and capital gains tax for the year of assessment to which it relates, and
> >
> > (b) an assessment of the amount payable by the person by way of income tax for that year, that is to say, the difference between the amount in which the person is assessed to income tax under paragraph (a) and the aggregate amount of any income tax deducted at source;
>
> but nothing in this subsection enables an assessment to show as repayable any income tax which any provision of the Income Tax Acts provides is not repayable.
>
> (4) The amounts in which a person is chargeable to income tax and capital gains are net amounts, taking into account any relief or allowance that is applicable.
>
> (5) A simple assessment must be based on information relating to the person that is held by HMRC (whether or not supplied by the person to whom the assessment relates).
>
> […]
>
> (9) In this section references to a simple assessment are to an assessment under this section.”

23. The new power to make simple assessments applies with effect for the 2016-17 tax year and subsequent tax years.

24. Section 29(1) TMA gives HMRC the power to make what is known as a “discovery assessment”. As in force at the time the assessments in this case were made, it provided:

> “(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
>
> (b) that an assessment to tax is or has become insufficient, or
>
> (c) that any relief which has been given is or has become excessive,
>
> 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."

25. It is s 29(1)(a) that is relevant in this case. It should be noted that the power is to assess "income" which ought to have been assessed to income tax.

26. The current power to assess set out in s 29 TMA is confined to circumstances where a loss of tax is discovered, but as originally enacted, well before the self-assessment regime was introduced, s 29 TMA (then headed "Assessing procedure") set out the main procedures for making tax assessments. The principal assessment power was set out in s 29(1) TMA as follows:

> "(1) Except as otherwise provided, all assessments to tax shall be made by an inspector, and-
>
> (a) if the inspector is satisfied that any return under the Taxes Acts affords correct and complete information concerning profits in respect of which tax is chargeable, he shall make an assessment accordingly,
>
> (b) if it appears to the inspector that there are any profits in respect of which tax is chargeable and which have not been included in a return under Part II of this Act, or if the inspector is dissatisfied with any return under Part II of this Act, he may make an assessment to tax to the best of his judgment."

27. The power to make discovery assessments was set out at s 29(3) TMA as follows:

> "If an inspector or the Board discover–
>
> (a) that any profits which ought to have been assessed to tax have not been assessed, or
>
> (b) an assessment to tax is or has become insufficient, or
>
> (c) that any relief which has been given is or has become excessive,
>
> the inspector or, as the case may be, the Board may make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged."

28. For income tax purposes the term "profits" as used in the original s 29 was defined as "income": see s 29(8) TMA.

29. A further relevant provision is s 28C TMA, which is set out in the Schedule to this decision. This gives HMRC the power to issue a determination of income tax liability if a return has been required under s 8 and has not been delivered.

Calculating liability to income tax

30. At this point, it is helpful to examine how liability for income tax is calculated.

31. Section 2(2)(c) of the Income Tax Act 2007 ("ITA") explains that Part 2 of that Act "… contains basic provisions about income tax including… the calculation of income tax liability (Chapter 3)."

32. Chapter 3 of Part 2 ITA, headed "Calculation of Income Tax Liability", provides in s 23 ITA a step-by-step guide to the process. A helpful summary of the process is set out in *Knibbs v HMRC* [2019] STC 2262 at [49] as follows:

> "Section 23 sets out a series of steps which are to be taken "to find the liability of a person ("the taxpayer") to income tax for a tax year"; "the result [of these steps] is the taxpayer's liability to income tax for the tax year."
>
> In summary, Step 1 is to identify the amounts of income (e.g. trading income, employment income etc) on which the taxpayer is charged to income tax for the tax year. Steps 2 and 3 are to deduct from these amounts of income the amounts of any relief (pursuant to the provisions listed in s 24) that the taxpayer is entitled to for the tax year in question or allowances (which are set out in Chapter 2 of Part 3). Steps 4 and 5 are to calculate the applicable rates of tax on these net amounts and to add the resulting amounts of tax together. Step 6 is to deduct from this amount of tax any applicable tax reductions (which are listed in s 26).
>
> Finally, Step 7 is to add in any amount of tax for which the taxpayer is liable under the miscellaneous charging provisions listed in s 30. The common feature of the provisions listed in s 30 is that they impose liabilities to income tax that are not based on any actual amount of income. (For example, where a member of a registered pension scheme receives an "unauthorised payment", the unauthorised payment is not strictly speaking "income" of any description, but the member is liable to an "unauthorised payments charge" under s 208(2)(a) of the Finance Act 2004 in an amount equal to 40% of the unauthorised payment.)
>
> ITA 2007, ss 22(2) and 32 list provisions imposing liability to income tax that do not feed into the calculations in s 23. As explained in the explanatory note to s 32, these liabilities arise in connection with the recovery of excessive relief where the taxpayer's self-assessment for the tax year in question is final; deduction of tax at source where the liability is not in respect of the person's own liability; and certain "stand-alone" charges, such as under the "transactions in securities" regime, which require some kind of administrative action to be taken by the Revenue in order to come into existence at all. Such liabilities therefore cannot in general be "self-assessed" by the taxpayer…"

33. The FTT in *Monaghan v HMRC* [2018] UKFTT 156 (TC) ("*Monaghan*") observed at [94] that the majority of the provisions listed in s 32 ITA are concerned

with tax relief which has been given erroneously or where conditions for it have been contravened and it is necessary to recover the relief.

34. We set out in the Schedule to this decision the text of ss 23, 30(1) and 32 ITA. It is to be noted that, by virtue of an amendment made by paragraph 6 of Schedule 1 to FA 2012, the HICBC is one of the charges listed in s 30(1) ITA.

35. As Mr Vallat observed, all the components of "total income" at Step 1 of s 23 ITA can plainly be the subject matter of a s 29(1)(a) TMA assessment, given the use in the provision of the word "income".

36. The charges listed at ss 30 and 32 ITA represent freestanding charges to income tax. In some cases, but not in the case of the HICBC, Parliament has made special provision for how these charges are to be assessed.

37. We refer to some of the special provisions referred to at [36] above in this decision. Two of them are set out in the Schedule to this decision.

Time limits for making assessments

38. Sections 34 to 36 TMA set out the principal provisions relating to the time limits within which assessments to tax, including discovery assessments, can be made by HMRC.

39. The ordinary time limit is four years. Section 34 TMA provides in that regard as follows:

> "(1) Subject to the following provisions of this Act, and to any other provisions of the Taxes Acts allowing a longer period in any particular class of case, an assessment to income tax, capital gains tax or to tax chargeable under section 394(2) of the Income Tax (Earnings and Pensions) Act 2003 may be made at any time not more than 4 years after the end of the year of assessment to which it relates.
>
> (2) An objection to the making of any assessment on the ground that the time limit for making it has expired shall only be made on an appeal against the assessment.
>
> (3) In this section "assessment" does not include a self-assessment."

40. It can be seen from sub-section (3) that s 34 TMA does not apply to a self-assessment. This provision was inserted by FA 2016 following the Upper Tribunal's decision in *R (on the application of Higgs) v HMRC* [2015] UKUT 92 (TCC) ("*Higgs*") that, contrary to the view of HMRC, "assessment" in the original s 34 TMA did not include a self-assessment. Accordingly, s 34A TMA, also inserted by FA 2016, provides the ordinary time limit for self-assessments as follows:

> "(1) Subject to subsections (2) and (3), a self-assessment contained in a return under section 8 or 8A may be made and delivered at any time not more than 4 years after the end of the year of assessment to which it relates.

(2) Nothing in subsection (1) prevents—

(a) a person who has received a notice under section 8 or 8A within that period of 4 years from delivering a return including a self-assessment within the period of 3 months beginning with the date of the notice,

(b) a person in respect of whom a determination under section 28C has been made from making a self-assessment in accordance with that section within the period allowed by subsection (5)(a) or (b) of that section."

(3) Subsection (1) has effect subject to the following provisions of this Act and to any other provisions of the Taxes Acts allowing a longer period in any particular class of case.

(4) This section has effect in relation to self-assessments for a year of assessment earlier than 2012-13 as if—

(a) in subsection (1) for the words from "not more" to the end there were substituted "on or before 5 April 2017", and

(b) in subsection (2)(a) for the words "within that period of 4 years" there were substituted "on or before 5 April 2017"."

41. Unlike the provision for simple assessments, s 34A TMA has effect for earlier tax years.

42. Section 36 TMA provides for extended time limits, relevantly as follows:

"(1) An assessment on a person in a case involving a loss of income tax or capital gains tax brought about carelessly by the person may be made at any time not more than 6 years after the end of the year of assessment to which it relates (subject to subsection (1A) and any other provision of the Taxes Acts allowing a longer period).

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

(a) brought about deliberately by the person,

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

[…]

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

(1B) In subsections (1) and (1A) references to a loss brought about by the person who is the subject of the assessment include a loss brought about by another person acting on behalf of that person.

