



Neutral Citation Number: [2022] EWCA Civ 1612

Case No: CA-2021-000034

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE UPPER TRIBUNAL**  
**(TAX AND CHANCERY CHAMBER)**

**Mrs Justice Falk and Upper Tribunal Judge Timothy Herrington**  
**[2021] UKUT 0150 (TCC)**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 07/12/2022

**Before:**

**LORD JUSTICE NEWEY**  
**LORD JUSTICE BAKER**  
and  
**LORD JUSTICE ARNOLD**

**Between:**

**THE COMMISSIONERS FOR HIS MAJESTY'S  
REVENUE AND CUSTOMS**

**Appellants**

**- and -**

**JASON WILKES**

**Respondent**

**David Yates KC and Laura Poots (instructed by The General Counsel and Solicitor to HM  
Revenue and Customs) for the Appellants**

**Richard Vallat KC and Marika Lemos (instructed by Collyer Bristow LLP) for the  
Respondent**

Hearing dates: 23 and 24 November 2022

**Approved Judgment**

This judgment was handed down remotely at 10.30am on 07 December 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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**Lord Justice Newey:**

1. The question raised by this appeal is whether the appellants, HM Revenue and Customs (“HMRC”), can issue a “discovery assessment” pursuant to section 29 of the Taxes Management Act 1970 (“TMA 1970”) where they learn that a taxpayer who has neither delivered a tax return in respect of the material year nor been notified of a requirement to do so was liable for high income child benefit charge (“HICBC”).
2. The facts can be stated very shortly. During the relevant period, the adjusted net income for tax purposes of the respondent, Mr Jason Wilkes, was in excess of £50,000 and greater than that of his wife, who was receiving child benefit. On Friday 30 November 2018, HMRC sent Mr Wilkes, in common it seems with many other taxpayers, a “nudge” letter in which, under the heading “Do you have to pay the [HICBC]?”, they explained the HICBC and asked Mr Wilkes to check if he was liable for it. On the following Monday, 3 December, Mr Wilkes telephoned HMRC and told them that his income exceeded £50,000. He was advised to use HMRC’s child benefit tax calculator to work out any HICBC liability, and on 18 December he spoke to Officer Pickett of HMRC, who concluded that HICBC was payable in respect of the 2014-2015, 2015-2016 and 2016-2017 tax years. On 20 December, therefore, assessments to tax were issued to Mr Wilkes under section 29 of TMA 1970 in the following amounts:
  - i) 2014-2015: £1,770;
  - ii) 2015-2016: £1,398; and
  - iii) 2016-2017: £1,076.
3. Mr Wilkes had not notified HMRC that he was chargeable to income tax in these years. HMRC considered whether a “failure to notify” penalty should be imposed on him, but they concluded that he had a reasonable excuse and so did not do so. It is noteworthy in this connection that income which Mr Wilkes had received from employment had been dealt with under the Pay As You Earn (“PAYE”) regime and that, as explained in paragraph 16 below, someone in respect of whom that regime is applied will often have no obligation to notify HMRC of chargeability to tax.
4. Mr Wilkes appealed against the assessments which HMRC had issued, and he was successful before the First-tier Tribunal (“the FTT”). In a decision dated 15 June 2020, the FTT (Judge Zachary Citron and Ms Jane Shillaker) held that the assessments had not been validly raised since HMRC had not discovered any “income which ought to have been assessed to income tax” within the meaning of section 29 of TMA 1970. HMRC appealed to the Upper Tribunal (“the UT”), but the appeal was dismissed. In a decision dated 30 June 2021, the UT (Falk J and Judge Timothy Herrington) agreed with the FTT that HMRC had not been entitled to make the assessments.
5. HMRC now challenge the UT’s decision in this Court.

**The statutory framework****HICBC**

6. HICBC was introduced by the Finance Act 2012 (“FA 2012”). Section 8 of that Act explained that schedule 1 to the Act contained “provision for and in connection with a high income child benefit charge”, and paragraph 1 of schedule 1 inserted into part 10 of the Income Tax (Earnings and Pensions) Act 2003 (“ITEPA 2003”) an additional chapter, chapter 8, comprising sections 681B to 681H.
7. Section 681B(1) of ITEPA 2003 (as amended by FA 2012) provides that “[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”. By section 681B(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.”

By virtue of section 681G, a spouse from whom a taxpayer is not separated is a “partner”.

