



TC04597

Appeal number: TC/2014/02816

INCOME TAX – HMRC determinations for 2006-07 and 2007-08 - Appellant's Self-Assessment returns filed out of time to displace determinations - Illness and Death of previous accountant - Claim for Special Relief - Schedule 1AB Taxes Management Act 1970 - Nature of the Tribunal's jurisdiction - Maxwell v HMRC [2013] UKFTT 459 (TC) and Currie v HMRC [2014] UKFTT 882 (TC) considered - Decision to disallow special relief - Decision upheld on review - Whether unreasonable in a judicial review sense - Held, Yes - Appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

JAMES RONALDSON SCOTT

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY'S Respondents
REVENUE & CUSTOMS**

**TRIBUNAL: JUDGE DR CHRISTOPHER MCNALL
 MR JOHN ADRAIN FCA**

Sitting in public at Mays Chambers, 73 May Street, Belfast on 27 May 2015

Mr Brian Short of Brian Short & Co, Accountants, for the Appellant

Ms Kate Murphy, an Officer of HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This Appeal concerns the appellant's disallowed claim for Special Relief under Schedule 1AB Paragraph 3A of the Taxes Management Act 1970 ('the 1970 Act').
2. On 30 November 2012, the Appellant submitted his self-assessment returns for the years ending 5 April 2007 and 5 April 2008.
3. The return of income for the year ended 5 April 2007 had a filing date of 31 January 2008. A determination of tax due for that year had been made, pursuant to Section 28C of the 1970 Act, on 4 June 2008. In order to displace that determination, a return should have been completed and submitted by no later than 31 January 2011, being three years from the filing date.
4. In relation to the year ending 5 April 2008, a determination had been made on 25 June 2010. In order to displace that determination, a return should have been completed and submitted by no later than 31 January 2012, being three years from the filing date.
5. Hence, the returns for both the years in question were not only each filed well out time, but also were filed outside the period in which the filing of a return would operate so as to automatically displace the determinations.
6. Accordingly, Mr Scott's only recourse is to the special relief regime.

'Special Relief'

7. Schedule 1AB of the 1970 Act deals with 'Recovery of Overpaid Tax etc'. Paragraph 3A allows a claim for relief to be made even though more than 4 years have elapsed since the end of the relevant tax year. However, Paragraph 3A(3) provides that '[...]the Commissioners are not liable to give effect to a claim made in reliance on this paragraph unless conditions A, B and C are met.'
8. Insofar as material, sub-paragraphs 3A(4), (5), and (6) of Schedule 1A read:
 - (4) Condition A is that in the opinion of the Commissioners it would be unconscionable for the Commissioners to seek to recover the amount (or to withhold payment of it, if it has already been paid)
 - (5) Condition B is that the person's affairs (as respects matters concerning the Commissioners) are otherwise up to date or arrangements have been put in place, to the satisfaction of the Commissioners, to bring them up to date so far as possible
 - (6) Condition C is that either -
 - (a) the person has not relied on this paragraph on a previous occasion (whether in respect of the same or a different determination of tax), or

(b) [not material to this case]

9. Mr Scott made a formal request for special relief. It was said that the returns were late *'due to the serious sickness over a prolonged period and subsequent death of his previous accountant'*. It was argued that the appellant took all documents which he received from the tax office to his previous accountant, and had been assured *'that it was all being dealt with and that [the taxpayer] had nothing to worry about'*. The previous accountant had died on 17 June 2012.

10. It was also argued that the determinations were excessive in relation to the amount of tax due.

11. For 2006-07 the tax due had been determined as £4,080.00. The tax due as per the appellant's (late) return was £2,168.40. A claim for special relief of £1,911.60 including penalties and interest was made.

12. For 2007-08 the tax due had been determined as £7,182.28. The tax due as per the appellant's (late) return was £1,569.80. A claim for special relief of £5,612.48 including penalties and interest was made.

Refusal of the claim for special relief

13. On 19 October 2013, HMRC refused the claim for special relief, on the basis that Mr Scott had previously been non-compliant in submitting tax returns prior to the special relief claim period, and had also been subject to legal proceedings by HMRC.