[…]"

Principles of statutory construction

43. It is settled law (after the decision of the House of Lords in *Barclays Mercantile Business Finance Ltd v Mawson* [2004] UKHL 51) that a tax statute is to be interpreted by reference to the ordinary principles of purposive construction. Lord Nicholls said, in a now familiar quote, at [28] that:

> "…the modern approach to statutory construction is to have regard to the purpose of a particular provision and interpret its language, so far as possible, in a way which gives effect to that purpose."

44. He went on to say at [32]:

> "The essence of the new approach was to give the statutory provision a purposive construction in order to determine the nature of the transaction to which it was intended to apply and then to decide whether the actual transaction (which might involve considering the overall effect of a number of elements intended to operate together) answered to the statutory description. Of course this does not mean that the courts have to put their reasoning into the straitjacket of first construing the statute in the abstract and then looking at the facts. It might be more convenient to analyse the facts and then ask whether they satisfy the requirements of the statute. But however one approaches the matter, the question is always whether the relevant provision of statute, upon its true construction, applies to the facts as found." (Emphasis added.)

45. In short, and as summarised by Rose J (as she then was) in *William Reeves v The Commissioners for Her Majesty's Revenue and Customs* [2018] UKUT 293 (TCC) at [34], a provision should be purposively construed in order to identify its requirements, and then the court must decide whether the actual transaction answers to the statutory description.

46. In construing the statute in question, the words used are to be given their ordinary meaning but an absurd result should be avoided where possible.

47. In support of this principle, in *Jenks v Dickinson (HM Inspector of Taxes)* [1997] STC 853 at 860g-j, Neuberger J (as he then was) cited with approval the words of Lord Donovan in the Privy Council's judgment in *Mangin v Inland Revenue Commissioner* [1971] AC 739 at 746. Lord Donovan said this:

> "First, the words are to be given their ordinary meaning. They are not to be given some other meaning simply because their object is to frustrate legitimate tax avoidance devices …
>
> Secondly, ... one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used...

> Thirdly, the object of the construction of a statute being to ascertain the will of the legislature it may be presumed that neither injustice nor absurdity was intended. If therefore a literal interpretation would produce such a result, and the language admits of an interpretation which would avoid it, then such an interpretation may be adopted.
>
> Fourthly, the history of an enactment and the reasons which led to its being passed may be used as an aid to its construction." (Emphasis added.)

48. Furthermore, in the Supreme Court's judgment in *Project Blue Ltd v HMRC* [2018] STC 1355 at [31] Lord Hodge said:

> "… it is without question a legitimate method of purposive construction that one should seek to avoid absurd or unlikely results."

49. If it is not possible to correct drafting mistakes by use of a possible interpretation of the words, it is sometimes possible to read words in to a statute: see *Inco Europe Ltd v First Choice Distribution (a firm)* [2000] 1 WLR 586 ("*Inco Europe*"). We return to that case in detail later when considering HMRC's last ground of appeal.

The Decision

50. Mr Wilkes presented a number of arguments criticising the principle of the HICBC charge and the manner in which it was administered by HMRC, which the FTT held to be outside its jurisdiction. The FTT also considered and dismissed any suggestion that there were any legal principles derived from the European Convention on Human Rights requiring them to depart from the plain meaning of the statute implementing the HICBC. The FTT therefore held that on the plain meaning of the statute implementing the HICBC, Mr Wilkes was liable to that charge for the three years in question, in the amounts assessed by HMRC: see [40] to [43].

51. At [44] the FTT held, based on their findings of fact, that Officer Pickett had made a "discovery" as that term is understood in the law.

52. None of those findings are challenged in this appeal. Accordingly, the only issue that was before the FTT which needs to be considered in this appeal is whether Officer Pickett discovered "that any income which ought to have been assessed to income tax [had] not been assessed" and therefore whether the situation fell within the scope of the power to make a discovery assessment under s 29(1)(a) TMA.

53. At [45] the FTT observed that the sort of income tax assessment that "ought" to have been made in respect of Mr Wilkes' liability to the HICBC was a self-assessment under s 9 TMA. He should have notified HMRC of his income tax chargeability (under s 7 TMA), upon which HMRC would have required him to file a tax return (under s 8 TMA). The FTT's analysis of s 9 TMA led it to hold at [46] that what Mr Wilkes "ought" to have self-assessed was an amount chargeable to, and payable by way of, income tax, contrasting that with the assessment power in s 29(1)(a) TMA which referred to "income which ought to be assessed to income tax".

54. The FTT went on to say at [47]:

> "In our view, when the statute refers to assessing "income to income tax", as opposed to assessing "amounts chargeable to income tax", it is referring to the steps in the calculation of income tax liability whereby income is identified, adjusted, subjected to the appropriate income tax rate, and thereby becomes an "amount" chargeable as income tax…"

55. At [48] the FTT made it clear that in the passage quoted above it was referring to the steps set out at s 23 ITA, observing that step 7 was "add to the amount of tax left after step 6 any amounts for which the taxpayer is liable" under certain provisions, which included the HICBC.

56. The FTT noted at [49] that:

> "Step 7… is the addition of a self-standing liability to income tax – unrelated to the "total income" of step 1. Officer Pickett's discovery related entirely to the components of the computation of the HICB charge, and so to step 7. It would thus appear, on what seems to us the most straightforward interpretation of the words of s29(1)(a) TMA, that the officer did not discover that any income which ought to be assessed to income tax, had not been so assessed."

57. At [50] the FTT recorded HMRC's observation that the effect of the "straightforward interpretation" was anomalous in that there was no power to raise a s 29 TMA assessment where a taxpayer is liable to the HICBC but has not been required to file a self-assessment tax return, but there was such power in respect of a taxpayer liable to the HICBC if he has filed a self-assessment tax return (due to s 29(1)(b) TMA). The FTT recorded HMRC's observation that this was unjust particularly where the reason the "first" taxpayer has not been required to file a tax return is that he has failed to notify HMRC of his income tax chargeability under s 7 TMA.

58. The FTT rejected HMRC's contention that this result should be avoided by reading s 29(1)(a) TMA so that it permitted a discovery assessment of "amounts" rather than "income" which ought to be assessed. Its reasoning was set out [52] as follows:

> "(1) Whilst the statutory purpose of s29(1) is quite clear in very general terms – to empower HMRC to raise an assessment to make good a loss of tax to the Exchequer where under-assessed tax is discovered – it is (like most of HMRC's collection and enforcement powers under the tax legislation) subject to various limits and conditions. For example, although not relevant here (as no tax return was filed), sub-sections (2) and (3) of s29 set out important limitations on deployment of HMRC's powers under s29(1)(b) TMA; and other provisions of TMA impose time limits for the raising of assessments. The intricacy of the rules means that it is not always easy to be certain whether an apparent limitation on HMRC's powers based on a straightforward reading of the words, like the one in question, is an intended delineation of HMRC's powers, or an imperfection in the drafting.
>
> (2) The force of the examples of alternative methods used in tax legislation to address the kind of anomaly present here, set out by Judge Thomas

in *Robinson*[2] (FTT) at [86] and [88], is their suggestion that the absence of any such "fix" here was not oversight. (HMRC argue that their absence indicates Parliament's confidence that the statute would be read in the way HMRC propose – we are unable to accept this, given our view of the straightforward reading of the provisions in question).

(3) We agree with HMRC's assertion here that the effect of what we call the "straightforward" reading of s29(1) is the anomaly described at [50] above … however, we are not entirely convinced that the anomaly rises to the level of absurdity or injustice, in part because HMRC's s29 powers can be unleashed where an assessment to tax is insufficient (s29(1)(b)), and HMRC, under s8 TMA, has power to require the delivery of self-assessment returns. We appreciate that it may be difficult to deploy these s8 TMA powers if a taxpayer has not complied with his obligation to notify chargeability under s7 TMA – but it seems to us that, through the informal methods used here by HMRC to discover that Mr Wilkes was liable to a HICB charge (i.e. writing to him to as they did in their 30 November 2018 letter), HMRC might also have come to the realisation that he was a person to whom a s8 notice should be issued for the tax years in question.

(4) Our most profound doubt is as to whether the statutory language would admit of the interpretation HMRC propose – or indeed any other interpretation that would eliminate the anomaly identified at [50] above. It is in our view impossible to conflate, as HMRC propose in interpreting "income which ought to be assessed" as meaning "amounts which ought to be assessed", two quite different figures: the figure for the overall income tax liability, and the figure for the income which is adjusted for various matters, and then subjected to a rate of tax, before emerging as an amount of tax due. In our view the statutory language does not admit of such conflation.

(5) The principles surrounding correcting obvious drafting errors in legislation set out in *Inco Europe* are, understandably, careful and strict, to reflect the distinct roles of the legislature and the courts. Of the three matters of which we must be "abundantly sure" before correcting the words of a statute, we are less than confident about two: the intended purpose of s29 is clear to us in very general terms, but not at the level of detail we are here engaging, as explained at sub-paragraph (1); and, related to this (and again as explained at sub-paragraph (1)), we are less than certain that by inadvertence the draftsman and Parliament failed to give effect to such purpose. We are more confident on the third matter: the provision Parliament would have made, as HMRC suggest, would have been to follow the drafting used in paragraph 41 Schedule 18 FA 1998, which speaks of discovery that "an amount" which ought to have been assessed to tax has not been so assessed. However, overall, this is not in our view a case of an "obvious" drafting error in the statute."

