TC03997

Appeal number: TC/2013/05448

INCOME TAX – HMRC determinations for 2005-06 and 2006-07 – appellant out of time to displace determinations – claim for special relief under TMA Sch 1AB para 3A – whether the Tribunal has a free-standing jurisdiction to decide that collection of the tax is "unconscionable" – whether jurisdiction limited to considering the reasonableness of HMRC's opinion on unconscionability – whose opinion is "the opinion of the Commissioners" – the factual basis of the opinion – whether the opinion in this case was unreasonable in a judicial review sense – held, no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

DONALD FITZROY CURRIE **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE REDSTON
MRS SHAMEEM AKHTAR

Sitting in public at the Tribunals Centre, 45 Bedford Square on 19 August 2014.

Mr Philemon Tito Mujumbi of CJV & Company, Accountants, for the Appellant

Mrs Gill Carwardine, of HM Revenue and Customs' Appeals and Reviews Unit, for the Respondents

DECISION

Introduction and outline

1. Mr Currie failed to complete his 2005-06, 2006-07 and 2007-08 self-assessment ("SA") returns by the due dates. HMRC issued determinations charging tax of £10,000 of tax for the first two years and £100,000 for the third year.

2. Mr Currie filed his returns at the end of 2012, more than four years after the filing due date, and so was out of time to displace the determinations by his self-assessments. He then claimed "special relief" under Taxes Management Act 1970 ("TMA"), Sch 1AB, para 3A.

3. Following an enquiry into the claim, HMRC issued a closure notice amending the claim to "eliminate the excess" – ie the amount claimed as special relief. Mr Currie appealed the amendment and subsequently notified the appeal to the Tribunal.

4. In advance of the hearing, HMRC withdrew the 2007-08 determination. As a result we only had to consider Mr Currie's appeal in relation to the two years 2005-06 and 2006-07.

5. The main issue in the case was whether Mr Currie's claim for special relief satisfied Condition A of the special relief rules. This is met if:

> "in the opinion of the Commissioners it would be unconscionable for the Commissioners to seek to recover the amount (or to withhold repayment of it if has already been repaid)."

6. As a preliminary matter we had to decide whether (a) our jurisdiction was limited to deciding whether HMRC's opinion that Condition A did not apply was unreasonable, in a judicial review sense, or (b) we were able to consider afresh whether it would be "unconscionable" for HMRC to enforce the determinations. For the reasons set out in the main body of the decision, we decided that the former was correct.

7. Having considered the evidence and the parties' submissions, we decided that HMRC's opinion in relation to Condition A was reasonable, so that Mr Currie's appeal was dismissed. If we were wrong as to the extent of our jurisdiction, so that we could take into account matters not known to HMRC at the time of their decision, we would also have refused the appeal.

The legislation

8. TMA s 8C provides as follows:

> **8C Determination of tax where 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 Parts VA, VI, IX and XI of this Act as if it were such a self-assessment.

(4) …

(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.

9. TMA Sch 1AB, para 3A sets out the requirements for a claim to special relief:

(1) This paragraph applies where--

(a) a determination has been made under section 28C of an amount that a person is liable to pay by way of income tax or capital gains tax, but the person believes the tax is not due or, if it has been paid, was not due,

(b) relief would be available under this Schedule but for the fact that-

(i)-(ii) …

(iii) more than 4 years have elapsed since the end of the relevant tax year…

(2) ...

(3) But 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.

(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 repayment 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 or tax), or

(b) the person has done so, but in the exceptional circumstances of the case should be allowed to do so again on the present occasion.

(7) …

(8) A claim made in reliance on this paragraph must include (in addition to anything required by Schedule 1A) such information and documentation as is reasonably required for the purpose of determining whether conditions A, B and C are met.

10. TMA, Sch 1AB, para 1(4) says that TMA Sch 1A makes further provision about making and giving effect to claims under Sch 1AB. TMA Sch 1A sets out the procedure for making claims. Para 5 gives HMRC the power to enquire into claims, and para 7 deals with the completion of those enquiries. The relevant provisions read:

(1) An enquiry under paragraph 5 above is completed when an officer of the Board by notice (a "closure notice") informs the claimant that he has completed his enquiries and states his conclusions.

(2) In the case of a claim for discharge or repayment of tax, the closure notice must either--

(a) state that in the officer's opinion no amendment of the claim is required, or

(b) if in the officer's opinion the claim is insufficient or excessive, amend the claim so as to make good or eliminate the deficiency or excess….

11. Para 8 is headed "Giving effect to such amendments" and again so far as relevant to this appeal, reads as follows

(1) An officer of the Board or the Board shall, within 30 days after the date of issue of a closure notice amending a claim other than a partnership claim under paragraph 7(2) above, give effect to the amendment by making such adjustment as may be necessary, whether–

(a) by way of assessment on the claimant, or

(b) by discharge of tax or, on proof to the satisfaction of the officer or the Board that any tax has been paid by the claimant by deduction or otherwise, by repayment of tax…

12. Para 9 gives the claimant the right to appeal against the decision stated in the HMRC closure notice, and reads:

(1) An appeal may be brought against–

(a) any conclusion stated or amendment made by a closure notice under paragraph 7(2) above…

…

(3) In the case of an appeal against an amendment made by a closure notice under paragraph 7(2) above, if an appeal is notified to the tribunal under section 49D, 49G or 49H, the tribunal may vary the amendment appealed against whether or not the variation is to the advantage of the appellant.