8. Section 681C of ITEPA 2003 deals with calculation of HICBC. It provides:
- “(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—

$$\frac{ANI - L}{X}\%$$

Where—

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

L is £50,000;

X is £100 ....”

The result, as the UT noted in paragraph 15 of its decision, is that “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”.

9. Schedule 1 to FA 2012 stated that TMA 1970 was to be amended in a single respect, namely, by the change to section 7 mentioned in paragraph 16 below. The schedule also specified, among other things, that PAYE regulations could make provision “for deductions to be made, if and to the extent that the payee does not object, with a view to securing that income tax payable for a tax year by the payee by virtue of section 681B (high income child benefit charge) is deducted from PAYE income of the payee paid during that year” and that reference to the HICBC was to be inserted into section 30 of the Income Tax Act 2007 (“ITA 2007”) as seen in paragraph 22 below.

Section 29 of TMA 1970

10. TMA 1970 was enacted long before self-assessment was introduced. In its original form, section 29 provided, in subsections (1) and (2), for assessments to tax to be made by either an inspector or the Board. Section 29(3) then stated:

“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) 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 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.”

By section 29(8), “profits” was defined to refer to “income”.

11. With the arrival of self-assessment under the Finance Act 1994 (“FA 1994”), section 29 of TMA 1970 was recast and what had been subsection (3) became, with slight adjustments, subsection (1). The new subsection (1) read:

“If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a chargeable period—

- (a) that any profits which ought to have been assessed to 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.”

12. Section 29 of TMA 1970 was further revised pursuant to the Finance Act 1998 (“FA 1998”). This substituted “year of assessment” for “chargeable period” and “income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax” for “profits which ought to have been assessed to tax”.

13. Section 29 of TMA 1970 remained in that form until this year. At the times relevant to this appeal, therefore, it was in these terms:

“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.”

14. Section 29 of TMA 1970 has very recently been amended by the Finance Act 2022 (“FA 2022”). Section 97 of FA 2022 provided for section 29(1)(a) of TMA 1970 to become, “that an amount of income tax or capital gains tax ought to have been assessed but has not been assessed”. The alteration has retrospective effect as regards, among other things, assessments in respect of HICBC, but it does not apply in relation to various appeals against discovery assessments of which notice had been given to HMRC by 30 June 2021 and, in consequence, does not affect the appeal which is before us.

15. A policy paper published by the Government in advance of the passing of FA 2022 explained:

“HMRC’s longstanding position is that the assessing provisions in Section 29(1)(a) of the Taxes Management Act 1970 may be used to recover tax charges arising on HICBC, Gift Aid, and certain pensions charges.

A recent case before the Upper Tribunal challenged HMRC’s use of that assessing provision to recover HICBC. The Upper Tribunal ruled against HMRC and that decision is subject to a further appeal by HMRC to the Court of Appeal.

The government will legislate in Finance Bill 21-22 to put beyond doubt that HMRC may use these discovery assessments to recover all of the above-mentioned tax charges.”

Other provisions of TMA 1970

16. Section 7(1) of TMA 1970 imposes on a person who is chargeable to income tax for any year of assessment but has not received a notice under section 8 a duty to notify HMRC that he is so chargeable. During the period material to this appeal, however, section 7(3) stated:

“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.”

Subsections (4) and (5), to which there is reference in subsection (3)(a), mean that, for the most part, someone whose income is dealt with under the PAYE regime (as Mr Wilkes’ was) need not give HMRC notice under section 7. Having regard, however, to subsection (3)(c), which was introduced by FA 2012, a person liable to HICBC is obliged by section 7 to notify HMRC of his chargeability notwithstanding that tax is deducted from his income under the PAYE regime unless he has been required to deliver a return pursuant to section 8.

17. Under section 8 of TMA 1970, a person may be required by notice given by HMRC to make and deliver a return “[f]or the purpose of establishing the amounts in which [he] is chargeable to income tax and capital gains tax ... and the amount payable by him by way of income tax for that year”. By section 9, any such return:

“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 ....”

18. It is also relevant to note that the Finance Act 2016 (“FA 2016”) introduced into TMA 1970 a new section 28H giving HMRC a power to make a “simple assessment”. Section 28H(3) explains that 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”.

The power does not, however, apply to anyone who has delivered a return under section 8 or who is subject to a requirement to do so.

19. Sections 34 to 41 of TMA 1970 concern time limits. By virtue of sections 34 and 34A, the ordinary time limit for either HMRC to make an assessment or the delivery of a self-assessment is four years. Thus, section 34(1) states:

“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 or capital gains tax may be made at any time not more than 4 years after the end of the year of assessment to which it relates.”