59. The FTT therefore concluded at [54] and [55] that HMRC had not discovered any income which ought to have been assessed to income tax that had not been so assessed

[2] We assume that the reference to *Robinson* is an error, and that this reference should be to the decision of Judge Thomas in *Robertson v HMRC* [2018] UKFTT 0158 (TC).

and that the s 29 TMA assessments were not validly raised, with the consequence that the assessments were reduced to nil.

Grounds of Appeal and issues to be determined

60. Permission to appeal was given by Judge Citron in the FTT on 3 September 2020 on the grounds set out in HMRC's application. Permission to amend those grounds was granted to HMRC by the Upper Tribunal on 30 October 2020. The amended grounds are:

> (1) All of Mr Wilkes' income ought to have been assessed to income tax. On the basis that no return was submitted, Mr Wilkes's income has not been assessed to a further charge of income tax: the HICBC. Accordingly, HMRC made a discovery that there was income which ought to have been assessed to income tax and had not been so assessed, and s 29(1)(a) TMA applies.
>
> (2) Alternatively, on a proper purposive construction of s 29(1)(a) TMA, the HICBC is within the words "any income which ought to have been assessed to income tax".
>
> (3) The purpose of s 29 TMA (to enable HMRC to make a good a loss of income tax by assessing an amount that ought to have been assessed to income tax) is not achieved by the FTT's interpretation.
>
> (4) The FTT erred in its references to the steps set out in s 23 ITA, as those steps do not shed any light on the purpose of s 29 TMA.
>
> (5) The FTT erred in considering that a restriction on the use of HMRC's s 29 TMA assessment power might be an "intended delineation", and in failing to acknowledge that the alternative route for HMRC to recover tax is subject to different time limits.
>
> (6) In the alternative, the FTT erred in its application of the principles in *Inco Europe*, in failing to correct an obvious drafting error.

61. In her submissions, Ms Poots took Grounds (2) to (5) together under the general heading "purposive construction" and made her submissions on those grounds before her submissions on Grounds (1) and (6).

62. We shall therefore determine this appeal by considering the following three issues in this order:

> (1) Whether on a purposive construction the word "income" in s 29(1)(a) TMA can simply be read as including any amount liable to income tax (or, we would suggest more accurately, as simply referring to any amount of income tax, or an amount in which a person is liable to income tax).
>
> (2) Alternatively, whether there is power to assess under s 29(1)(a) TMA on the basis that all of Mr Wilkes's income ought to have been assessed to income

tax and, because no return was submitted, that income has not been assessed to a further charge to income tax: the HICBC.

(3) Alternatively, whether the principles in *Inco Europe* apply in this case to allow the Tribunal to correct an obvious drafting error, if we consider that one exists.

Purposive construction

HMRC's submissions

63. The essence of HMRC's first ground of appeal is that on a proper purposive construction of s 29(1)(a) TMA, the HICBC is within the words "any income which ought to have been assessed to income tax". That is on the basis that "income" is to be read as including "any amount liable to income tax", notwithstanding, as HMRC accept, that the legislation imposing the HICBC does not specify an amount of income upon which income tax is charged, but instead imposes a freestanding charge to income tax in the amount calculated under s 681C ITEPA.

64. The purpose that HMRC attribute to s 29(1)(a) TMA is to enable HMRC to make good a loss of income tax or capital gains tax, by assessing any amount that ought to have been assessed to either tax.

65. HMRC contend that this purpose is not achieved on the FTT's interpretation. HMRC's contention is that such an interpretation is not workable because it renders the HICBC ineffective in a scenario that HMRC frequently face, that is the taxpayer simply not notifying HMRC that they are liable to the charge, and HMRC not becoming aware of this for several years. Furthermore, the FTT's interpretation produces anomalous results, as explained in detail below.

66. Ms Poots' submissions in support of these contentions can be summarised as follows:

(1) Although s 7 TMA requires the taxpayer to notify their chargeability to the HICBC, the FTT's interpretation meant that HMRC were not empowered to make a discovery assessment to give effect to Mr Wilkes' liability to the HICBC. The effect of s 7 TMA is to bring the HICBC within the scope of the self-assessment regime, as on receipt of such a notice HMRC will be able in some cases to issue a notice to file under s 8 TMA and may able to issue a determination under s 28C TMA if the taxpayer fails to comply, but that will not always be the case and in those circumstances the exercise of the power under s 29(1)(a) TMA will give HMRC an effective remedy, consistent with the way that the self-assessment regime is designed to operate.

(2) The FTT's interpretation, relying on the ss 8 and 28C TMA powers to conclude that the anomaly identified did not give rise to a level of absurdity or

injustice, fails to acknowledge that this route to assessing the HICBC is subject to different time limits, shorter than those applicable to discovery assessments. A notice to file under s 8 TMA is only available to HMRC within four years after the end of the year of assessment to which it relates (due to the effect of s 34A TMA), which is a shorter period than that available in respect of discovery assessments.

(3) The following example demonstrates the anomaly. A self-employed taxpayer liable to the HICBC submits a return, including their income from self-employment, but leaves out the HICBC. In those circumstances, HMRC can make an assessment under s 29(1)(b) TMA because the taxpayer's self-assessment is insufficient. If HMRC discover the inaccuracy several years later, the time limits for an assessment under s 29 TMA give HMRC an effective remedy because the time is extended to six years where the taxpayer acted carelessly and 20 years where the taxpayer acted deliberately. This position is to be contrasted with the position of a taxpayer who was not otherwise required to submit a return but deliberately failed to notify HMRC of their chargeability after they become liable to the HICBC. That taxpayer would be able to "escape" the HICBC after four years whereas the taxpayer who filed a return but deliberately failed to include the HICBC would be at risk of discovery assessment for 20 years. This anomaly is not an outcome that Parliament would have intended.

(4) Furthermore, the FTT's interpretation results in HMRC having different powers to enforce different income tax charges. Again, this is not consistent with the purpose of the legislation. Take the example of a taxpayer who has earned income from self-employment and has failed to notify HMRC of their chargeability resulting from that income under s 7 TMA. HMRC discover this, say, eight years later. It is clear, in those circumstances, that HMRC could raise a discovery assessment under s 29 TMA. The time limit for doing so would be 20 years, because the loss of tax would be attributable to the taxpayer's failure to comply with the notification obligation under s 7 TMA: s 36(1A)(c) TMA. This position is to be contrasted with the position where a taxpayer fails to notify chargeability resulting from the HICBC, and HMRC discover this 8 years later. On the FTT's approach, HMRC cannot raise a discovery assessment in relation to the HICBC and so HMRC simply cannot enforce the tax charge when they become aware of it. Again, this is not an outcome that Parliament would have intended.

(5) Contrary to the findings of the FTT, the steps found in s 23 ITA do not shed any light on the purpose of s 29(1)(a) TMA because Step 7, which brings into the income tax calculation other charges to income tax after the elements relating to the taxpayer's income have been determined, was introduced long after the relevant words in s 29(1)(a) TMA. The draftsperson of s 29 TMA cannot have had in mind the need to distinguish between the amounts in Step 1 and the amounts in Step 7. There is therefore no basis for viewing the existence of Step 7

in s 23 ITA as a reason for limiting HMRC's discovery assessment powers to income subject to tax, and excluding other amounts of income tax.

Purposive construction: discussion

67. In our view, based on the ordinary meaning of the words used in s 29(1)(a) TMA the purpose of the provision as it applies to income tax is to provide an additional assessment mechanism where *income* which ought to have been assessed to income tax has not been assessed, rather than simply to allow *amounts of income tax* to be assessed. Clearly, the language used in the provision gives effect to that purpose and, in our view, it does not give rise to an unworkable or absurd result. We come to that conclusion for the following reasons.

The HICBC and self-assessment

68. We accept Ms Poots' submission that Parliament intended to bring the HICBC within the scope of the self-assessment regime. This is apparent from the amendment made to s 7 TMA by paragraph 2 of Schedule 1 to FA 2012. That ensures that individuals who would normally be excluded from an obligation to notify chargeability to tax because their income is fully taxed by other means (typically by deduction at source under the PAYE regime) are not so excluded if they are subject to the HICBC.

69. Notification of chargeability under s 7 TMA would act as a prompt for HMRC to issue a notice to file a return under s 8 TMA, which would include a self-assessment under s 9 TMA. Any self-assessment would need to include the HICBC as part of the "…amounts in which…[the taxpayer] is chargeable to income tax": see s 9(1)(a) TMA, set out at [20] above, and the change to s 30 ITA referred to at [34] above. In the absence of a return, a determination of the tax could be made under s 28C TMA, which could be superseded by a later self-assessment if one was made.

70. However, apart from the change to s 7 TMA no other amendments were made to the tax assessment machinery when the HICBC was introduced.