(4) Where any such amendment is varied, whether by HMRC or by the tribunal or by the order of any court, paragraph 8 above shall (with the necessary modifications) apply in relation to the variation as it applied in relation to the amendment…

13. Where a person has sought a statutory review of the amendment to the claim contained in the closure notice, the task of the Review Officer is at TMA s 49E:

49E Nature of review etc

(1) This section applies if HMRC are required by section 49B or 49C to review the matter in question.

(2) The nature and extent of the review are to be such as appear appropriate to HMRC in the circumstances.

(3) For the purpose of subsection (2), HMRC must, in particular, have regard to steps taken before the beginning of the review—

(a) by HMRC in deciding the matter in question, and

(b) by any person in seeking to resolve disagreement about the matter in question.

(4) The review must take account of any representations made by the appellant at a stage which gives HMRC a reasonable opportunity to consider them.

(5) The review may conclude that HMRC's view of the matter in question is to be—

(a) upheld,

(b) varied, or

(c) cancelled.

(6) HMRC must notify the appellant of the conclusions of the review and their reasoning within—

(a) the period of 45 days beginning with the relevant day, or

(b) such other period as may be agreed.

(6)-(9) …

14. If the Review Officer upholds the original decision, TMA s 49G(4) provides that "if the appellant notifies the appeal to the tribunal, the tribunal is to determine the matter in question." TMA s 48I defines "the matter in question" as "the matter to which an appeal relates."

The Tribunal's jurisdiction in relation to Condition A

15. CJV & Company ("CJV") made a claim for special relief on Mr Currie's behalf. This was treated, procedurally, like any other claim not included in a return. An enquiry was opened under TMA Sch 1A, para 5 and concluded by closure notice under TMA, Sch 1A, para 7(2)(b). The relevant provision is repeated here for ease of reference:

> (2) In the case of a claim for discharge…of tax, the closure notice must either--
>
> (a) …
>
> (b) if in the officer's opinion the claim is…excessive, amend the claim so as to make good or eliminate the…excess."

16. The officer's opinion was that Mr Currie's claim was excessive. She amended the claim to "eliminate the excess", reducing it to nil. The basis for the amendment was her opinion that neither Condition A nor Condition B of TMA s 28A were satisfied (HMRC later accepted that Condition B had subsequently been met; we return to this later in our decision).

17. TMA, Sch 1A, para 9(1)(a) says that "an appeal may be brought against any conclusion stated, or amendment made, by a closure notice under paragraph 7(2) above." Mr Currie appealed under this provision, on the ground that Condition A was satisfied.

18. That Condition reads (emphasis added) "*in the opinion of the Commissioners* it would be unconscionable for the Commissioners to seek to recover the amount …" not the simpler "it would be unconscionable for the Commissioners to seek to recover the amount."

19. We asked ourselves whether the Tribunal's task on appeal was limited to deciding whether HMRC's opinion is unreasonable, in a quasi-judicial review sense, or whether we were able to consider afresh whether it would be "unconscionable" for HMRC to enforce the determinations.

20. This is relatively new legislation, and we have neither found or been referred to any other decision which has considered special relief, other than *William Maxwell v HMRC* [2013] UKFTT 459 ("*Maxwell*"), a decision of Judge Rankin and Mr Hennessey. The Tribunal in *Maxwell* assumed that the Tribunal can consider afresh whether it would be "unconscionable" for HMRC to enforce the determinations.

However, the alternative appears not to have been suggested by either party and the judgment contains no discussion of the point.

21. The statute merely says, at TMA Sch 1A, para 9(3), that the Tribunal can "vary the amendment appealed against whether or not the variation is to the advantage of the appellant." There is no explicit restriction of our jurisdiction, unlike, for example, the "special circumstances" legislation at Finance Act 2009, Sch 55 para 22 and Sch 56 para 15, which provide that the Tribunal can only substitute its decision for that made by HMRC if it decides that HMRC's application of the "special circumstances" provision was "flawed when considered in the light of the principles applicable in proceedings for judicial review."

22. Despite the lack of any explicit limitation, the Tribunal's jurisdiction may also be inferred from the statutory provision itself. In *John Dee v HMRC* [1995] STC 941 at page 952 Neill J said (in the context of an appeal under VATA s 40(1)(n)) that although there were no explicit statutory limits on the power of a Tribunal considering such an appeal, it was nevertheless "necessary in each case to examine the nature of the decision against which the appeal is brought." He adopted and approved the phrase "the statutory condition" used by Mr Stephen Richards, HMRC's Counsel in that case, as an appropriate name for a jurisdictional restriction contained within the statutory provision. We therefore need to decide whether "*in the opinion of the Commissioners*" is a statutory condition limiting our jurisdiction.

23. So far as we were able to establish, the phrase does not appear elsewhere in direct tax legislation, although there are other usages which are similar:

(1) TMA s 29(1) says that where "an officer of the Board or the Board" makes a discovery, "the officer 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" and TMA s 31 gives the taxpayer a right of appeal against the assessment. However, this differs from the special relief provisions, because it is not the officer's opinion as such which is under appeal, but the liability shown on the assessment.

(2) TMA s 100 says that "an officer of the Board" may impose a penalty "setting it at such amount as, *in his opinion*, is correct or appropriate." The jurisdiction of the tribunal is at TMA s 100B: if the penalty "appears" to the tribunal to be correct/appropriate, the Tribunal confirms it; if it "appears" to be incorrect, the Tribunal can increase or reduce it to the correct amount. This also differs from the special relief provisions, because the Tribunal has full jurisdiction to replace the officer's opinion with its own.

(3) The Income Tax (Earnings and Pensions Act) 2003, s 65(6) says that "*in their opinion* there is reason to do so, an officer of Revenue and Customs may revoke a dispensation." The HMRC officer is making a discretionary decision against which the statute provides no appeal rights; a taxpayer can only challenge such a decision by judicial review. Again, this does not assist us with the special relief provisions.