Section 34(3) confirms that, as the UT had held in *R (Higgs) v Revenue and Customs Commissioners* [2015] UKUT 92 (TCC), [2015] STC 1600, section 34 does not apply to self-assessments, but section 34A, which was inserted into TMA 1970 by section 168(3) of FA 2016, subjects self-assessments to a similar time limit. Section 34A(1) provides that, subject to exceptions, “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”.

20. Extended time limits are applicable where a loss of tax has been brought about either carelessly or deliberately. Section 36 of TMA 1970 states:

“(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) ....”

Calculation of tax in accordance with ITA 2007

21. ITA 2007 was enacted as part of the tax law rewrite project. Section 23, which forms part of chapter 3 of part 2, provides a step-by-step guide to calculating a person’s income tax liability. In *Knibbs v Revenue and Customs Commissioners* [2019] EWCA Civ 1719, [2019] STC 2262, at paragraph 49, the Court of Appeal adopted the following summary of the process:

“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 ....”

22. Section 30 of ITA 2007, which is mentioned in this summary, identifies in subsection (1) the provisions referred to at step 7 of the section 23 calculation in the case of a taxpayer who is an individual. Between 2016 and 2019, they were:

“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).”

“Chapter 8 of Part 10 of ITEPA 2003 (high income child benefit charge)” was added to the list by FA 2012.

### **The issues**

23. The grounds of appeal give rise to the following issues:

- i) Are the words “income which ought to have been assessed to income tax” in section 29(1)(a) of TMA 1970, adopting a purposive construction, to be read as including any “amount which ought to have been assessed to income tax”?
- ii) Were HMRC entitled to make the assessments at issue on the basis that *all* of Mr Wilkes’ income should have been the subject of a self-assessment and so “ought to have been assessed to income tax” but had “not been assessed”?
- iii) Should schedule 1 to FA 2012 be “rectified” in accordance with the principles explained in *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586 (“*Inco*”)?

### **Issue (i): Reading section 29(1)(a) as extending to any “amount” which ought to have been assessed to income tax**

24. When an issue of statutory interpretation arises, “the question is always,” as Lord Nicholls said in *Barclays Mercantile Business Finance Ltd v Mawson* [2004] UKHL 51, [2005] 1 AC 684 (“*Mawson*”), at paragraph 32, “whether the relevant provision of the statute, upon its true construction, applies to the facts as found”. In answering that question, the Court will attach significance to the purpose of the legislation. As Lord Nicholls said in *Mawson* at paragraph 28, “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 best gives effect to that purpose”. That being so, the Court will seek to avoid an interpretation which gives rise to absurd or anomalous consequences. In *Project Blue Ltd v Revenue and Customs Commissioners* [2018] UKSC 30, [2018] 1 WLR 3169, Lord Hodge noted at paragraph 31 that “it is without question a legitimate method of purposive statutory construction that one should seek to avoid absurd or unlikely results”.

25. Mr David Yates KC, who appeared for HMRC with Ms Laura Poots, submitted that, construed purposively, the words “any *income* which ought to have been assessed to income tax” in section 29(1)(a) of TMA 1970 should be read as including “any

*amount* which ought to have been assessed to income tax” (emphasis added in each case). He did not dispute that, read literally, the child benefit which Mr Wilkes’ wife received was not “income”, let alone “income” of Mr Wilkes, or that HICBC is a free-standing charge to income tax rather than a tax charged on “income”. Mr Yates argued, however, that, having regard to section 29’s purpose, section 29(1)(a) should not be understood as limited to true “income”. The purpose of section 29, he said, is to provide HMRC with a “back-up”, enabling HMRC to remedy a loss of income tax or capital gains tax either where an assessment to tax is insufficient or where there has been no prior assessment at all. Had Mr Wilkes delivered a self-assessment but omitted any reference to the HICBC for which he was liable, Mr Yates pointed out, HMRC could plainly have made an assessment under section 29(1)(b) (“an assessment to tax is or has become insufficient”). It would, Mr Yates said, be anomalous, and contrary to the legislation’s purpose, if no assessment in respect of HICBC could be made in circumstances where Mr Wilkes had (however reasonably) not merely omitted to disclose his liability to HICBC in a self-assessment but failed to notify HMRC of his chargeability as was his obligation under section 7 and so never either been required to deliver a tax return or done so. In the context, Mr Yates contended, there is no good reason to distinguish between (a) income tax on income and (b) other amounts of income tax. The reference to “income” in section 29(1)(a) (and “profits” in the earlier version) was not used to *restrict* HMRC’s assessment powers but intended to ensure that HMRC’s powers of assessment covered everything liable to income tax.