14. On 12 December 2013, Mr Scott appealed that decision. The outcome was communicated in a letter dated 14 February 2014. That letter set out a long history of non-compliance by Mr Scott with his obligations under the self-assessment regime from as early as 1999. He had only submitted his last two returns on time. In 2007, Mr Scott had also been the subject of proceedings for bankruptcy, and had been made bankrupt on HMRC's petition, only for that order to be 'rescinded' some weeks later. It was also said that he had been issued with 25 statements of account between 19 February 2008 and 5 September 2012. Payment reminders for each of the two years in question had been sent, within time. The failures to file in relation to the tax years in question had each led to 2 fixed penalties and 2 surcharges. Mr Scott had been professionally represented from 2005 to 2012.

15. On 5 March 2014, Mr Scott's representatives requested a review of that decision. A review was conducted, and its outcome was communicated in a letter dated 23 April 2014. The key conclusion was that Mr Scott had *'not provided [the reviewing officer] with any circumstances which would have prevented [him] from submitting his self-assessments within the statutory time limits'*. A review of Mr Scott's tax records was mentioned, and so some review must have been conducted, but the only conclusion was that these showed a history of late submission of returns.

The evidence and the parties' arguments

16. We heard evidence on oath from Mr Scott, and he was cross-examined. He had relied on his previous accountant to do his tax returns for him. He was aware of the consequences of not filing. He knew of the bankruptcy, and had thought that, given
5 what he had gone through that time, his previous accountant - who continued to represent him after that unhappy event - would 'get things right'. Mr Scott would leave documents in the accountant's office with the person at reception. He would never see anyone else. He never inquired why he was receiving reminders as to the outstanding returns. He received letters from HMRC, and, although he opened them, he probably
10 didn't read them. He was sure though that he did not receive monthly Statements of Account. He was experiencing matrimonial difficulties, and it was possible that post was being intercepted by his wife.

Maxwell v HMRC

17. The appellant drew our attention to, and relied upon, the decision of the First-tier Tribunal in *William Maxwell v HMRC* [2013] UKFTT 459 (TC) (*Maxwell*). That decision, released on 27 August 2013, appears to have been the first case in which this
15 Tribunal had considered the provisions of Schedule 1AB Paragraph 3A of the 1970 Act.

18. In *Maxwell*, the Tribunal allowed a claim for special relief where the appellant's
20 previous accountant (who, coincidentally, was the same accountant as in the present appeal) had become unwell. The Tribunal was satisfied that Mr Maxwell had not known of his accountant's ill-health, and decided that, in the circumstances, it was, in its view, unconscionable for HMRC to pursue the tax due or to withhold repayment. Hence, Condition A was satisfied. Conditions B and C were not in issue, and so the
25 Tribunal held that the claim for special relief should have been allowed.

19. The Tribunal said (at Paragraph [13]):

'Unconscionable means "completely unreasonable" or "unreasonably excessive" and in so considering HMRC must assess the behaviour of the Appellant as to whether it is what might be expected from any
30 reasonable person in a similar situation.'

20. Both parties who appeared before us accepted that was a good working definition, at least for these purposes, of 'unconscionable'. We agree.

Currie v HMRC

21. In *Donald Fitzroy Currie v HMRC* [2014] UKFTT 882 (TC) (*Currie*), released
35 in August 2014, a differently constituted panel of the Tribunal considered an appeal relating to the refusal of special relief.

22. On this occasion, the Tribunal approached the appeal from a somewhat different direction. As a preliminary matter, it considered that it had to decide whether its jurisdiction (a) was limited to deciding whether HMRC's opinion that Condition A did
40 not apply was unreasonable 'in a judicial review sense' (Para. [6] - this is also put as

'in a quasi-judicial review sense' at Para. [19], but the sense is clear, and nothing turns on the difference in expression) or (b) it was able to consider afresh whether it would be 'unconscionable' for HMRC to enforce the determinations.

5 23. As we have done, the Tribunal in *Currie* adopted the *Maxwell* definition of unconscionable.

24. The Tribunal in *Currie*, having considered the evidence and (unlike the Tribunal in *Maxwell*) having heard submissions specifically directed to that point, and having reflected on the legislation, decided that the narrower view - (a) - was correct. That meant that the primary decision was one for HMRC, and not the Tribunal, and could
10 only be set aside if unreasonable in a judicial review sense.

25. As the Tribunal in *Currie* recognised, its decision contrasted with *Maxwell*, in which the Tribunal had considered (b) as correct. However, as the Tribunal noted (at Para. [20]) that was perhaps an unsurprising outcome given that no alternative analysis seems to have been suggested by either party to the Tribunal in *Maxwell*.