(4) The Income Tax Act, s 234(3)(b) states that Enterprise Investment Scheme ("EIS") relief is withdrawn "if an officer of Revenue and Customs has given notice to that company stating *the officer's opinion that*, because of the ground in question, the whole or any part of the EIS relief…was not due." ITA s 236 says "for the purposes of the provisions of TMA 1970 relating to appeals, the giving of notice by an officer of Revenue and Customs under section 234(3)(b) is taken to be a decision disallowing a claim by the issuing company." This at first appears similar to the special relief provisions, in that the officer's opinion that relief is not due is treated as the refusal of a claim. But the officer's opinion turns on whether or not "the ground in question" has been satisfied. That is not a matter of discretion or judgement, but of substantive law. In our case, the underlying law itself includes the phrase "in the opinion of the Commissioners."

24. We found more assistance in indirect tax, where the phrase "in the opinion of the Commissioners" appears, for example, in Value Added Taxes Act 1994 ("VATA"), s 33(2)(b). This says that in certain cases, HMRC may refund the VAT attributable to exempt supplies "if *in the opinion of the Commissioners*, it is an insignificant proportion of the whole of the tax chargeable." This provision was considered in *Haringey LBC v C & E Comrs* [1995] STC 230, a decision of Dyson J. He said that:

> "the question was whether as a matter of law, the commissioners could have formed the opinion that the input tax attributable to the exempt supplies was an insignificant proportion of the total chargeable tax.."

25. It is clear from the discussion which follows that "in the opinion of the commissioners" means that the decision is to be made at HMRC's discretion, and can only be displaced if unreasonable.

26. Dyson J considered the phrase again *Pegasus Birds v C&E Comrs* [1999] STC 95 at the High Court, this time in the context of VATA s 73(6)(b), which says that HMRC can only make a further assessment following a failure to make returns:

> "one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge."

27. At page 101 he said that:

> "An officer's decision that the evidence of which he has knowledge is insufficient to justify making an assessment, and accordingly, his failure to make an earlier assessment, can only be challenged on Wednesbury principles, or principles analogous to Wednesbury…"

28. When *Pegasus Birds* went to the Court of Appeal (under reference [2000] STC 91) Dyson J's decision was upheld, albeit without any express reference to his analysis.

29. Guided by these authorities, we find as follows:

(1) The phrase "in the opinion of the Commissioners" is a "statutory condition" as that term was understood and explained in *John Dee*. When the Tribunal exercises its jurisdiction in relation to an appeal against a "Condition A" decision, we are limited by that statutory condition.

(2) In reliance on *Haringey* and *Pegasus Birds* we find that the use of the statutory condition "in the opinion of the Commissioners" means that the Tribunal's jurisdiction is limited to considering whether the opinion of the Commissioners is "unreasonable" as that term is understood in a judicial review sense. We cannot consider afresh whether it would be unconscionable to enforce the determination.

(3) The relevant judicial review principles are well understood: we must allow the appeal (unless a new decision would invariably have been the same) if the Commissioners had acted in a way in which no reasonable panel of commissioners could have acted, if they took into taken into account some irrelevant matter or disregarded something to which they should have given weight. The Tribunal may also have to consider whether the commissioners have erred on a point of law or fettered their discretion or acted with an improper purpose.

Whose opinion?

30. Having decided that the Tribunal's jurisdiction is to consider whether "the opinion of the Commissioners" was unreasonable, we then need to establish the parameters of that opinion. In particular, is it the opinion of any HMRC officer who has been involved in the case? Is it the opinion of the officer who issued the amendment to the closure notice? Is it the opinion of the Review Officer? Or is it the opinion of more than one of these?

31. In *Pegasus Birds* at page 102, Dyson J said that:

> "The person whose opinion is imputed to the commissioners is the person who decided to make the assessment. It does not matter that he or she may not be the person who first acquired knowledge of the evidence of the facts which are considered to be sufficient to justify making the assessment."

32. The closest parallel in Mr Currie's case is with the officer who issued the review decision, as that is the decision which is under appeal. This also fits with our decision on information in the next section. In a case where there was no review, the person whose opinion is imputed to the commissioners may be the officer who issued the closure notice, but that is not a matter we have to consider.

What information?

33. In order to decide whether the decision is reasonable, we need to know whether the Commissioners failed to take into account any relevant matter, and we cannot do that unless we first know what matters they must take into account. Is it all the information known to all parts of HMRC? Does HMRC have an obligation to make enquiries of the claimant?

34. We find part of the answer in TMA Sch 1AB, para 3A(8), which says:

> "A claim made in reliance on this paragraph must include (in addition to anything required by Schedule 1A) such information and documentation as is reasonably required for the purpose of determining whether conditions A, B and C are met."

35. This means that the Review Officer has to take into account all relevant information provided by the claimant. A failure to take any such information into account may well vitiate the decision. That does not mean, of course, that he has unquestioningly to accept that information.

36. Under TMA s 49E, the Review Officer also has to take into account steps taken "by HMRC in deciding the matter in question" as well as steps taken by "any person in seeking to resolve disagreement about the matter in question" and "any representations made by the appellant at a stage which gives HMRC a reasonable opportunity to consider them."

37. However, there is no requirement that consideration be given to information in HMRC's possession which was neither provided with the claim (TMA Sch 1AB para 3A(8)) nor provided during discussions about the claim or directly to the Review Officer (TMA s 49E).

What happens if the Commissioners' decision is unreasonable?