26. Neither the FTT nor the UT accepted such arguments. The UT said in paragraph 67 of its decision:

“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.”

27. Supporting the UT’s decision, Mr Richard Vallat KC, who appeared for Mr Wilkes with Ms Marika Lemos, submitted that, on its plain words, section 29(1)(a) of TMA 1970 (as it was framed before FA 2022) does not cover HICBC. Endorsing the UT’s distinction between “*income* which ought to have been assessed” and “*amounts of income tax* to be assessed”, Mr Vallat said that section 29(1)(a) is concerned with the former (i.e. underlying income assessable to income tax) whereas HICBC is an example of the latter (i.e. an amount of income tax that is chargeable). In the circumstances, he said, section 29(1)(a) would not apply in the present case even if “income which ought to have been assessed to income tax” were, as HMRC suggest, read as “amount which ought to have been assessed to income tax”. The HICBC for which Mr Wilkes was liable, Mr Vallat argued, was not an “amount which ought to have been assessed to income tax” but, instead, an amount of income tax for which he was liable. The difference is reflected in the amendment to section 29 effected by FA 2022, which revises section 29(1)(a) to refer to “an amount of income tax [which]

ought to have been assessed but has not been assessed” rather than substituting “amount” for “income”.

28. When considering the rival contentions, it is important, in my view, to remember that, during the period relevant to this appeal, section 29(1)(a) of TMA 1970 was in the form which it had taken when FA 1998 was passed, which did not differ significantly from the way in which it had been recast under FA 1994. We are thus concerned with the position in 1994/1998, not with that after any subsequent legislation had been enacted. That being so, I do not think the provisions of, say, the Finance Act 2004 (“FA 2004”), ITA 2007, FA 2012 or FA 2016 can shed any significant light on how section 29(1)(a) should be interpreted.
29. Approaching matters on that basis, it seems to me that, subject to the *Inco* point considered later in this judgment, “income” is not to be interpreted as “amount” in section 29(1)(a) of TMA 1970 and that, even if it were, that would not of itself enable HMRC to make an assessment in circumstances such as those in the present case. My reasons are as follows:
- i) Read naturally, the wording of section 29(1)(a) is not apt to give HMRC the power for which it contends. Section 29(1)(a) speaks of “income” not “amount”, and HICBC is neither “income” nor even charged on income;
  - ii) While it is doubtless the case that, once self-assessment had been introduced, section 29 was in general terms meant to provide a back-up to that as well as to assessment by HMRC, the provision was framed more precisely. Parliament did not simply authorise HMRC to make an assessment wherever they discovered a shortfall in income tax or capital gains tax, but restricted exercise of the power it was conferring to the particular circumstances specified in, respectively, section 29(1)(a) (income/gains ought to have been assessed to tax), section 29(1)(b) (insufficient assessment) and section 29(1)(c) (excessive relief). It cannot be inferred that Parliament intended section 29(1) to operate wherever income or capital gains tax was thought to be outstanding;
  - iii) In 1994/1998, there was no question of section 29 giving rise to the anomaly which HMRC say exists now: HICBC had not yet been introduced. Nor, as Mr Yates fairly accepted, could he identify any other anomaly which Mr Wilkes’ construction of the provision would have created in 1994/1998. Not only did HICBC lie in the future, but so did the charges relating to pensions (as to which, see paragraph 47 below) in respect of which comparable issues might be thought to arise (compare *Monaghan v Revenue and Customs Commissioners* [2018] UKFTT 0156 (TC)). Mr Yates suggested that in 1994/1998 there was the *potential* for anomalies to arise in the future if “income” were not understood to extend to “amount” in section 29(1)(a), but it was entirely within Parliament’s power to prevent any problem. If when enacting subsequent legislation it wished to ensure that section 29(1)(a) applied as regards a new charge to income tax, it could adopt a variety of techniques (among them, amendment to section 29(1)(a) or deeming amounts to be “income”) to ensure that it did so. The simple fact is that, as at 1994/1998, there was no reason to think that the reference to “income” rather than to “amount” in section 29(1)(a) should cause any anomalies or (to quote

