TC04509

Appeal number: TC/2014/04451

Income Tax – Determinations for 2002/03 to 2007/08 – Whether special relief appropriate – Whether unconscionable to pursue tax – Yes – TMA 1970 Schedule I AB, para 3A(4)

FIRST-TIER TRIBUNAL
TAX CHAMBER

JOHN CLARK **Appellant**

- and -

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

TRIBUNAL: JUDGE KENNETH MURE, QC
MEMBER: MRS CHARLOTTE BARBOUR, MA, CA, CTA

Sitting in public at George House, 126 George Street, Edinburgh on 15 May 2015

Appellant:- Mr John Lynch, LLB, CA

Respondents:- Mrs C Cowan, Officer of HMRC

DECISION

Introduction

1. This is an appeal against the respondents' refusal to grant Special Relief in respect of Determinations for 2002/03 and the five subsequent Years for a total income tax liability, as now adjusted, of £17,779.94. The respondents' stance is set out in their review letter of 17 July 2014 (tab 4, p67-69). The issue for us to determine is whether it is *unconscionable* for the respondents to seek payment of this considering the particular circumstances of the appellant. He failed to submit Returns timeously to displace the Determinations. He is dyslexic. Further, he has serious learning difficulties, having a mental age of about 12. He relied on his wife to attend to his "paperwork" but they separated in March 2003 and she has since died.

The Law

2. The Taxes Management Act 1970, Schedule I AB, para 3A provides:-

> "(3) … 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 …".

Reference was made also to:-

William Maxwell v HMRC [2013] UKFTT 459 (TC);

Stephen Campbell TC/2013/07124;

Donald F Currie v HMRC [2014] UKFTT 882 (TC);

Gary Austin v HMRC [2010] UKFTT 312 (TC); and

J N Dimensions Limited v HMRC [2011] UKFTT 653 (TC)

The Evidence

3. The only witness led was the appellant himself. He approved the terms of his Witness Statement (Tab 5). He gave his evidence with the assistance of Mrs Simpson, who read out all written documents put to him. He explained that his wife dealt with his correspondence. In the summer of 2003 she had registered him with the respondents as a self-employed painter and decorator, which was the case for 2002/03 and 2003/04. He worked about three days per week. The appellant ceased this work in March 2004 and did not re-commence self-employment until 2013. In the interim he worked periodically as an employee subject to PAYE. The appellant and his wife separated in March 2003 (she died in 2013). The appellant has suffered severely from depression. His daughter, a schoolgirl as at her parents' separation,

stayed with him and he had sole responsibility for her care. He had to realise savings to subsist at that stage.

4. In early 2006 there was a fire at his house, causing extensive damage. He could not return to live there for almost a year, possibly not until early 2007. His daughter left his house in January 2009.

5. The applicant explained that he had no recollection of receiving tax returns or demands for payment nor would he have appreciated the significance of such documents. He had received a "charge" from the respondents in February 2010 in respect of tax allegedly due, but he had not appreciated its significance. With his daughter's assistance he had written to the respondents in June 2011. There had been no reply: the letter was simply returned, marked "sent to wrong department". Later the appellant had tried to progress matters with the respondents at three meetings in their Dunfermline office but without success. He was unable to communicate satisfactorily with their staff as they had not appreciated his learning difficulties.

6. The appellant explained that he had difficulties with reading, writing and spelling. He confirmed that he never had an answer-phone and that he had not met any officer of the respondents at his home.

7. In cross-examination the appellant was pressed by Mrs Cowan to explain how he had managed to deal with other "paperwork" matters at the material time, during which he could have lodged Returns to displace the Determinations and delay any obligation to pay tax. He explained that he had had some help from his daughter and younger son after his wife had left him. The house insurance had been paid by bankers' order. He accepted that he had been able to make an election under the Miners' Pension Benefit Scheme, but he explained that its implications had been the matter of general discussion with former work-mates and he was thus well familiar with its terms.

8. The appellant denied receiving any of the 23 statements recorded as having been issued by HMRC as summarised at Tab 8, p1-23. He accepted that he had managed to secure payment of child benefit for his daughter which his wife had been claiming improperly. A friend and his son had assisted in resolving this. The negotiation had been conducted by phone. The appellant disputed Mrs Cowan's inference that he had been "selective" about when he sought others' advice and that he had made a conscious decision not to pay tax. He indicated that he felt acutely embarrassed by his literacy problems, and that he had not even confided fully in his sons about the practical extent of these difficulties.