Section 29 TMA and self-assessment

71. Although Ms Poots sought to portray the discovery assessment procedure in s 29 TMA as an integral part of the self-assessment system, in reality it is not. It predates it and has continued in place, albeit with a number of changes which are not relevant to this case. In our view s 29 TMA stands apart from the self-assessment regime and has not been amended in such a way as to indicate that it was intended to operate only as an integral part of that system.

72. As Mr Vallat observed, in its original form many years before the self-assessment regime was introduced, s 29 TMA contained the main power to enable assessments to tax to be made: see [2526] above. The drafting did, however, contemplate that assessments could be made by other provisions in the Taxes Acts, as illustrated by the

opening words of s 29(1) TMA which stated "Except as otherwise provided" all assessments to tax would be made in the manner provided for in that section. In particular, the original version of s 29(1) made it clear that the assessment power applied to "profits". Although we were not taken to them, we note that there would have been other provisions elsewhere in the Taxes Acts which gave specific powers of assessment in relation to income tax charges that were not dependent on the existence of "profits". An example, in force when the original s 29 was enacted, would have been an assessment under the transactions in securities rules, pursuant to what was then s 460 Income and Corporation Taxes Act 1970. The current version of that provision (Chapter 1 of Part 13 ITA) is now included on the list in s 32 ITA.

73. Therefore, it was not surprising that the power to issue a discovery assessment as contained in the original s 29(3) TMA was confined to making an assessment in relation to any discovered insufficiency in relation to income tax payable in respect of profits. The close connection between "profits in respect of which tax is chargeable" in the original s 29(1) TMA and "profits which ought to have been assessed to tax" in the original s 29(3) TMA is clear.

74. When self-assessment was introduced by Finance Act 1994 this close connection between the general assessment process and the power to make a discovery assessment was lost. It was at this point that s 29(1) TMA was rewritten broadly to the form it is in today (albeit referring, as the original s 29(3) did, to "profits"), and the requirement in s 9 TMA for a return to include a self-assessment was introduced. However, that assessment provision no longer operated by reference to "profits", but rather by reference to amounts of tax.

75. Clearly, if it had wanted to maintain the close connection, Parliament could have done so by amending what is now s 29(1)(a) TMA so that it operated by reference to amounts of income tax and not just profits or income. However, Parliament did not do so. Instead, and as discussed further in the next section, the TMA as amended for self-assessment drew a clear distinction between "profits" in the discovery assessment provision and amounts of income tax.

76. Further, the discovery assessment provision now in s 29(1) TMA maintained its precise, three part, structure, covering (a) profits not assessed, (b) insufficient assessments and (c) excessive reliefs. If it had been intended that a discovery assessment could be made in any case where HMRC had discovered that there was more tax to pay then it might have been expected that that would have been stated in simple terms.

77. We observe that one change that was made after self-assessment was introduced is that the reference to "profits" was changed to the current reference to income and chargeable gains when the corporation tax assessment machinery was separated out by Finance Act 1998 (as to which, see [84] below). But this change did no more than set

out in s 29(1) TMA the effect of the previous definition of "profits" as it applied for income and capital gains tax purposes (see [28] above).

78. As already touched on, we also note the assessment provisions that exist in respect of charges listed in s 32 ITA, which are not within self-assessment. As discussed at [92] below, the potential for discovery assessments to be made in respect of such charges in appropriate circumstances supports our conclusion that s 29 TMA stands apart from the self-assessment regime and is not intended to operate simply as an integral part of that system.

Contrast with other relevant provisions: contextual interpretation

79. The reference in s 29(1)(a) TMA to "income which ought to have been assessed to income tax" can be contrasted with language in other relevant provisions of the legislation. In particular:

(1) Section 7(1) TMA requires a person who is "chargeable to income tax" to notify HMRC of that fact. This will include a person liable to the HICBC, because it is a charge to income tax, see s 681B(1) ITEPA (set out at [13] above). The fact that the HICBC was not considered to involve a form of income, and does not form part of total income, is further reinforced by s 7(3)(c) TMA, set out at [17] above. The drafting of that paragraph must be predicated on the assumption that the HICBC does not form part of total income, because if that were not the case then the condition in s 7(3)(a) TMA that total income is derived only from sources within sub-sections (4) to (7) (none of which cover the HICBC) would not be met.

(2) Under s 8 TMA, a return can be required to establish the "amounts in which a person is chargeable to income tax", which again would include the HICBC. There are limited references to income in s 8 TMA, relating to the content of the return that may be required.

(3) Section 9(1) TMA requires a return under s 8 TMA to include a self-assessment of the "amounts in which… the person making the return is chargeable to income tax…", and the "amount payable by him" (being, broadly, the total tax charge for the year less amounts deducted at source). Again, these references are clearly to amounts of tax rather than income. There are similar references in s 28C(1A) and (with effect from 2016-17) s 28H(3) TMA.

(4) Step 1 in s 23 ITA requires identification of the "amounts of income on which the taxpayer is charged to income tax for the tax year". This is stated in Step 1 to be the "total income" for tax purposes. It is clearly not intended that this includes the HICBC, which is dealt with at Step 7 as one of the additional charges to tax listed in s 30 ITA. The language should be compared with "income which ought to have been assessed to income tax" in s 29(1)(a) TMA.

80. We do not agree with Ms Poots that s 23 ITA cannot shed any light on the purpose of s 29(1)(a) TMA simply because it was enacted later. Whilst s 23 ITA had no direct equivalent in earlier legislation, the explanatory notes confirm that it was based on earlier legislation. The concept of total income certainly existed in the earlier legislation. The explanatory notes also confirm that s 30 was based on provisions in the earlier legislation.

81. The wording in sections 8 and 9(1) referred to at [79] above should be contrasted with HMRC's contention that s 29(1)(a) TMA should be read as including "any amount liable to income tax". In truth the HICBC is simply an amount *in which* Mr Wilkes was chargeable to income tax (or, put even more simply, an amount of tax for which he was liable), rather than "an amount liable to income tax". The latter phrase to our mind more obviously connotes an amount *on which* income tax is charged, rather than an amount of tax.

82. We are therefore not convinced by HMRC's argument that a purposive construction under which the reference to "any income which ought to have been assessed to income tax" in s 29(1)(a) TMA is read as "any amount which ought to have been assessed to income tax" would necessarily suffice to secure the result they seek. What they seek to assess is income tax, in the form of the HICBC, not an amount which ought to have been assessed to income tax.

83. The difficulty HMRC face is that the wording of the discovery power in what is now s 29(1) TMA has not been amended, either when self-assessment was introduced or subsequently, to work in the manner described at [75] above. Instead the language has remained broadly in its original form. This is so despite other material changes being made to s 29 TMA, as described in *HMRC v Tooth* [2021] UKSC 17 at [28] to [33]. These have comprised not only the changes made when self-assessment was introduced, referred to above, but also further changes made by Finance Act 2008, after the enactment of ITA 2007.

Corporation tax equivalent

84. It is worth noting that the equivalent discovery power to s 29(1) TMA in respect of corporation tax, in paragraph 41 Schedule 18 Finance Act 1998, allows a discovery assessment to be made where an officer discovers that "an amount which ought to have been assessed to tax has not been assessed". Ms Poots was not able to supply an explanation of why the previous reference to "profits" for corporation tax purposes was altered. However, ultimately we did not consider the point to assist either party materially.

85. Even though there is now no specific reference to profits, for the reasons discussed above the language is not obviously apt to extend to a self-standing tax charge, as opposed to some amount, whether of profits or otherwise, to which a tax charge applies. It therefore seems unlikely that the difference in language indicates any

intention to draw a significant distinction between corporation tax on the one hand and income or capital gains tax on the other, a distinction for which there would be no obvious policy rationale.

Charges within ss 30 and 32 ITA: specific provisions

86. It is also worth noting, although we do not place material weight on it, that specific provision has been made in respect of certain charges to income tax within s 30 ITA which would appear to permit s 29(1)(a) TMA to be applied. The fact that specific provision exists arguably lends some support to the existence of an appreciation by Parliament of a distinction between income tax levied on income and other charges to income tax.

87. One technique that Parliament has used is to deem an amount to be treated as income for the purposes of the Taxes Acts. As set out in the Schedule, a charge to income tax on a social security pension lump sum which arises under s 7 Finance (No. 2) 2005 is to be treated as income, but is not be taken into account in determining the total income of any person. The charge under s 7 is listed in s 30 ITA, like the HICBC.

88. In the case of some tax charges that fall within s 30 ITA Parliament has chosen to confer a power to make regulations in a sufficiently broad manner to permit s 29(1)(a) TMA to be modified to bring the tax charge in question within its scope. Sections 254 and 255 Finance Act 2004 ("FA 2004") confer a power on HMRC to make regulations in respect of the assessment of certain pension related income tax charges, including by modification of any provision of the Tax Acts. This power was exercised by regulation 9(2) of the Registered Pension Schemes (Accounting and Assessment) Regulations 2005 (SI 2005/3454), the text of which is set out in the Schedule to this decision. That provision, when read with other provisions in the regulations, modifies s 29(1)(a) TMA so that unauthorised payments out of pension schemes to companies which give rise to charges to income tax under ss 208 or 209 FA 2004 can be assessed through the discovery procedure. The recipient of a lump sum death benefit which is chargeable to a lifetime allowance charge under s 217(2) FA 2004, whether a company or an individual, can also be the subject of a discovery assessment. Such a charge is also income tax: s 214(1) FA 2004. Both the unauthorised payments charges and the lifetime allowance charge are listed in s 30 ITA.