Lord Hodge) any “absurd or unlikely results”. In other words, that there was no need to depart from the plain wording of the provision for Parliament’s purpose to be achieved; and

- iv) On top of that, I agree with Mr Vallat that reading “income” as “amount” in section 29(1)(a) would not suffice for HMRC’s purposes. Not only is outstanding HICBC not “income which ought to have been assessed to income tax” but it is not an “amount which ought to have been assessed to income tax”. HICBC is not an “amount assessed to income tax” but is an extra charge to income tax. Construing section 29(1)(a) in a way that would legitimate the assessments on Mr Wilkes would thus require a more radical reinterpretation of the provision, not just the substitution of “amount” for “income”, and so involve a still greater departure from the natural meaning of the words used.

30. In my view, therefore, this ground of appeal fails.

**Issue (ii): Can the assessments on Mr Wilkes be justified on the basis that *all* of his income ought to have been assessed to income tax?**

31. So far as relevant, section 29(1) of TMA 1970 (as it stood at the relevant times) provides that, if HMRC “discover ... that any income which ought to have been assessed to income tax ... [has] not been assessed”, HMRC “may ... make an assessment in the amount, or the further amount, which ought in ... their opinion to be charged to make good to the Crown the loss of tax”.

32. In the present case, tax was deducted from Mr Wilkes’ income pursuant to the PAYE regime. Since, however, he was liable to HICBC, it was incumbent on him to notify HMRC pursuant to section 7 of TMA 1970 that he was chargeable to income tax and, had he done so, he would in the ordinary course of events have been required by a notice under section 8 to deliver a return which would have included a self-assessment of “the amounts in which ... [he was] chargeable to income tax” in accordance with section 9. Those amounts would have encompassed all his income, notwithstanding the PAYE deductions from it.

33. In the circumstances, Mr Yates argued, it can be seen that “income [of Mr Wilkes] which ought to have been assessed to income tax ... [has] not been assessed” even if section 29(1)(a) is taken to be limited to true “income” and not to extend to any other “amount”: Mr Wilkes’ employment income should have been the subject of a self-assessment, albeit that, given the application of the PAYE regime, there might have been no additional income tax liability on that income. That being so, so Mr Yates submitted, it was open to HMRC to make assessments in respect of the HICBC for which Mr Wilkes was liable on the basis that the sums in question “ought ... to be charged in order to make good to the Crown the loss of tax”.

34. Rejecting this contention, the UT said this in paragraph 118 of its decision:

“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 ... in fact contained no assessment of Mr Wilkes’ income.”

35. Mr Yates submitted that the UT was mistaken in confining the power of assessment to “the particular loss of tax in question”. Once, he said, HMRC have discovered that “income which ought to have been assessed to income tax ... [has] not been assessed,” they can make an assessment to make good any loss of any income tax which should have been taken into account in the relevant self-assessment. Mr Yates further argued that, supposing a link to the taxpayer’s income to be required, it is to be found in the fact that liability to HICBC depends on the taxpayer’s income: the extent, if any, to which there is liability turns on whether, and if so how far, a taxpayer’s income exceeds £50,000.
36. In my view, however, the UT was correct. Section 29(1) of TMA 1970 empowers HMRC to make an assessment “in the amount, or the further amount, which ought ... to be charged in order to make good ... the loss of tax”. In the context, “the loss of tax” must refer back to the shortfall in tax occasioned by “income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax”, not having been so assessed; to the respect in which “an assessment to tax is or has become insufficient”; or to the respect in which a “relief ... is or has become excessive”. Mr Yates rightly did not suggest that HMRC have an untrammelled power to make an assessment as regards any tax at all that they might consider due at a time at which they have discovered that, say, “income which ought to have been assessed to income tax” has not been. The ability to assess is clearly tied to the basis on which HMRC have concluded that section 29(1)(a), section 29(1)(b) or section 29(1)(c) has been satisfied. Where the relevant condition is that found in section 29(1)(a), “the loss of tax” must, as it appears to me, be that arising from the fact that income has not been assessed to income tax when it ought to have been or chargeable gains have not been assessed to capital gains tax when they ought to have been. Section 29 allows HMRC to make an assessment only in respect of “the” loss of tax and, where what has been discovered is that there has been a failure to assess income to income tax, any assessment under section 29 must be designed to address the income tax lost on that income.
37. The assessments on Mr Wilkes did not perform that function. While HMRC may have learned that Mr Wilkes’ income should have been the subject of self-assessments but had not been, that did not mean that any more income tax was payable on the income. To the contrary, HMRC had no reason to think that the fact that Mr Wilkes had not delivered returns for the material years had occasioned any “loss of tax” on his income. HMRC concluded that there was outstanding HICBC, but HICBC was not “income which ought to have been assessed to income tax”.
38. It is fair to say that there is a degree of relationship between liability to HICBC and a taxpayer’s income. A taxpayer will not have to pay any HICBC unless he earns more than £50,000 and, if he does, the amount for which he is liable will depend on whether his earnings also exceed £60,000 or, if not, where within the £50,000-