38. The next question is what happens if we decide that the Commissioners' opinion is unreasonable. If the decision to refuse special relief would inevitably have been the same, the Tribunal may still dismiss the appeal, but there must be a high degree of certainty that this is the position – see for example *Kalra v Secretary of State for the Environment* [1996] 1 PLR 37, CA at [45].

39. If that is not the case, there are three possibilities :

(1) the Tribunal has only a supervisory jurisdiction, so we must remit the matter back to HMRC to decide;

(2) the Tribunal has an appellate jurisdiction which limits us to allowing or dismissing the appeal; or

(3) the Tribunal has an appellate jurisdiction under which we can not only allow or dismiss the appeal but go on to remake the decision.

40. Since the taxpayer has a right to appeal the amendment to the claim, our jurisdiction is appellate and not supervisory. It is therefore not limited to the power to remit the decision back to HMRC, in order that it can remake the decision.

41. So what powers does the tribunal have? TMA Sch 1A para 9(4) says that where an appeal is notified to the tribunal under s 49D, 49G or 49H, then "the tribunal may vary the amendment appealed against whether or not the variation is to the advantage of the appellant." This is a perfectly workable provision in the context of most claims – for instance, a claim to offset losses against income might be slightly too high or

slightly too low. But claims to special relief are binary: either the claimant is given special relief or he is not. If he is given the relief, the determination is not enforced. A power to vary is of no practical use in a special relief appeal.

42. We were unable to identify any other relevant provision, and in particular no power which would allow the Tribunal to step into the Commissioners' shoes and remake the decision. We therefore find that our jurisdiction is limited to allowing or dismissing the appeal.

43. In consequence, were we to find that HMRC's decision in this case was unreasonable, we would allow the appeal, unless we were certain that the outcome would have been the same had the Commissioners made the decision correctly on the basis of the evidence before them.

Conditions B and C

44. The closure notice stated that Mr Currie had met neither Condition A nor Condition B. Condition B reads:

> "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."

45. The first part of the Condition is whether the person's affairs are "otherwise up to date." This is a question of fact, which the Tribunal is empowered to decide.

46. If the person's affairs are not up to date, he can nevertheless be treated as satisfying Condition B if he has put arrangements in place to bring them up to date so far as possible, providing that those arrangements are "to the satisfaction of the Commissioners." This is a discretionary decision. As with Condition A, the Tribunal can only interfere with such a decision if it is unreasonable in a judicial review sense.

47. As stated above, Mr Currie's claim was refused on the basis that neither Condition A nor Condition B was satisfied. Mrs Carwardine explained that Condition B was originally not met because Mr Currie had failed to submit his 1998-99 SA return. This was subsequently received, and HMRC were now only relying on Mr Currie's failure to meet Condition A. Both parties also stated that no other issue remained outstanding, so as to engage Condition B. We accepted this and have not further considered that Condition.

48. Condition C is, like the first part of Condition B, a question of fact to be decided by the Tribunal on the evidence: either the claimant has applied for special relief before, or he has not. In Mr Currie's case it was accepted that no prior claim had been made.

Making findings of fact and the decision in *Maxwell*

49. We have found that our jurisdiction is limited to considering whether the HMRC officer making the decision to refuse the special relief claim acted unreasonably.

50. We therefore have to establish the information which should have been taken into account in making that decision. In particular, we cannot take into account further evidence provided to HMRC by Mr Currie or his representative, Mr Mujumbi, at the hearing.

51. We have first set out our findings of fact on the claim, including the information provided to the Review Officer, and other pertinent material. These form the basis for our decision on Mr Currie's appeal.

52. We have already noted that the only other published decision on special relief is *Maxwell*, which assumed that the Tribunal had the jurisdiction to decide whether it was unconscionable for HMRC to enforce the determination. For the reasons already explained, we respectfully disagree with that approach. But in case we are wrong, we have gone on to consider whether we would have allowed or dismissed the appeal if the Tribunal had the broader jurisdiction assumed in *Maxwell*. We have therefore made further findings of fact based on the information provided to us at the hearing. Those findings, and our decision on this alternative basis, is at the end of our judgment.

Evidence provided to the Tribunal

53. HMRC provided the Tribunal with several bundles of documents containing:

(1) the correspondence between the parties and between the parties and the Tribunal;

(2) Mr Currie's SA returns for 2005-06, 2006-07 and 2007-08;

(3) His SA Statement dated 2 October 2013;

(4) Various HMRC internal documents, including the SA Return summaries for each of the three tax years; the "View Compliance History" for the tax years 2001-02 through to 2004-05 together with a summary page; various notes of telephone calls between HMRC and Mr Currie's representatives together with HMRC internal emails and notes relating to the case;

(5) HMRC's SA Notes for the period 16 November 2000 to 27 June 2013; and

(6) HMRC screen prints showing the determinations made.

54. Mr Currie gave oral evidence on oath and was cross-examined by Mrs Carwardine. He also answered questions from the Tribunal. We found that he was not a credible witness. He was vague and evasive about key facts, and changed his evidence under questioning.

Findings of fact relevant to HMRC's decision to refuse the claim

55. On 6 April 2006 Mr Currie was issued with an SA return for 2005-06, and on 6 April 2007 he was issued with an SA return for 2006-07. The filing due dates were 31 January 2007 and 31 January 2008 respectively.

56. In both years Mr Currie worked as a barristers' clerk. He also owned a number of properties which he rented out. His accountant was a firm called Wyntax.

57. In the year 2005-06 HMRC were in regular contact with Mr Currie and his agent, telephoning around twice a month, chasing earlier year's returns and payments. On 3 December 2007 HMRC called Wyntax, asking about the overdue SA return for 2005-06.