89. The FTT suggested, by reference to comments in *Robertson v HMRC* [2018] UKFTT 0158 (TC), that the existence of specific "fixes" such as regulation 9 supported Mr Wilkes' case. Ms Poots submitted that, on the contrary, the fact that regulation 9 did not apply to unauthorised payments to individuals reflected the fact that it was unnecessary for it do so, because individuals are clearly within income tax self-assessment and s 29(1)(a) TMA is broad enough to catch unauthorised payments to them, even though s 208(8) FA 2004 provides that such payments are not to be treated as income. There was no logical basis for discovery to be available in respect of unauthorised payments to companies but not to individuals. She also explained the

reference in regulation 9 to lump sum death benefits by reference to such amounts being taken out of self-assessment by regulation 8 of the same regulations.

90. We note that in relation to the unauthorised payments charge this issue is expected to be addressed by the Upper Tribunal on an appeal against the decision in *Monaghan*. In the circumstances it would not be appropriate for us to consider it further. However, we would make the point that regulation 9 is part of regulations made by HMRC under powers conferred on them. It is therefore of limited assistance in determining Parliament's intention in respect of the legislative provisions with which we are concerned, as opposed to HMRC's own views about their scope. In any event, the proper interpretation of a provision in legislation relating to a different area (in this instance pensions taxation as opposed to the HICBC), and enacted at a different time, seems to us to carry relatively limited weight in determining the actual scope of s 29(1) TMA.

91. As Mr Vallat observed, there are other liabilities to income tax listed in s 32 ITA which do not form part of the income tax calculation prescribed by s 23 ITA, where provision is made for assessments to be made, but not by self-assessment, in the particular manner prescribed. We were not taken to them specifically, but we note the FTT's observation in *Monaghan* at [95] that all of the listed provisions provide for assessments to be made; some of them refer to sections or parts of TMA as being applied as they are applied to assessments under that Act; some provide their own time limits and some are simply statements that an assessment may be made.

92. The FTT in *Monaghan* also stated that none of the provisions listed in s 32 invoke or apply s 29 TMA with or without modification. We think that is too broad. A more accurate statement would be that we are not aware of any provision that specifically modifies s 29 for the purposes of the charge in question. In principle, in any case where s 29 is not excluded it would appear possible for a discovery assessment to be made in respect of the charge in question, but only if the specific requirements of s 29 are met. So, for example, a discovery assessment might be made under s 29(1)(b) in an appropriate case where an earlier assessment has been discovered to be insufficient. In our view this supports the conclusion that s 29 is not part of the self-assessment regime, but is a self-standing provision.

Anomalies and the scope of HMRC's other powers

93. Whilst we accept that the "straightforward" interpretation adopted by the FTT does mean that some anomalies will arise, we agree with the FTT that these anomalies do not rise to the level of absurdity or injustice.

94. In that context, it is important to examine the other powers available to HMRC to recover the tax charge where a taxpayer has failed to notify their liability to the HICBC.

95. It is not irrelevant that HMRC administer child benefit. This means that they have available on their systems information which, in most cases, would at least enable them to identify a risk that the HICBC is due and has not been paid. Indeed, that is precisely what happened in this case. As we understand it, the letter that prompted Mr Wilkes to contact HMRC was written following work that cross-checked child benefit records with tax records, including by checking common addresses.

96. Thus it appears to us that there is a greater likelihood that HMRC will be able to identify from their existing records that a person may be liable to the HICBC than they would in the example given by Ms Poots of a self-employed trader who failed to notify HMRC under s 7 TMA of his liability to tax on his trading income, and who might not be on HMRC's radar at all. It is in those cases where the discovery assessment power combined with the extended time limits in s 36 TMA may be of considerable assistance to HMRC.

97. The fact that Parliament considered it appropriate to provide that the HICBC would trigger an obligation to notify chargeability under s 7 TMA in circumstances where the taxpayer would not otherwise be required to do so does not detract from this. It can straightforwardly be seen as preferable for an onus to be placed on the taxpayer to alert HMRC to chargeability, rather than for HMRC officers to be required to check child benefit records to try to determine in each case whether the HICBC needed to be paid.

98. In submissions, Ms Poots made the point that the information held by HMRC would not always allow liability to the HICBC to be identified correctly. One example was where the partner of the person liable to the HICBC had registered for child benefit using a different address, and had either never updated it or had recently moved in with his or her partner, with the result that the liability was not identified. Another was where individuals were living at the same address but not as partners, where the risk was that the existence of a liability might be wrongly identified.

99. However, it does not follow that examples such as these support an interpretation which would allow HMRC a longer period to recoup the HICBC, in line with that available in respect of discovery assessments. The sorts of difficulty identified in submissions would be likely to exist irrespective of an extended time limit, and in most cases would be unlikely to be materially affected by it. For example, issues with out of date addresses might be expected to be resolved within the four year period prescribed by s 34A TMA for the making of a self-assessment, if they were going to be resolved at all. As regards individuals not living as partners, HMRC would face the same difficulty in determining whether to take action after a four year period as beforehand, but in each case information would be available that could be used to identify a risk and make further enquiries.

100. We note that in this case, as found by the FTT, HMRC did make contact with Mr Wilkes at a time when the four year time limit prescribed by s 34A TMA had not

expired in relation to any of the tax years in question. It would therefore have been open to HMRC to have given Mr Wilkes notice under s 8 TMA to file a tax return for the years in question, and if he failed to do so they could have exercised their power under s 28C TMA to determine the amount of tax in respect of which Mr Wilkes was chargeable.

101. Furthermore, HMRC now have power under s 28H TMA, as set out at [2122] above, to make a simple assessment on a person who has not delivered, or is not the subject of a requirement to deliver, a return under s 8 TMA for the year in question.

102. It appears to us that this power could appropriately be used in relation to similar circumstances to those of Mr Wilkes in this case. It could in fact have been used in relation to Mr Wilkes' liability for the 2016-17 tax year, as the provision has effect in relation to that tax year and subsequent years. As the explanatory note to the provision that introduced this new power explained, the provision allows HMRC to make an assessment of an individual's tax liability without them first being required to complete a self-assessment return where HMRC has sufficient information about that individual (whether it is received from individual or third party) to make the assessment.

103. It is also relevant to note that the extended 20 year time limit provided by s 36(1A)(b) TMA in a case where a person fails to notify his liability to tax in accordance with s 7 TMA will apply in relation to a simple assessment.

104. In relation to time limits generally, Ms Poots appeared in her submissions to suggest that the extended time limits were only available in respect of discovery assessments. That is not the case: s 36 TMA is expressed to apply to all assessments. That means that the extended 20 year time limit will apply to a simple assessment made under s 28H where a loss of tax is caused by deliberate behaviour or a failure to comply with s 7 TMA, and a six year time limit will apply in respect of careless behaviour. In other circumstances the ordinary four year time limit in s 34 TMA would apply.

105. A further issue that we raised with the parties following the hearing, and on which we invited written submissions, was this. In support of their submissions about anomalies if s 29 TMA did not apply to HICBC, HMRC relied on the four year limit in s 34A TMA. However, that was introduced only in FA 2016, albeit with effect for earlier tax years. Before s 34A was introduced HMRC thought that s 34 applied to impose a four year time limit but in fact it did not, as established in *Higgs* (see [40] above).

106. This potentially affects the weight that should be attached to HMRC's submissions about the anomalies caused by different time limits. In their further written submissions HMRC accepted that prior to the enactment of s 34A the actual effect of the legislation (in the light of *Higgs*) was that an effective notice to file could have been issued at any time. In the absence of a return being made HMRC would have had three years from the filing date to make a determination under s 28C. In this context, the

filing date would be three months after the notice to file: s 28C(6) TMA. (The three year time limit is in s 28C(5)(a).) As a result there would in fact have been no shorter time limit as compared to a discovery assessment. Rather, there would strictly have been no time limit at all.

107. Ms Poots nonetheless submitted that this would not have been apparent before *Higgs* was decided. HMRC's earlier view that a four year time limit did apply (as now confirmed by s 34A) was reflected in guidance, so a draftsperson and Parliament could not have been confident that there would not be a shorter time limit. Ms Poots also referred us to *Morris v HMRC* 79 TC 184 at [36] as indicating an HMRC view to that effect (although in fact the point was doubted by Patten J: see [37]).

108. The difficulty with this submission is that we are seeking to determine Parliament's intention. As determined by *Higgs*, Parliament must be taken not to have intended that a four year time limit should apply to self-assessment returns until it legislated for that in FA 2016. So although we do not think it is a material point, we do consider that the fact that s 34A TMA was only introduced by FA 2016 as being of some relevance in determining the force to be attached to HMRC's submissions about anomalies arising from different time limits.