£60,000 range they lie. That (limited) connection with income cannot, however, render section 29(1)(a) of TMA 1970 applicable. The fact remains that unpaid HICBC is not “income which ought to have been assessed to income tax” and an assessment in respect of outstanding HICBC will not “make good ... the loss of tax” arising from “income which ought to have been assessed to income tax” not having been so assessed.

39. As it seems to me, therefore, this ground of appeal fails.

**Issue (iii): “Rectification”**

40. In very limited circumstances, the Court can “rectify” legislation. Lord Nicholls, with whom the other members of the House of Lords agreed, explained the position as follows in *Inco*, at 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 opusculum, *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 ....

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 ....”

41. It is worth noting the following about the ability of a Court to “rectify” legislation:

- i) As Sales J emphasised in *Bogdanic v Secretary of State for the Home Department* [2014] EWHC 2872 (QB) (“*Bogdanic*”), at paragraph 41, *Inco* “states a principle of interpretation of a legislative instrument”. In *Inco*, Lord Nicholls spoke of the Court adding, omitting or substituting words “in discharging its interpretative function”, approved a passage in which Sir Rupert Cross had observed that the judge “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*” (emphases added) and stressed that “[the Courts’] constitutional role in this field is interpretative”. Sales J was, I think, right to observe in *Bogdanic*, at paragraph 43, that:

“properly speaking the court does not rectify or amend the legislative instrument. It gives it its true meaning, arrived at by the process of objective interpretation described in the authorities referred to above [i.e. ‘cases such as *Black-Clawson International* [[1975] AC 591] and *Fothergill* [[1981] AC 251 ... and *R v Secretary of State for the Environment Transport and the Regions, ex p. Spath Holme Ltd* [2001] 2 AC 349, especially at 396F-399E per Lord Nicholls’ - see *Bogdanic* at paragraph 41]”; and

- ii) Legislation can potentially be “rectified” (to use a term which, as Sales J pointed out, is not strictly accurate) without the Court being able to discern with confidence exactly what Parliament would have done had it realised its mistake. In *Inco*, Lord Nicholls said that the Court must be “abundantly sure” of “the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used”. In *Pollen Estate Trustee Co Ltd v Revenue and Customs Commissioners* [2013] EWCA Civ 753, [2013] 1 WLR 3785, Lewison LJ noted at paragraph 49 that “it is sufficient that we can be confident of the gist or substance of the alteration, rather than its precise language”.

42. There was reference during the hearing before us to *Director of the Serious Fraud Office v B (No 2)* [2012] EWCA Crim 901, [2012] 1 WLR 3188 (“the *SFO* case”). There, the Court of Appeal concluded that the *Inco* approach should be applied in relation to an amendment which the Armed Forces Act 2006 (“AFA 2006”) had made to section 13(2)(c) of the Administration of Justice Act 1960 (“AJA 1960”). Section

13(2)(c) of AJA 1960 had contained provision for appeals from decisions of “the Court of Appeal” and “the Court of Criminal Appeal or the Courts-Martial Appeal Court”. The Court of Criminal Appeal had been replaced under the Criminal Appeal Act 1966 by the Court of Appeal (Criminal Division) (“the CACD”), but the Senior Courts Act 1981 (“SCA 1981”) had stipulated that references to the “Court of Criminal Appeal” should be read as referring to the CACD, while references to the “Court of Appeal” were to be taken to relate to the Court of Appeal (Civil Division). AFA 2006 provided for section 13(2)(c) of AJA 1960 to be amended in a way which removed any mention of the “Court of Criminal Appeal”. In the *SFO* case, the Court of Appeal concluded that the *Inco* threshold conditions were met on the basis that “the intention of [the relevant provision of] AFA 2006 was, primarily, to deal with the name change of the ‘Courts-Martial Appeal Court’ and various devolution issues”, that the legislature had not had “any intention, when enacting the AFA 2006, of removing the right of appeal from the CACD to the Supreme Court in cases of contempt of Court” and that “the legislature intended no more than a tidying up exercise, removing a reference to the Court of Criminal Appeal – a court which had not existed for 40 years”: see paragraphs 25 to 27. In paragraph 28, Gross LJ, giving the judgment of the Court, said:

“on the construction of section 13(2)(c) to which we feel driven ... , it follows that Parliament and the draftsman have, by inadvertence, failed to give effect to the legislative intention in question. Doubtless, because of a mistaken—but wholly understandable—assumption that the words ‘Court of Appeal’ in section 13(2)(c) encompassed the CACD as well as the Civil Division of the Court of Appeal, the effect of the amendment was altogether more far-reaching than intended: removing the right of appeal from the CACD to the Supreme Court rather than simply removing an obsolete reference to the Court of Criminal Appeal. The draftsman can be forgiven, we think, for not having paragraph 3(c) of Schedule 4 to the SCA 1981 uppermost in his mind when producing paragraph 45 of Schedule 16 to the AFA 2006.”

43. Mr Yates argued that the *Inco* approach is applicable in the present case. It is clear, he submitted, that the intended purpose of schedule 1 to FA 2012 was to impose the HICBC *and* to ensure that liability to HICBC would be assessed within the regime for which TMA 1970 provided, including via discovery assessment. If section 29(1)(a) of TMA 1970 does not permit a discovery assessment to be made in respect of HICBC, the draftsman and Parliament will by inadvertence have failed to give effect to that purpose and, had the error been noticed, Parliament would have included in schedule 1 to FA 2012 wording to the effect that HICBC, as an amount of income tax, could be assessed under section 29(1). By way of example, schedule 1 to FA 2012 might have provided for the insertion into TMA 1970 of a new section 29(1)(aa) along the lines of “that any liability to a high income child benefit charge has not been assessed, or”. Mr Yates stressed that there is no dispute that HMRC has power to make an assessment in respect of HICBC under section 29(1)(b) where a self-assessment is “insufficient”. Why, he asked rhetorically, should Parliament have intended HMRC to be able to assess for unpaid HICBC where a return has been delivered but not where there has been no return?

44. One of the grounds on which the UT rejected such contentions was that what HMRC were suggesting was not “the sort of drafting mistake that falls within the principle in *Inco Europe*”: see paragraph 144 of the UT’s decision. The UT explained:

“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 draftsman 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 draftsman 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 draftsman, 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* [i.e. *R (Passenger Transport UK) v Humber Bridge Board* [2003] EWCA Civ 842, [2004] QB 310], 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.”

45. Taking issue with the UT’s views, Mr Yates submitted that no distinction between different types of drafting mistake falls to be drawn when the question is whether to “rectify” legislation. The *SFO* case, he said, provides an example of a drafting error which resulted from a misunderstanding of (or ignorance of) another statutory provision.
46. For my part, I agree with the FTT and UT that FA 2012 cannot be “rectified” in the way for which HMRC contend. For such “rectification” to be permissible, we would have to be “abundantly sure” that FA 2012 failed to give effect to the “intended purpose” of the legislation. For that to be the case, as it seems to me, it would have to

be entirely clear that Parliament had intended HMRC to be able to make a discovery assessment where a liability for HICBC had arisen but no return had been delivered. In my view, it is not. In the first place, it is possible that neither the draftsman nor Parliament formed any intention on the point. In previous cases in which legislation has been “rectified”, it could be said that the draftsman/Parliament had intended to achieve a particular result but failed to do so or, alternatively, that the legislation at issue was liable to contradict something that the draftsman/Parliament had intended. In the present case, in contrast, it is quite conceivable that the draftsman and Parliament simply did not address their minds to whether section 29 of TMA 1970 should apply where there has been no self-assessment return. It is to be noted in that context that (a) while FA 2012 provided for an amendment to be made to section 7 of TMA 1970, it said nothing at all about section 29 and (b) there is no suggestion that any indication of an intention that HMRC should be able to make a discovery assessment in circumstances such as those in this case is to be found in the explanatory notes relating to FA 2012 or in any policy or other document prepared in connection with the Bill that became FA 2012. Secondly, the possibility cannot be ruled out that the draftsman/Parliament decided that HMRC did not need to be able to make a discovery assessment in respect of HICBC where no self-assessment return had been delivered. When FA 2012 was passed, the power to make “simple assessments” conferred by FA 2016 had not yet been introduced and so could not have been taken into account. However, section 8 of TMA 1970 already empowered HMRC to require a person to deliver a return and that might have been deemed sufficient, particularly since child benefit is administered by HMRC. In that connection, the UT said this in its decision (albeit when addressing purposive construction):

“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 ... 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.”