58. On 11 February 2009, HMRC issued two determinations, charging tax of £10,000 for each of the two tax years. In accordance with TMA s 8C(5), the latest date by which the determination for 2005-06 could be displaced was 10 February 2010, being one year after the date on the determination; the latest date for displacing the 2006-07 determination was 31 January 2011, being three years from the filing date.

59. On 18 May 2010 Mr Currie spoke to HMRC on the telephone and said he was unable to complete the returns because there was an investigation at his Chambers and he was unable to get the necessary books and records. He said that he would now contact his Chambers to see if he could access these papers.

60. On 30 June 2010, HMRC were informed that Mr Currie's new agent was Guardian Taxation Services ("Guardian"). On 2 September 2010, Guardian asked HMRC to send duplicate SA returns for both tax years, and these were despatched.

61. On 19 October 2010 HMRC were told that Mr Currie had another new tax agent.

62. On 2 December 2010 Mr Currie called HMRC and asked for a further set of duplicate tax returns for both years. On 19 January 2011 he again spoke to HMRC and said he was sending in the 2009 SA return but "did not know when he had sent the earlier returns in."

63. On 21 October 2011 HMRC's Action History Log records that:

> "correspondence in from other IR office. Gary Hopper asking for dtms [determinations] 08 £100k, 09 £150k, 10 £200k. tp has 2 let properties and cg [capital gains] on selling one, dir of 2 cos, number of bank/bs accounts, barristers clerks are high earners."

64. On 8 November 2011, the Action History Log records:

> "clerical review by manager. Over £100k stencil completed. Land reg for PA, 65, UB6 8AZ shows tp and wife as proprietors. Price paid 19/4/2006 £313k. Registered charge in favour of Southern Pacific Mortgage Ltd. Experian requested."

65. On 15 November 2011, having received the Experian report, a manager authorised the determinations for 2007-08, 2008-09 and 2009-10.

66. On 19 January 2012, Mr Currie spoke to HMRC and claimed he had submitted the outstanding returns to HMRC's Cardiff Office.

67. On 14 March 2012, CJV informed HMRC that they had been appointed as agents for Mr Currie.

68. On 24 April 2012, HMRC spoke to Mr Currie, who asked for further time to submit the returns.

69. On 10 June 2012, HMRC's solicitors' office began legal action to file a bankruptcy petition. The hearing date was set for 5 July 2012, but was adjourned following letters from CJV.

70. On 12 November 2012 HMRC received Mr Currie's 2005-06 return, dated 28 October 2012. It showed income as a barrister's clerk of £4,800 and expenses of £1,440, making a net profit of £3,360. Rental income was £36,450, reduced by repairs of £5,758, "finance charges, including interest" of £42,192, and 10% wear and tear of £3,645. The result was a net UK property business loss of £15,145. His profit from working as a barrister's clerk was below the 2005-06 personal allowance.

71. On 5 December 2012, HMRC received Mr Currie's 2006-07 SA return, dated 3 December 2012. It showed exactly the same income and expenses for Mr Currie's self-employment, being £4,800 less £1,440, giving a net profit of £3,360. His rental income was shown as £39,457, less repairs of £13,280 and finance charges/interest of £33,839 and 10% wear and tear of £3,946. The UK property business loss for the year was £12,967. Again, the net profits from his work as a barrister's clerk were below his personal allowance.

72. On 4 December 2012 HMRC received a letter dated 3 November 2012 from CJV, asking for special relief. It said that:

(1) all outstanding returns had been submitted;

(2) Mr Currie's liability as shown on his SA returns was "very minimal if not zero";

(3) collecting the tax shown on the determinations would render Mr Currie insolvent.

73. Mr Shaddick, an HMRC Technical Adviser, replied to CJV's letter. He said:

> "based on the information already provided by you, together with our own records of previous letters and telephone conversations, Condition A would not appear to be satisfied because there is insufficient information to show that your client was prevented from complying with his legal obligation to complete the appropriate tax returns within the time allowed by a reason outside his control at the relevant time."

74. He went on to say that there were no circumstances making it "unconscionable" to recover the tax shown in the determinations and that the letter from CJV did not address all the points required for a valid special relief claim.

75. On 3 January 2013 CJV submitted a formal special relief claim. In addition to the points already made in the previous letter, it said:

(1) Mr Currie had asked Wyntax to deal with his affairs but they "did not meet their side of the obligation." Mr Currie had then appointed Rayner Essex LLP to sort out the problem." He did not receive any correspondence or communication from HMRC because it was all going to his accountants, and his accountants would not release the paperwork so he could appoint another accountant. Overall, he was "being let down by his accountants"; and

(2) pursuing the determination would be to the detriment of Mr Currie's other creditors, including his obligations to his mortgage lenders.

76. CJV attached a letter from Mr Frank Bellis of HMRC to Wyntax dated 23 May 2007, which raises questions and asks for supporting documents in relation to enquiries into the tax years 2000 to 2005. It also asks for details of two properties at Albemarle Gardens and Swabey Road, both owned by Mr Currie.

77. CJV also attached an undated handwritten note from Mr Currie, which refers to "receiving letters from so many branches of the Revenue, some I responded to." He stated that he instructed an accountancy firm called A Murray of Greenford, and that "all this time I had not heard from them so I assumed all was well."

78. On 5 February 2013 Mr Shaddick agreed with the HMRC officer dealing with the bankruptcy petition that the court would be asked to grant a lengthy adjournment while the special relief claim was considered.