Conclusion

109. In our view, HMRC express the purpose of s 29(1)(a) TMA too broadly. For the reasons we have given above we cannot infer from the wording of the provision a broad intention to cover any shortfall in income tax.

110. Section 29(1)(a) TMA is not inextricably linked to the self-assessment regime. Further, as we have demonstrated there are other powers available to HMRC to ensure that the HICBC is assessed. The fact that in relation to some of those powers, particularly the power to require the filing of a self-assessment return, the relevant time limit may be shorter than that available in respect of a discovery assessment in our view is not sufficient to lead us to conclude that the absence of the power to raise a discovery assessment in certain circumstances makes the situation unworkable or absurd. Consequently, we can find no basis on which we should adopt a strained interpretation of the meaning of s 29(1)(a) TMA, either as contended by HMRC or as we think it would in fact need to be interpreted to apply to the HICBC.

111. We therefore determine the "purposive construction" issue in favour of Mr Wilkes.

Whether there is "income which ought to have been assessed"

112. In their amended grounds of appeal, as an alternative to their arguments on purposive construction, HMRC relied on an approach similar to that taken by the FTT in *Wiseman v HMRC* [2020] UKFTT 383 (TC) ("*Wiseman*").

113. In *Wiseman* the FTT declined to follow the approach taken by the FTT in this case and held that on a straightforward and literal reading of s 29(1)(a) TMA there was power to assess the taxpayer for the HICBC by means of a discovery assessment. In summary, the FTT held that an officer of HMRC had discovered that Mr Wiseman's income should have been assessed to a further charge to income tax in respect of the HICBC, but it had not been so assessed because no return had been submitted. The FTT said this at [244] to [247] of *Wiseman*:

> "244 … We have decided that there is no need to adopt a purposive interpretation of section 29(1)(a) TMA 1970 because a literal and natural reading of the words '*income*' and '*income tax*' in the phrase '*income which ought to have been assessed to income tax'* provides for a discovery assessment to be made in respect of HICBC. We hope this is a straightforward answer to the perceived problem of the statutory language.
>
> 245. The simple conclusion we have to come to is that where there has been a failure to notify HMRC of a liability to HICBC and failure to file a self-assessment return, discovery assessments are nonetheless available to HMRC on a straightforward and literal reading of section 29(1)(a) TMA 1970. There is no reason to adopt a purposive approach as urged upon us by HMRC. The natural and ordinary meaning of the provision empowers HMRC to make discovery assessments in respect of HICBC.
>
> 246. The income which ought to be assessed is the person's high income which has not been included on a return or otherwise notified to HMRC for assessment to HICBC (it is not the income from income from child benefit, which the taxpayer may themselves not have received). The person's income is to be assessed for HICBC (a charge to income tax) as both section 3 of the ITA 2007 defines taxes under Part 10 of ITEPA as income taxes and section 681B(1) itself makes clear that the higher income child benefit charge is a form of income tax - 'a charge to income tax'.
>
> 247. If HMRC discovers that '*income*' of a taxpayer (from ordinary employment income from or any other source) has not been notified to them under section 7 TMA 1970 or provided to them in a filed self-assessment return and which '*ought to have been assessed to income tax*', because there was a HICBC liability, but where it has not been notified, assessed or paid, for example, because only PAYE income tax has been notified and paid to HMRC or where there has been no assessment of their [adjusted net income], then HMRC may make a discovery assessment to income tax. In those circumstances, the taxpayer's income ought to have been assessed to a further charge to or form of income tax but has not been. The income ought to have been assessed to a further form of income tax (HICBC) than that already notified and paid through PAYE or notified in a self-assessment return."

114. Ms Poots submitted that, as the FTT held in *Wiseman*, all of Mr Wilkes's income ought to have been assessed to income tax and, on the basis that no return was

submitted, that income has not been assessed to a further charge to income tax: the HICBC.

115. Ms Poots submitted that the HICBC is not a freestanding charge to tax. Where the conditions are met, "P" is expressly liable "to a charge to income tax" (see the opening words of s 681B ITEPA). The HICBC arises as a result of the adjusted net income of P exceeding £50,000, and so P's income is income which ought to have been assessed to income tax, *including* by assessing the resulting HICBC as a further charge to income tax.

116. By way of development of those arguments, one possible approach might be along the following lines:

> (1) An assessment of income tax for the year in question should take into account all sources of income and follow the steps in the calculation set out in s 23 ITA. In particular, "total income" would need to be calculated, and adjustments made for allowances and other reliefs, before calculating the tax on each component and adding to the total the HICBC and any other amounts listed in s 30 ITA.
>
> (2) To raise a discovery assessment would therefore involve HMRC assessing Mr Wilkes' income.
>
> (3) That is income which has not been assessed because no self-assessment (or other assessment) has otherwise been made. It "ought" to have been assessed because otherwise Mr Wilkes would have paid insufficient income tax for the year in question.

117. In our view this approach really amounts to reading s 29(1)(a) TMA as if it simply referred to a discovery that insufficient income tax (or capital gains tax) had been paid. For the reasons that we have set out above in relation to the purposive construction issue, we do not consider that that is permissible.

118. Further, whilst this approach correctly describes what would need to be covered by a self-assessment, it does not accurately describe the process of a discovery assessment. Section 29(1) allows an assessment to be made in an amount which:

> "…ought [in the officer's] opinion to be charged in order to make good to the Crown the loss of tax."

The focus is therefore on the particular loss of tax in question, rather than being an overall assessment of the taxpayer's income for the year (which could be very different). This is well illustrated by the assessments in this case which, as discussed below, in fact contained no assessment of Mr Wilkes' income.

119. An alternative approach would be to place emphasis on the fact that the HICBC is not freestanding. It only applies because Mr Wilkes' adjusted net income exceeded £50,000. On that basis the charge might be described as an additional charge to income tax that arises where that income figure is exceeded and certain additional conditions are met.

120. The question raised by this approach is whether the fact that HICBC is linked to adjusted net income is enough to make a difference. Given our earlier conclusions, it could only do so if that link allowed a conclusion that the officer discovered that Mr Wilkes had *income* that ought to have been assessed.

121. We do not consider that the existence of a link does make a difference. What the officer discovered was not that Mr Wilkes' income, or any part of it, ought to have been assessed but that he had failed to pay the HICBC. The existence of adjusted net income in excess of £50,000 is a condition for the HICBC to apply, rather than the charge to the HICBC being a charge on that income. We consider that this is clear from s 681B(1) ITEPA, which provides that the charge arises "if" that income level is exceeded and certain (in our view additional) conditions are met. Mr Wilkes had not paid insufficient tax on his *income*. Rather, he had paid insufficient *income tax* in the form of the HICBC.

122. The fact that the HICBC is tapered for income levels between £50,000 and £60,000 does not affect this in our view. It does not demonstrate that what is being taxed, or what should be assessed, is the income itself. The amount of the charge is determined by reference to the level of child benefit, subject to a percentage reduction to the extent that adjusted net income is below £60,000. The intention is to avoid a "cliff edge" effect in what is an effective clawing back of child benefit. It is not a tax on the income.

123. We also note that, in order to assess the HICBC, the HMRC officer is not in fact required to *assess* income at all. If the information available indicated, as it did in this case, that the taxpayer's adjusted net income exceeded £60,000, then all that was required was an assessment in an amount equal to the child benefit received. Indeed, that is precisely the form that the discovery assessments took in this case. They included no assessment of Mr Wilkes's income, but simply stated the amount of tax payable in an amount equal to the level of child benefit that Mr Wilkes disclosed had been received by his wife.

124. Even if Mr Wilkes' adjusted net income had been below £60,000, we do not think that the process of applying the percentage reduction required by s 681C ITEPA would be sufficient to allow s 29(1)(a) TMA to apply. That process simply uses adjusted net income as an element in the calculation that determines the amount of the charge, the principal element being the amount of child benefit. It does not mean that it could then fairly be said that the *income* ought to have been assessed to income tax.

125. This point is reinforced by the way in which, as we have found, the HICBC is included only at the final step in the calculation of income tax liability (Step 7 in s 23 ITA). Its inclusion in the final step shows that the amount of the charge is not affected by other parts of the calculation. It is also of some relevance that the concept of adjusted net income does not itself feature in the calculation of income tax liability in Chapter 3 of Part 2 ITA. Instead it is derived from s 58 ITA, which applies for the purposes of Chapters 2 and 3 of Part 3 ITA (which deal with the personal allowance and certain other personal reliefs).

126. In our view the approach taken in *Wiseman* is, with respect, one that adopts an overly strained interpretation of s 29(1)(a) TMA and is not correct. The officer could not fairly be described as having discovered that there was income that had not been assessed. Rather, he discovered that Mr Wilkes should have paid the HICBC. The assessment made was one to make good that loss of tax.

127. We therefore determine this issue in favour of Mr Wilkes.

Whether the principle in *Inco Europe* applies

128. On the assumption that they are unsuccessful in their alternative grounds of appeal discussed above, HMRC contend that the FTT erred in its application of the principle in *Inco Europe*, and should have corrected an obvious drafting error.