15 26. Before us, the Appellant urged that we should follow and apply *Maxwell* in preference to *Currie*. It was said that we should exercise a wide jurisdiction, look at the matter afresh, and substitute our own view for that of HMRC. It was submitted that, if we did, the appeal should be allowed, on the basis that the facts of *Maxwell* - and in particular the accountant's illness - were materially indistinguishable from
20 those in the present appeal.

27. HMRC urged that we should follow and apply *Currie* in preference to *Maxwell*. It was said that our jurisdiction was narrow, and that we could not look at the matter afresh and substitute our own view for that of HMRC. It was submitted that, if we looked at the matter in the narrower, judicial review, sense, the appeal should be
25 dismissed, on the basis that the decision to disallow special relief was not an unreasonable one in that sense.

Currie preferred to Maxwell

28. We are not bound by either decision, and we are free to approach the matter afresh, albeit paying due regard to the reasoning and views of other panels where it is
30 helpful to do so.

29. It seems to us that the approach of the Tribunal in *Currie* is preferable, and we adopt the same reasoning. It seems to us that the Tribunal's function in assessing conscionability should be to assess whether HMRC's opinion is 'unreasonable', as that term is understood in a judicial review sense. Not only is that consistent with the
35 statutory language, but such an approach strikes a fair and principled balance between the interests of the taxpayer and HMRC respectively.

30. In broad terms, this means that the decision can only be challenged on 'Wednesbury' principles, or principles analogous to Wednesbury: see the judgment of

Dyson J. (as he then was) in *Pegasus Birds v Customs and Excise Commissioners* [1999] STC 95 at 101.

31. 'Wednesbury' is simply a shorthand referring to the principles articulated by the Court of Appeal (Lord Greene M.R., with whom Somervell LJ and Singleton J agreed) in the seminal case of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223:

10 "The court is entitled to investigate the action of the [decision-maker] with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account..." (at pp 233-234)

32. Thus, we are not concerned with reviewing the merits of the decision, but rather the lawfulness of the decision-making process itself.

33. We must therefore turn to apply those principles to this case.

15 **Application to this Appeal**

Unreasonably excessive

34. On two occasions - on 12 December 2013 (before the original decision) and 5 March 2014 (before the review) - the Appellant's representative (doubtless influenced by the passage in *Maxwell* already referred to) had pressed on HMRC the point that it was unconscionable for HMRC to recover the amounts determined '*as the determinations are excessive in relation to the amount of tax due in these years*'.

35. Figures were provided. Although those letters did not work out the ratios of tax determined / tax due, it is nonetheless plain, on the figures, and information which was known and available to HMRC, that the contention was not a frivolous one. Whilst we do not seek to articulate any arithmetical 'rule of thumb', the amounts of tax determined for each year were significantly in excess of the amounts of tax said to be due (namely, £4,080/£2,186 = 188%; and £7,182/£1,568 = 458%). On the figures alone, the contention appeared to have some substance to it, and it pointed towards further inquiry.

36. Since we have adopted the formulation of conscionability as including assessment of whether a determination is 'unreasonably excessive', it must therefore follow that when a determination - on the face of it, and when compared with the taxpayer's figures, as substantiated by his tax returns (even if late) - appears unreasonably excessive, then whether or not the determination is in fact unreasonably excessive is a matter which ought properly to be taken into account by the decision-maker. If it is not taken into account by the decision-maker, then the decision is *Wednesbury* unreasonable.

37. In our view, the disparity between the sums determined and the sums due, as put to HMRC, was so striking that some further explanation and inquiry were called for.

Once the point had been made, HMRC was under a duty to pay due regard to it, for instance by making inquiry so as to find out or make sure that it was adequately informed of the full facts and circumstances of Mr Scott's tax position. For example, it was open to HMRC to have responded, setting out the factual basis upon which
5 HMRC's determination of the tax had been arrived at.

38. HMRC's initial response - on 14 February 2014 - did not do this. It made no reference whatsoever to the point.

39. Even when the point was pressed again in the letter of 5 March 2014, the review made only passing reference to it (*Your agent claims it would be unconscionable for
10 HMRC to seek to recover the amount charged in the determinations for the years 2006/7 and 2007/8 on the grounds that they are unreasonable and excessive*'). It went no further, either in terms of discussion, or in terms of analysis.