79. On 14 February 2013 Mr Shaddick replied to CJV, repeating his earlier letter and also stating that reliance on accountants was not sufficient to allow Mr Currie's claim to meet the Condition A test. He pointed out that Mr Currie knew he had to sign his SA returns, so must have been aware they had not been submitted.

80. On 26 February 2013 Ms Sharon Freeman of HMRC opened an enquiry into the special relief claim. On 9 April 2013 Mr Shaddick informed her that the bankruptcy adjournment was about to come to an end. On 30 April 2013 she issued a closure notice, refusing the claim on the basis that neither Condition A nor Condition B were satisfied. A further adjournment of the bankruptcy petition was ordered by the court.

81. On 13 May 2013, HMRC received Mr Currie's appeal against the amendment. On 26 June 2013, Mr Shaddick provided further information about why the claim had been refused. He relied in particular on HMRC's information about contact between HMRC on the one hand and Mr Currie and his advisers on the other, as already set out above.

82. On 27 June 2013 Mr Hopper (the HMRC officer who had asked for the 2007-08 determination) sent Mr Shaddick an email saying that the determination had been for

£10,000. He also said that Mr Currie had sold a property at Flat 9, Vanguard House for £234,256 in 2008 which had been purchased in 2005.

83. On 27 June 2013 CJV asked for an independent statutory review of Ms Freeman's decision. On 1 July Mr Shaddick provided various background documents and information to Mr Peter Harbord, the Review Officer, including a copy of Mr Hopper's email and details of the bankruptcy petition.

84. On 3 July 2013 Mr Harbord issued the review letter, which *inter alia:*

(1) referred to CJV's submission that Mr Currie had relied on his accountants, but did not accept that this was sufficient to engage the test in Condition A;

(2) confirmed the other points made in Mr Shaddick's letter of 26 June 2013 (which in turn relied on his letter of 14 February 2013); and

(3) offered to settle the matter by withdrawing the determination for 2007-08.

85. In a telephone conversation followed by a letter, both dated 13 August 2013, CJV refused Mr Harbord's offer and informed HMRC that Mr Currie had notified the appeal to the Tribunal.

The 2007-08 determination

86. The 2007-08 determination had been appealed to the Tribunal, but Mrs Carwardine informed us that it had been withdrawn because HMRC were not confident that it had been correctly issued for £100,000; it was possible that it should have been for £10,000. Mrs Carwardine said that there may have been a keying error.

87. We note that the determination was issued following Mr Hopper's request on 21 October 2011 for three determinations: £100k for 2008, £150k for 2009 and £200k for 2010. His request was made in the context of other comments relating to Mr Currie owning two let properties and selling one, being a director of two companies, having a number of bank/building society accounts and being a barrister's clerk. It seems to us that Mr Hopper's second email of 27 June 2013 (with its reference to a determination of £10,000) might have been the one containing the keying error. However, as the determination has been withdrawn, this is not a matter we have to decide.

Submissions of Mr Mujumbi of CRV on behalf of Mr Currie

88. Mr Mujumbi said that Mr Currie's tax returns for the years before 2005-06 and 2006-07 showed that no tax was due. He said that the appeal should be allowed, because it was unconscionable:

(1) to issue determinations for amounts so much greater than the figures on those earlier tax returns; and

(2) to seek to collect the amounts shown on the determinations, now that HMRC had received the 2005-06 and 2006-07 returns showing much lower figures than on those determinations and especially given Mr Currie's reliance on his earlier accountants, who he said had let Mr Currie down.

89. Finally, he submitted that HMRC had now withdrawn the 2007-08 determination, which they had previously defended. If that determination had not been made according to the officer's best judgement, it was a reasonable inference that the 2005-06 and 2006-07 assessments were also defective. For this further reason, therefore, it would be unconscionable to collect the amounts on the determinations.

Submissions of Mrs Carwardine on behalf of HMRC

90. Mrs Carwardine said that HMRC accepted that the 2007-08 determination had not been raised "to an officer's best information and belief" as required by TMA s 8C (1A). But in her submission, that did not affect the other two determinations. There was a risk that there had been a keying error when the 2007-08 determination was made, but there was no such risk with the other two years. Mr Currie had a self-employment source of income as a barrister's clerk. He also had a number of rental properties. HMRC had to make a "best judgement" estimate of the tax which would arise from those income sources and had done so.

91. In any event, this was not a "best judgement" appeal, but a "special relief" appeal. She said special relief was a "final and exceptional remedy" which was not to be granted simply because a determination may be excessive. It has to be "unconscionable" for HMRC to collect the tax, and "unconscionable" meant "completely unreasonable" or "unreasonably excessive."

92. Mrs Carwardine referred to *Maxwell*, where the taxpayer's appeal succeeded because he relied on his accountant. She said that although that case had not been appealed, HMRC did not accept it had been correctly decided. In any event, the facts in *Maxwell* were very different from Mr Currie's. In *Maxwell* the agent had a serious medical condition. The Tribunal found that the appellant was unaware of this and believed his affairs were being properly dealt with. In contrast, Mr Currie was in contact with HMRC at the relevant time, knew he had to submit his returns and knew they had not been submitted. On 18 May 2010, not long after the deadline for displacing the first determination, Mr Currie had spoken to HMRC and had said that the reason for the delay was his inability to access some of his papers: he did not blame his agent. Guardian had asked for duplicate returns on 2 September 2010, which was also before the time limit for displacing the second determination, and those duplicate returns had been sent out; Mr Currie himself had asked for duplicate returns in December 2010; had he completed the 2006-07 return promptly on receipt, he would have displaced the related determination.

93. In short, Mr Currie's claim had been correctly amended to remove the relief and she asked that the appeal be dismissed.