9. In a brief re-examination the appellant insisted that on visiting HMRC's offices at Dunfermline he had explained that he had difficulties reading and writing and that he could not spell. He had asked an official there to complete a form for him but (correctly, we were advised) she spelled out the words required to reply, which he then wrote down in capital letters. It had taken him 15-20 minutes to write down four lines. He had gone alone to the tax office in Dunfermline.

10. In response to the Tribunal the appellant indicated that he had earned only very modest amounts when painting and decorating and would work only about three days per week.

11. We found the appellant an entirely credible witness. He was frank, candid and utterly lacking in guile. We had no hesitation in accepting his evidence as a true account of his difficulties in this matter.

12. There was before us a Report on the appellant by a chartered educational psychologist, Patricia Duggan. Its terms were not disputed. Mr Lynch referred us particularly to paras 61, 62, 67, 73, 74 and 75. It deals with the appellant's dyslexia but it considers also his general learning difficulties. The author's conclusion is that the appellant has an intellectual level of a primary school child.

13. No other evidence was led. In response to the Tribunal's enquiry Mrs Cowan explained that the investigating tax officer would not be led. She indicated that the Determinations had been made to best judgement and in the absence of any written records or accounts from the appellant. The respondents' practice was to make modest estimates of turnover and net profit. Research had been conducted into the profits typically generated by various businesses.

Submissions

14. We heard in turn from Mr Lynch and Mrs Cowan. Both had lodged earlier Notes of their Arguments which we found helpful.

15. Mr Lynch argued that recovery here would be *unconscionable* in the context of the legislation. Condition A, he submitted, had been met. The adjusted sum sought by the respondents, he noted, was now £17,779.94. The appellant had no recollection of receiving the various documents claimed to have been sent by the respondents. For much of 2006, a critical time, he had been unable to occupy his house because of fire damage. Correspondence from the local Sheriff Court relating to his sequestration had been returned marked "no answer" (Tab 7 p11). The Writ suing for the tax allegedly due had apparently to be served personally. The appellant did not have a telephone answering machine. (This was not challenged in cross-examination.) In any event the appellant, given his condition and learning difficulties, would not have been able to understand the terms and implications of HMRC's correspondence. It seemed that one of their representatives attempted to visit him to discuss matters, but had not succeeded in contacting him (Tab 7 p7). The Tax Returns lodged at Tab 4 p22-29 confirm that for the relevant Years the appellant did not have a tax liability. The commencement date of the appellant's trading had been notified, Mr Lynch observed, as "July 2003" (Tab 7 p2).

16. Next, Mr Lynch noted the reference to the CWF I form and procedural changes mentioned by Mrs Cowan. It indicated the business' commencement date of July 2003 but the date of its instruction, Mrs Cowan had claimed, was unclear. Mr Lynch questioned drawing any inference that it had been made belatedly (Tab 7 p19).

17. After the appellant and his wife had separated, the appellant was primarily concerned about his daughter. He was not then able to rely on his wife's assistance to deal with correspondence. He had given full cooperation, so far as he was able, to other public authorities.

18. Finally, Mr Lynch referred to the case-law cited. He adopted as supportive the decision in *William Maxwell* (Tab 10) especially para 13. The other authorities cited by the respondents were distinguishable. In *Stephen Campbell* the hearing had proceeded in the absence of the appellant and without critical supporting evidence. In *Donald F Currie* there were serious issues as to the taxpayer's credibility. Dyslexia had been considered as insufficient in the context of *reasonable excuse* in *Gary Austin* and in *J N Dimensions Limited*. However, the circumstances in these cases were not comparable to the present appeal given the terms of the expert report.

19. For these reasons Mr Lynch urged us to allow the appeal.

20. In reply Mrs Cowan submitted that condition A was not satisfied. The test of it being *unconscionable* to enforce payment had not been met in her view. That test should be made at the date of the Determination. Had Returns been submitted timeously the Determinations would have been set aside.