129. In *Inco Europe* Lord Nicholls described the principle in the following terms at p.592:

> "It has long been established that the role of the courts in construing legislation is not confined to resolving ambiguities in statutory language. The court must be able to correct obvious drafting errors. In suitable cases, in discharging its interpretative function the court will add words, or omit words or substitute words. Some notable instances are given in Professor Sir Rupert Cross's admirable opuscule, *Statutory Interpretation*, 3rd ed. (1995), pp. 93–105. He comments, at p. 103:
>
>> "In omitting or inserting words the judge is not really engaged in a hypothetical reconstruction of the intentions of the drafter or the legislature, but is simply making as much sense as he can of the text of the statutory provision read in its appropriate context and within the limits of the judicial role."
>
> This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of

> the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation: see per Lord Diplock in *Jones v. Wrotham Park Settled Estates* [1980] A.C. 74 , 105–106. In the present case these three conditions are fulfilled.
>
> Sometimes, even when these conditions are met, the court may find itself inhibited from interpreting the statutory provision in accordance with what it is satisfied was the underlying intention of Parliament. The alteration in language may be too far-reaching. In *Western Bank Ltd. v Schindler* [1977] Ch. 1 , 18, Scarman L.J. observed that the insertion must not be too big, or too much at variance with the language used by the legislature. Or the subject matter may call for a strict interpretation of the statutory language, as in penal legislation."

130. In *Inco Europe* the issue was whether a Schedule to the Arbitration Act 1996, apparently intended to deal with consequential amendments, had the radical effect of removing the jurisdiction of the Court of Appeal to entertain an appeal, which on its literal reading it appeared to do. The House of Lords held that it did not have that effect.

131. The conditions described by Lord Nicholls have since been applied on a number of occasions.

132. In *Pollen Estate Trustee Co Ltd v Revenue and Customs Comrs* [2013] EWCA Civ 753; [2013] 1 WLR 3785 the literal meaning of the statute appeared to preclude exemption from stamp duty land tax where a charity acquired only a share of a property rather than the whole beneficial interest. The Court of Appeal concluded that there was no policy justification for that limitation and construed the legislation as if the exemption applied "to the extent that the purchaser is a charity" rather than only where "the purchaser is a charity".

133. In *Bogdanic v Secretary of State for the Home Department* [2014] EWHC 2872 (QB) ("*Bogdanic*") Sales J (as he then was) considered whether a regime for imposing penalties on carriers who carried clandestine entrants to the UK could apply to immigration control zones established in France. This raised a question of the correct interpretation of some regulations which brought into effect amendments to the relevant legislation, the literal meaning of which appeared to restrict the regime to arrivals in the UK.

134. Sales J emphasised at [41] and [42] that *Inco Europe* states a principle of statutory interpretation that is aimed at giving effect to the (objectively assessed) intention of Parliament. Given the primacy that must ordinarily be given to the language used, the

"countervailing objective indicators that, despite the language used, the legislator's intention was different" needed to be very strong in order for the court to apply what he described (in shorthand terms) as a "rectifying interpretation". The court needed to be confident that the "clear, objectively assessed meaning", taking account of all the (objective) indicators available, was contrary to the literal meaning.

135. Although the context was a penal regime, in *Bogdanic* Sales J was able to conclude that it was possible to read in words to the regulations to extend their effect to arrivals in immigration control zones. In reaching that conclusion he considered the legislative history in detail, finding that the regime had previously extended to the Coquelles immigration control zone, and the clear intention was for that to continue.

136. In the earlier case of *Confederation of Passenger Transport UK v Humber Bridge Board* [2004] QB 310 ("*Humber Bridge*"), the Court of Appeal was similarly able to read in words to a statutory instrument setting tolls for the Humber Bridge, to remedy an inadvertent omission of a tariff for large buses. The Court took account of the fact that such vehicles had previously been within the scope of the charge, and the fact that the relevant regulations even included a definition of "large bus". As in *Bogdanic* the court considered the legislative history in some detail, including explanatory notes and other documents which included a decision letter of the Secretary of State (paragraph [48]).

137. In submissions, Ms Poots clarified that, as well as the alleged drafting error relating to the manner in which the HICBC charge was introduced by Schedule 1 to FA 2012, the question of intended purpose of the statute (the first of the three tests referred to by Lord Nicholls) also relates to Schedule 1. In essence, the argument is that specific provision was made to bring the HICBC within the self-assessment regime, and it must therefore have been intended that s 29 TMA would be available to HMRC. By inadvertence, the draftsperson of Schedule 1 and Parliament failed to give effect to that purpose. Had this error been noticed, Parliament would have included within Schedule 1 wording to the effect that the HICBC, as an amount of income tax, could be assessed under s 29(1)(a) TMA. Ms Poots therefore submitted that the conditions for the application of the principle in *Inco Europe* are met.

138. It is worth noting that this is a slightly different approach to the one which found favour with the FTT in *Haslam v HMRC* [2020] UKFTT 304 (TC) (see paragraphs [66] to [69] of that decision). In that case the FTT upheld a discovery assessment to the HICBC as correctly made under s 29(1)(a) TMA relying on *Inco Europe*, but by reference to what was said to be the intended purpose of s 29(1)(a) itself rather than Schedule 1 to FA 2012. The FTT in this case also referred to the intended purpose of s 29 at [52(5)], rather than the intended purpose of Schedule 1. (As discussed at [85] above we are not convinced that following the drafting in paragraph 41 Schedule 18 FA 1998 would address any error, as the FTT suggested in the same paragraph of the Decision.)

139. We are not persuaded that the principle in *Inco Europe* can be used to read in words that would allow HMRC to use s 29(1)(a) TMA to assess the HICBC, because we are not satisfied that this is the sort of drafting mistake that falls within the principle in that case.

140. As we have said at [68] above, Parliament intended to bring the HICBC within the scope of the self-assessment regime. We have also said at [69] that notification of chargeability under s 7 TMA would act as a prompt for HMRC to issue a notice under s 8 TMA, which would include a self-assessment under s 9 TMA, and that the self-assessment would need to include the HICBC.

141. However, as we have mentioned above, apart from the change to s 7 TMA no other amendments were made to the tax assessment machinery and we have found that in reality s 29 TMA is not part of self-assessment.

142. We do not think that the question of whether the principle in *Inco Europe* applies can be disassociated from the question of purposive construction. This is not just because both are principles of statutory interpretation. Rather, the underlying difficulty is what appears to have been an assumption by HMRC, possibly shared by the draftsperson of Schedule 1 to FA 2012, that s 29(1)(a) TMA was broad enough to catch "self-standing" income tax charges which are not charges on amounts of income. If, as we have held, that assumption was wrong on a purposive construction of the legislation, then it is very difficult to see how any error made by the draftsperson of Schedule 1 FA 2012 was the sort of slip that Lord Nicholls had in mind. This was not simply a case of Homer, in the shape of the draftsperson, having nodded (*Inco Europe* at p.589). Homer would have been under a material misapprehension. The facts are very different to *Inco Europe*, *Bogdanic* and *Humber Bridge*, where in each case it was clear from the legislative context that an error had been made that had unintentionally reversed the effect of earlier rules, running counter to the intention of Parliament. In *Pollen*, it was clear that Parliament intended to provide relief to charities, and there was no principled reason to restrict relief by reference to a literal interpretation of the words: such an approach would be capricious (paragraph [50], per Lewison LJ).

143. Rather, in this case there would have been a more fundamental misunderstanding about Parliament's intention in enacting s 29 TMA in its current form, leading to a failure to make appropriate provision for assessments to the HICBC to be made outside the self-assessment system. Correcting the misapprehension would in our view amount to judicial legislation, rather than the correction of an obvious drafting error.

144. On the basis that we do not consider that this is the sort of drafting mistake that falls within the principle in *Inco Europe*, it is not strictly necessary to consider the three tests referred to by Lord Nicholls, but since they were fully argued before us we will do so briefly. Whilst we are prepared to accept that from HMRC's perspective the omission was inadvertent, we would not be "abundantly sure" either of the intended

purpose of Schedule 1 FA 2012 as it might affect s 29 TMA, or as to the substance of the provision that Parliament would have made.

145. It is clear that, by amending s 7 TMA and including the HICBC on the list in s 30 ITA of charges falling within Step 7 of s 23 ITA, Parliament intended that the HICBC should be collected via the self-assessment procedure. However, we have been shown nothing in the legislation or other material that might be relevant (such as explanatory notes) that demonstrates that Parliament's intention must be taken to have been that additional assessing procedures should be available. As already discussed in the context of purposive construction, the existence of anomalies is not sufficient. On that basis, the first of the three tests (intended purpose) would not be met.

146. We would also not be satisfied as to the third test, the substance of the provision that would be made. It would be necessary to be sure not only that an additional assessing procedure was intended (which has not been established) but the particular form of it, namely (on HMRC's case) an amendment to s 29(1)(a) TMA to allow a discovery assessment in respect of a charge to the HICBC, rather than (for example) a separate assessment procedure that took a different form. We are not so satisfied.