Whether HMRC's decision was unreasonable

94. On the basis of our earlier analysis of the statutory provisions, our task is to decide whether the opinion of the Commissioners was unreasonable, as that term is understood in a judicial review sense.

95. Mrs Carwardine defined "unconscionable" as "unreasonably excessive" or "completely unreasonable" and we accept that definition. Although she did not say so, it appears to be derived from the Oxford English Dictionary, which says that "unconscionable" means "not in accordance with what is right or reasonable…unreasonably excessive…grossly unfair, especially to a weaker party…acting without regard for what is right."

96. Again, as we have already found, the opinion we have to consider is that of the Review Officer who decided that Condition A did not apply, and against whose decision Mr Currie has appealed to the Tribunal. The Review Officer was Mr Harbord, whose decision incorporated by reference the points in Mr Shaddick's earlier correspondence with CJV.

The quantum of the determination

97. CJV said that Condition A was met because Mr Currie's liability, as shown on his SA returns, was "very minimal if not zero," and that this had also been demonstrated by the earlier returns. Mr Shaddick said that the determinations had been made to the best judgement of the relevant HMRC Officers. It was not "unconscionable" to collect the tax shown on a determination simply because it was higher than the liability on the SA returns.

98. We agree with Mr Shaddick. It is of course possible to imagine a scenario where the size of the determination compared with the taxpayer's financial position generally or in relation to the year in question is so "unreasonably excessive" that it should be discharged. But that requires more than a simple comparison between the SA returns and determinations. Mr Currie did not provide any supporting evidence for his income and expenditure: no bank statements, no details of his rental receipts and outgoings, no credit cards, no asset statement, no documentation from his former Chambers. It is true that HMRC did not ask for any of this material, but the onus is on the taxpayer to provide the requisite "evidence and documentation" with the claim, or otherwise as part of the enquiries into the claim or directly to the Review Officer, under TMA s 49E.

99. We therefore find that it was reasonable of Mr Harbord to decide that it was not "unconscionable," on the basis of quantum alone, to collect the determined liability.

Best judgement

100. CJV also said that collecting the liability was "unconscionable" because the determinations had not been made to the relevant officer's "best judgement." At the hearing, Mr Mujumbi invited us to infer from HMRC's late abandonment of the 2007-08 determination that there had also been a lack of best judgement in these two earlier years.

101. Mr Mujumbi is right that TMA s 8C(1A) requires that a determination must be made "to the best of [the officer's] information and belief." However, as Mrs Carwardine said, this is not a "best judgement" appeal. Merely showing that a determination has not been made to an officer's best judgement does not of itself lead to the conclusion that it would be unconscionable to collect the tax shown on that

determination. This is because the two tests are fundamentally different: the determination may have been made to the best of the officer's information and belief, but collection may still be unconscionable; equally, it may have fallen below that threshold, but collection may not be unconscionable.

102. Of course, an assessment not made to the "to the best of [the officer's] information and belief" may also be so "unreasonably excessive" that it would be unconscionable to collect it. But that would be decided on the facts in the light of the "unconscionable" test; it would not depend on whether the original determination was made "to the best of [the officer's]information and belief."

103. In any event, CJV have failed to convince us that the original determinations were not made to the officer's best judgement, given that Mr Currie had two sources of income, as a self-employed barrister's clerk and as a landlord. We also decline to infer from HMRC's withdrawal of the 2007-08 assessment that the other two assessments were not made on a best judgement basis. In particular, the determinations at issue in this case were made at a different time from that for 2007-08. HMRC withdrew that determination because they were not sure whether it was intended to be for £100,000 or £10,000. It would be unreasonable to infer that the two earlier determinations, both for that lower sum of £10,000, were not made to the best judgement of the officer in question.

The accountants

104. Mr Harbord said that for Condition A to be met there had to be something more than a difference between the amount on the SA return and that on the determination. The main factor put forward by CJV was Mr Currie's reliance on his accountants, but the only evidence provided in support of that submission was a single letter from HMRC to Wyntax and the handwritten letter from Mr Currie.

105. One of CJV's submissions was that all contact was between HMRC and Mr Currie's accountants. That this was not the case is shown by HMRC's call records, as taken into account by Mr Shaddick in his correspondence with CJV. It is even contradicted by Mr Currie's own letter, attached to the special relief claim, with its reference to "receiving letters from so many branches of the Revenue, some I responded to." As Mrs Carwardine pointed out, Mr Currie's request on 18 May 2010 that HMRC send him a duplicate copy of the returns meant that he was in time to displace the 2006-07 determination.

106. In Mr Harbord's opinion, the picture painted was insufficient to make it unconscionable for HMRC to enforce the determinations.

107. We agree. A taxpayer who engages an accountant to complete his returns retains legal responsibility for meeting the deadlines set by statute. If he fails to file the returns, he cannot simply blame his accountants. It is rare that a taxpayer's reliance on his agents is sufficient even to provide him with a "reasonable excuse" defence, let alone meet the much higher hurdle of "unconscionability." As this Tribunal has previously said at [6] of *Michael Lithgow v HMRC* [2012] UKFTT 620(TC) (Judge Geraint Jones QC), a case about reasonable excuse:

> "I cannot take the view that the failings of a professional agent can ordinarily be considered objectively reasonable as an excuse. If that was the position, then professional agents would be able to ignore deadlines for filing or undertaking other tasks safe in the knowledge that their clients could not be penalised because the clients would simply point to the failings of their various professional agents."