40. In our view, HMRC should have tried to come to grips with the point which was being made. On the accepted definition of 'unconscionability', it went right to heart of
15 whether Condition A had been met or not. However, HMRC did not engage with the argument in any genuine sense and instead chose to focus on Mr Scott's tax history. Although his history was very poor, it was not, in our view, relevant for the purposes of Condition A, given that neither Conditions B nor C were in issue.

41. In treating the matter as it did, and in failing to deal with the point about the
20 disparity between the self-assessments and the determinations, which had been backed up with figures, HMRC failed to take account of a material factor. Its decision about whether special relief should be granted was not a rational one (in a *Wednesbury* sense). Its decision was therefore unreasonable in a judicial review sense.

42. In and of itself, that is sufficient to dispose of the appeal. But, for the sake of
25 completeness, we wish to make clear that we do not speculate what the outcome of such explanation or inquiry might have been, and whether it would have favoured HMRC or Mr Scott, or whether it would have made any difference at all. We simply do not know. There is no evidence on the point.

Mr Scott's tax history

30 43. Independently of the above, there is another way in which the decision of 23 April 2014 was unreasonable in a judicial review sense. In our view, Mr Scott's tax history or behaviour were not material factors which should have been taken into account when considering special relief. It was not challenged by HMRC that his tax
35 affairs were otherwise up to date (they were) and that he had not received special relief before (he had not). Hence, Conditions B and C were not in issue.

44. Given that the three statutory conditions are separately expressed, and each must be satisfied, it seems to us that considerations about the taxpayer's history must, as a matter both of language and logic, properly fall within the exclusive scope of
40 Condition B. Therefore, if Condition B is not in issue, then the taxpayer's history (except any previous claim for special relief) cannot properly be resuscitated or relied

upon for the purposes of assessing 'conscionability' within the scope of, or for the purposes of, Condition A. Thus, the decision, in taking account of an immaterial factor, was also unreasonable in a further *Wednesbury* sense.

The accountant's illness

5 45. Given the above conclusions, we are not obliged to express any concluded view
as to whether the accountant's illness, without more, would have justified the claim
for special relief. However, we are extremely sceptical that it would have done so.
Even though he had an accountant, Mr Scott was personally responsible for making
sure that his tax affairs were in order and up-to-date. On Mr Scott's own evidence, his
10 attention to his tax affairs was far from scrupulous. For example, although Mr Scott
knew that he was receiving reminders as to outstanding returns, he never asked why.
It would have been obvious to Mr Scott that his previous accountant was not doing
what he should. The fact that Mr Scott was even threatened with bankruptcy
proceedings by HMRC, and was made bankrupt (although annulled shortly thereafter)
15 should have made it absolutely clear that his tax affairs were not being kept in order.
We would go so far as to say that Mr Scott's entire approach to his tax affairs, when
dealing with his previous accountant (not his present representative) were most
unimpressive.

Relief

20 46. Having concluded that we should adopt the same approach as in *Currie*, and
having decided that HMRC's decision was unreasonable, engaging our jurisdiction,
we must therefore consider what relief, if any, to allow.

47. Relief is not automatic. For example, it can be disallowed if the outcome, even
had the point been considered, would have been the same. However, there is no
25 evidence before us which would entitle us to conclude, even on the balance of
probabilities, that the decision to refuse special relief would inevitably have been the
same, had the point about 'unreasonably excessive' been inquired into. Nor, in fairness
to HMRC, was any such outcome suggested to us on their behalf.

48. We have considered the closely-reasoned discussion of this point in *Currie*, and
30 we consider, as the Tribunal did in that case, that our jurisdiction is limited to
allowing or dismissing the appeal. We cannot substitute our own view on special
relief for that of the Commissioners.

Conclusion

49. In consequence, we allow the appeal, with the effect that the claims to special
35 relief for the years 2006-07 and 2007-08 must be allowed.

50. This document contains full findings of fact and reasons for the decision. Any
party dissatisfied with this decision has a right to apply for permission to appeal
against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax
Chamber) Rules 2009. The application must be received by this Tribunal not later

than 56 days after this decision is sent to that party. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

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**DR CHRISTOPHER MCNALL
TRIBUNAL JUDGE**

RELEASE DATE: 27 AUGUST 2015

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