47. It is perhaps also relevant to mention certain of the tax charges that apply in relation to pension schemes. An “unauthorised payments charge” arises where a registered pension scheme makes an unauthorised payment (see section 208 of the FA 2004) and an “unauthorised payments surcharge” can be payable in respect of some payments

(see sections 209-213). Regulation 4 of the Registered Pension Schemes (Accounting and Assessment) Regulations 2005 (“the 2005 Regulations”) provides for HMRC to issue assessments to tax in respect of these (and other) charges “[i]n the cases listed in column 1 of Table 2” to “the assessable person specified in column 2”, and, so far as relevant, Table 2 is as follows:

<i>Column 1</i>	<i>Column 2: assessable person</i>
Case 1: a charge to tax arises under section 208 of the Act (unauthorised payments charge) and the person liable to the charge is a company.	The person liable to the charge under section 208(2) of the Act.
Case 2: a charge to tax arises under section 209 of the Act (unauthorised payments surcharge) and the person liable to the charge is a company.	The person liable to the charge under section 209(3) of the Act.

Until this year, when it was removed from the 2005 Regulations by section 97(2) of FA 2022, regulation 9 stated that section 29(1)(a) of TMA 1970 applied “in relation to an assessment to tax under case 1, 2 or 3” subject to the insertion after “any income” of “, 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”, so that, for those purposes, section 29(1)(a) read:

“that any income, 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 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”.

48. The 2005 Regulations thus provided for section 29(1)(a) of TMA 1970 to be modified so far as cases 1 and 2 were concerned, but only in relation to a *company’s* liability, not an *individual’s*. HMRC suggested that those responsible for framing the 2005 Regulations assumed that, where it was an individual who was liable, section 29(1)(a) would apply as it stood, without any modification. What matters for present purposes, however, is that it is not beyond the bounds of possibility that the draftsman of FA 2012, and Parliament, simply wished to align FA 2012 with the 2005 Regulations and, finding that it had not been thought appropriate to enable HMRC to make a discovery assessment on an individual where an “unauthorised payments charge” or

“unauthorised payments surcharge” was due in the absence of a return, concluded that the same course should be followed with HICBC.

49. A second objection to FA 2012 being “rectified” is, in my view, that it is not possible to be “abundantly sure” what Parliament would have done had it perceived there to be an error. It might have included in FA 2012 provision for section 29(1) of TMA to be amended along the lines proposed by Mr Yates. It is by no means inconceivable, however, that it could have adopted a different course. It could, for example, have deemed child benefit to be “income” for the purposes of section 29 (compare section 7 of the Finance (No. 2) Act 2005), imposed a stand-alone assessment regime (compare paragraph 9 of schedule 16 to the Finance Act 2020), empowered HMRC to make regulations (compare section 255 of FA 2004) or introduced a power to make “simple” assessments such as subsequently arrived with FA 2016. It is noteworthy that FA 2022 does not amend section 29(1) in quite the way that Mr Yates propounded, but, rather, rewrites section 29(1)(a). In the circumstances, it appears to me that we cannot be “abundantly sure” of even the “gist or substance” of what would have been enacted.
50. In short, it seems to me that, were we to “rectify” section 29 of TMA 1970 as HMRC propose, we would be engaging in judicial legislation, not discharging our interpretative function. It may well be that, had Parliament considered the matter, it would have chosen to amend section 29 so as enable HMRC to make an assessment in respect of HICBC where no return had been delivered. However, we cannot be “abundantly sure” that that was Parliament’s intention, nor as to the substance of what Parliament would have enacted. I therefore consider that this ground of appeal fails.

### **Conclusion**

51. I would dismiss the appeal.
52. I should like, finally, to express my thanks to Mr Vallat, Ms Lemos and Collyer Bristow LLP, their instructing solicitors, for acting in this matter pro bono. I have found the assistance we received from them, as well as from Mr Yates, Ms Poots and the other members of HMRC’s legal team, most helpful.

### **Lord Justice Baker:**

53. I agree.

### **Lord Justice Arnold:**

54. I also agree.