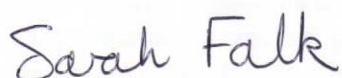
147. As an illustration of this point it is worth comparing the assessment procedure under s 29 TMA with the simple assessment procedure in s 28H TMA introduced by FA 2016. The former, as already discussed, provides for an assessment of the amount required to make good the loss of tax. The latter, like a self-assessment, is an assessment of the (total) amount in which the taxpayer is chargeable to tax as well as an assessment of the amount payable: see s 28H(2) TMA. So it would require all sources of income to be taken into account. This is also made clear by s 28H(6) TMA, which requires the notice of assessment to show particulars of the income taken into account.

148. Another illustration of the point would be the possibility that, as with the pensions legislation already discussed, Parliament might have conferred power on HMRC to make regulations.

149. We therefore determine this issue in favour of Mr Wilkes.

Disposition

150. The appeal is accordingly dismissed.



MRS JUSTICE FALK **JUDGE TIMOTHY HERRINGTON**

UPPER TRIBUNAL JUDGES

RELEASE DATE: 30 June 2021

SCHEDULE

<u>Taxes Management Act 1970</u>

Section 28C: Determination of tax when no return delivered.

(1) This section applies where—

(a) a notice has been given to any person under section 8 or 8A of this Act (the relevant section), and

(b) the required return is not delivered on or before the filing date.

(1A) An officer of the Board may make a determination of the following amounts, to the best of his information and belief, namely—

(a) the amounts in which the person who should have made the return is chargeable to income tax and capital gains tax for the year of assessment; and

(b) the amount which is payable by him by way of income tax for that year;

and subsection (1AA) of section 8 or, as the case may be, section 8A of this Act applies for the purposes of this subsection as it applies for the purposes of subsection (1) of that section.

(2) Notice of any determination under this section shall be served on the person in respect of whom it is made and shall state the date on which it is issued.

(3) Until such time (if any) as it is superseded by a self-assessment made under section 9 of this Act (whether by the taxpayer or an officer of the Board) on the basis of information contained in a return under the relevant section, a determination under this section shall have effect for the purposes of Part VA, VI, IX and XI of this Act as if it were such a self-assessment.

[…]

(5) No determination under this section, and no self-assessment superseding such a determination, shall be made otherwise than—

(a) before the end of the period of 3 years beginning with the filing date; or

(b) in the case of such a self-assessment, before the end of the period of twelve months beginning with the date of the determination.

(6) In this section "the filing date" in respect of a return for a year of assessment (Year 1) means either–

(a) 31st January of Year 2, or

(b) if the notice under section 8 or 8A was given after 31st October of Year 2, the last day of the period of three months beginning with the day on which the notice is given.

Registered Pension Schemes (Accounting and Assessment) Regulations 2005

Regulation 9

(1) Section 29(1)(a) of TMA (assessment where loss of tax discovered) applies with the following modification in relation to an assessment to tax under case 1, 2 or 3.

(2) After "any income" insert—

", unauthorised payments under section 208 of the Finance Act 2004 or surchargeable unauthorised payments under section 209 of that Act or relevant lump sum death benefit under section 217(2) of that Act".

(Cases 1 and 2 relate to payments to companies within ss 208 and 209 FA 2004, and Case 3 to s 217(2) FA 2004: regulation 4(1) read with regulation 2(2).)

Finance (No. 2) Act 2005

Section 7: Charge to Income Tax on Lump Sum

(Version in force in 2012)

(1) A charge to income tax arises where a person becomes entitled to a social security pension lump sum.

(2) For the purposes of the Tax Acts (including subsection (5)) a social security pension lump sum—

(a) is to be treated as income, but

(b) is not to be taken into account in determining the total income of any person.

(3) The person liable to a charge under this section is the person ("P") entitled to the lump sum, whether or not P is resident, ordinarily resident or domiciled in the United Kingdom.

(4) The charge is imposed on P for the applicable year of assessment (see subsection (6)).

(5) A charge under this section is a charge in respect of the amount of the lump sum at the following rate—

(a) if P's Step 3 income for the applicable year of assessment is nil, 0%;

(c) if P's Step 3 income for that year of assessment is greater than nil but does not exceed the basic rate limit for that year, the basic rate for that year;

(d) if P's Step 3 income for that year of assessment exceeds the basic rate limit for that year but does not exceed the higher rate limit for that year, the higher rate for that year;

(e) if P's Step 3 income for that year of assessment exceeds the higher rate limit for that year, the additional rate for that year.

[…]

(9) For the purposes of this section P's "Step 3 income" means P's net income less allowances deducted at Step 3 of the calculation in section 23 of ITA 2007 (calculation of income tax liability).

Income Tax Act 2007

23 The calculation of income tax liability

To find the liability of a person ("the taxpayer") to income tax for a tax year, take the following steps.

Step 1 Identify the amounts of income on which the taxpayer is charged to income tax for the tax year.

The sum of those amounts is "total income".

Each of those amounts is a "component" of total income.

Step 2 Deduct from the components the amount of any relief under a provision listed in relation to the taxpayer in section 24 to which the taxpayer is entitled for the tax year.

[…]

The sum of the amounts of the components left after this step is "net income".

Step 3 Deduct from the amounts of the components left after Step 2 any allowances to which the taxpayer is entitled for the tax year under Chapter 2 of Part 3 of this Act (individuals: personal allowance and blind person's allowance).

[…]

Step 4 Calculate tax at each applicable rate on the amounts of the components left after Step 3.

[…]

Step 5 Add together the amounts of tax calculated at Step 4.

Step 6 Deduct from the amount of tax calculated at Step 5 any tax reductions to which the taxpayer is entitled for the tax year under a provision listed in relation to the taxpayer in section 26.

[…]

Step 7 Add to the amount of tax left after Step 6 any amounts of tax for which the taxpayer is liable for the tax year under any provision listed in relation to the taxpayer in section 30.

The result is the taxpayer's liability to income tax for the tax year.

Section 30: Additional Tax

(1) If the taxpayer is an individual, the provisions referred to at Step 7 of the calculation in section 23 are–

section 414A(4) read with section 414A(5) (gift aid where devolved basic rate is below basic rate),

section 424 (gift aid: charge to tax),

section 809ZN (tainted gift aid donations: charge to tax),

section 809ZO (tainted charity donations by trustees: charge to tax),

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

section 192B of FA 2004 (relief at source: excessive relief given),

section 205 of FA 2004 (pension schemes: the short service refund lump sum charge),

section 206 of FA 2004 (pension schemes: the special lump sum death benefits charge),

section 208(2)(a) of FA 2004 (pension schemes: the unauthorised payments charge),

section 209(3)(a) of FA 2004 (pension schemes: the unauthorised payments surcharge),

section 214 of FA 2004 (pension schemes: the lifetime allowance charge),

section 227 of FA 2004 (pension schemes: the annual allowance charge), and

section 7 of F(No.2)A 2005 (social security pension lump sum).

Section 32: Liability not dealt with in the calculation

The liabilities referred to in section 22(2) are income tax liability–

under section 74C(5) (non-active traders: withdrawal of relief),

under section 79(1) (capital allowances restrictions: withdrawal of relief),

under section 81(6) (dealings in commodity futures: withdrawal of relief),

under section 103B(5) (non-active partners: withdrawal of relief),

under section 235 (withdrawal or reduction of EIS relief),

under section 257G (withdrawal or reduction of SEIS relief),

under section 257S (withdrawal or reduction of relief for social investments),

under sections 266 to 270 (withdrawal or reduction of VCT relief),

under section 372 (withdrawal or reduction of CITR),

under section 512 (heritage maintenance settlements: application of property for non-heritage purposes),

under Chapter 1 of Part 13 (transactions in securities),

under regulations made under section 918(4) (foreign payers of manufactured dividends: Real Estate Investment Trusts: the reverse charge),

under section 920 or 923 (foreign payers of manufactured interest or manufactured overseas dividends: the reverse charge),

under Chapter 15, 16 or 17 of Part 15 (deduction of tax at source: collection mechanisms),

under paragraph 11(3) of Schedule 20 to FA 1994 (recovery of excess credit for overseas tax: changes for facilitating self-assessment),

of the person who is (or persons who are) the responsible person in relation to an employer-financed retirement benefits scheme under section 394(2) of ITEPA 2003,

under Chapter 5 of Part 4 of FA 2004 (registered pension schemes: tax charges), except any liability under a provision mentioned in section 30(1),

under section 682(4) of ITTOIA 2005 (assessments, adjustments and claims after the administration period), so far as the liability represents a tax reduction given effect at Step 6 of the calculation in section 23, and

under section 24(4) of TIOPA 2010 (recovery of excess credit for overseas tax).

Section 58: Meaning of “adjusted net income”

(1) For the purposes of Chapters 2 and 3, 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.

(2) The grossed up amount of a gift is the amount of the gift grossed up by reference to the basic rate for the tax year.

(3) The gross amount of a contribution is the amount of the contribution before deduction of tax under section 192(1) of FA 2004.

(4) Subsection (6) of section 809ZM (removal of income tax relief in respect of tainted donations etc) excludes certain donations from being deducted at step 2 in subsection (1).