108. Furthermore, on the facts of this case, Mr Currie told HMRC on 18 May 2010 that the reason for the delayed submission was his own failure to access the relevant documents. He did not blame his accountants. It also follows that he cannot have believed "all was well" on the basis that it was being handled by his accountants, as he said was the case in his letter to the Review Officer.

Bankruptcy

109. CJV also raised the risk of Mr Currie's personal bankruptcy, and the effect which enforcing the determination would have on other creditors, such as Mr Currie's mortgage lenders.

110. The bankruptcy proceedings to collect the amounts shown on the determinations form a constant background to the special relief appeal. Mr Shaddick and Mr Harbord self-evidently did not consider either the risk of personal insolvency or the possible consequential effect on other creditors as sufficient to meet the Condition A test. Again we agree.

111. If the taxpayer does not have sufficient funds to pay the tax charged by a determination, he may go bankrupt. This does not of itself make enforcement of the determination "completely unreasonable." To find otherwise would mean that a taxpayer could always succeed in a special relief claim if enforcement risked bankruptcy, and that cannot be right.

112. Similarly, when a creditor enforces a liability there is always a risk that its collection will disadvantage other lenders. Again, that cannot of itself make enforcement unconscionable.

113. This is not the same as saying that bankruptcy and the effect on other creditors are never relevant factors, but rather that neither automatically satisfies the Condition A test. It would be for the claimant to explain why, on the facts of a particular case, those outcomes would be unconscionable. In Mr Currie's case, no such facts were put to the Review Officer.

Matters not taken into account

114. The tax returns submitted disclose other matters which could have been taken into account. How does Mr Currie support himself, given that his returns show significant negative net income for both years? How credible is it that he received precisely the same income from his work as a barristers' clerk in two tax years? Is it a coincidence that £100 a week for 48 weeks comes to £4,800, the figure disclosed on the tax returns? How likely is it that his self-employment expenses were identical in both years?

115. In our judgment, Mr Harbord could have found that the SA returns did not provide reliable or credible evidence in support of Mr Currie's special relief claim. Of course, had he done so, it would only have reinforced his opinion that the relief should not be granted.

Our decision

116. We find that the Commissioners' opinion that Mr Currie did not meet the requirements of Condition A to be reasonable. Mr Harbord did not fail to consider relevant matters or consider irrelevant matters; there was no fettering of his discretion; the decision was not perverse or wholly unreasonable and there is no other reason why the decision was flawed in a judicial review sense.

117. As a result, we refuse Mr Currie's appeal against the closure notice and the amendment of his claim to special relief.

Further findings of fact

118. As already explained, we make the following further findings of fact in relation to the evidence provided at the hearing. None of it was supplied to Mr Harbord for the review decision. On the basis of our analysis of the statutory provisions, these further facts are therefore only of relevance if the Tribunal can decide for itself whether or not the decision to enforce the determination is unconscionable (as in *Maxwell*) rather than being limited to deciding whether Mr Harbord's opinion was unreasonable in a judicial review sense (as we think is correct).

119. Mr Currie changed his accountants largely because of disputes over fees, but one firm (Rayner Essex) rejected him as a client because he refused to provide bank statements and other documents so as to allow them properly to complete the returns.

120. At the time of the 2005-06 and 2006-07 determinations, Mr Currie owned at least three rental properties as well as his own house, which had four bedrooms. We say "at least three" because Mr Currie's evidence about his properties was vague and contradictory. He told us that he had "six or seven addresses" and said "I own most of them" but later that he was the landlord of only three properties.

121. He was also improbably vague about when the properties were purchased: at one point he said that he had purchased his most recent property in 2009, then changed this to 2004-05, before saying it might have been even earlier. We are unable to make any findings as to when the properties were purchased.

122. Mr Currie has mortgages on all his properties, but said he had no idea how much the monthly payments were for any house, apart from the one he is currently occupying, which is around £500 a month. He was unable even to estimate or give us an approximate figure. Since mortgage costs are usually the most significant of a landlord's expenditure, we found it difficult to believe that he was unable to give the Tribunal even a rough estimate of his monthly costs. We find that it is more likely that he was unwilling to do so.

123. Mr Currie said he had used a self-certification process to obtain his mortgages but was unable to remember the earnings figures he had given to his broker. Again, he was not able to provide even an approximate figure to the Tribunal.

124. Mr Currie's rents are collected in cash or cheque by an agent, who also handles all the repairs. When asked about receipts and other documents relating to the rental properties Mr Currie said "sometimes I keep it and sometimes I don't."

125. Mr Currie was also unable to remember how many bank accounts he had, but thought it was around 4 or 5, but said he could not recall why he needed so many different accounts. We find as a fact that he had at least 4-5 bank accounts.

126. When working as a barristers' clerk Mr Currie told us that he was paid on a commission basis, with the total amount available for the clerks being divided up by the deputy head of chambers on a monthly basis and we find that to be a fact. He also said he received £100 a week. We make no finding on the quantum of his earnings as a barristers' clerk.

Unconscionable?

127. Were the Tribunal to make its own decision as to whether it was unconscionable for HMRC to collect the tax shown on the determinations, this further evidence would be very unhelpful to Mr Currie. He has significant assets and does not keep proper books and records. In the light of his further evidence about being paid on a commission basis as a barristers' clerk, it is even less likely that his earnings were exactly £100 a week, so as to make the total of £4,800 shown on his SA returns.

128. There is nothing here to support his appeal, and on the basis of this further evidence, taken together with our earlier findings of fact, we would have had no hesitation in deciding that it was not unconscionable of HMRC to enforce the determination.

Appeal rights

129. 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.

ANNE REDSTON
TRIBUNAL JUDGE

RELEASE DATE: 10 September 2014