21. Mrs Cowan explained that the tax assessed had been calculated to best judgement, on modest estimates of the turnover and profit of such a "one-man" business. This topic had been carefully researched. The supporting documents peculiar to the appellant's case were no longer available. When the Determinations were made the respondents were unaware of the appellant's exact level of earnings. There had not been any interchange of information between HMRC and other government departments, such as the DWP, at the material time. The DWP information produced at Tab 7 p1-3 had not been circulated to HMRC until 2007.

22. The appellant had had a three year opportunity to submit Returns and effectively displace the Determinations. This procedure was intended as a "prompt" to encourage the taxpayer to respond. The Determinations had been correctly raised, Mrs Cowan submitted. The procedure was not punitive, she added.

23. Mrs Cowan then referred to the appellant's letter "received" by HMRC on 12 February 2013 (Tab 4 p3-5). It refers to "difficult personal circumstances in the last three years". These, she surmised, were 2010-2013, but the time limit for lodging Returns had since passed (except for 2006/07 and 2007/08). Further, Mrs Cowan argued, the appellant had during the period in which Returns could have been submitted, the ability to seek help. He had encashed his pension entitlement under the Miners' Pension Scheme and he had made a claim for compensation under his house insurance policy. At p6 of her Skeleton Argument Mrs Cowan had queried why the appellant chose not to engage with HMRC before the expiry of the time-limit when he did deal with other significant matters. She could not accept that the appellant had not received any of HMRC's notifications recorded at Tab 8 p2-23. Further, she questioned the date of the notification of self-employment as at 2003: she suggested that there was no notification until December 2006 (Tab 7 p20). Mrs Cowan noted

the decisions in *Gary Austin* and *J N Dimensions Limited*, which considered dyslexia albeit in the somewhat distinct context of *reasonable excuse*. She stressed that the condition was of varying degree. It did not absolve a sufferer from his tax obligations. Here, the appellant had an obligation to seek appropriate assistance to comply with his obligations. HMRC had acted properly in the present instance. The appellant chose not to engage with HMRC, she continued. Special Relief was an exceptional remedy. It was not intended to benefit those who chose not to engage with HMRC. The *onus* of proof was on the appellant and had not been discharged. Accordingly the appeal fell to be dismissed.

24. In his concluding remarks for the appellant Mr Lynch urged us to regard the intimation of self-employment as at July 2003 to have been timeously made. The appellant's wife was now deceased and the respondents' CWF I form was not available. The record should be accepted at face value. The appeal in *Stephen Campbell* did not have the benefit of full and satisfactory evidence of the taxpayer's health difficulties. Here there was the psychologist's report (Tab 6). In its conclusion the level of comprehension of the appellant was categorised as being at primary school level.

Decision

25. On the basis of the appellant's evidence and the documentation before us we make the following **findings-in-fact:-**

(i) The appellant worked as a self-employed painter and decorator during the Years to 5 April 2003 and 5 April 2004. Thereafter until about February 2013 he was not self-employed, but for periods worked part-time as an employee within the PAYE system. He undertook labouring and general unskilled work then.

(ii) The respondents issued Tax Returns for the Years 2002/03, 2003/04, 2004/05 and 2005/06 to the appellant on 11 December 2006. None of these was filed by the due date of 18 March 2007. Consequently Determinations of tax liability in respect of these Years were made by the respondents on 30 April 2007. These could be displaced by Returns submitted by 18 March 2010. The respondents issued two further Tax Returns for the Years 2006/07 and 2007/08 to the appellant on respectively 6 April 2007 and 6 April 2008. Neither was filed by their due dates, *viz* 31 January 2008 and 31 January 2009. Consequently Determinations in respect of these Years were made by the respondents on 2 June 2008 and 2 June 2009. These could be displaced by Returns submitted by 31 January 2011 and 31 January 2012 respectively. Returns for these six Years were not received by the respondents until 10 July 2013.

(iii) These Determinations were made without reference to actual business records or other accounts prepared for the appellant showing his turnover and profit. The records produced by the respondents at Tab 4 p22-29 indicate that the appellant's income was less than his tax allowances for each of the relevant Years.

(iv) The appellant's wife attended to *inter alia* his tax affairs until about March 2003 when she separated from him. The appellant was dependent upon her to assist him with these matters. She died in February 2013. She registered the appellant as being a self-employed painter and decorator in July 2003.

(v) The appellant is dyslexic. His intellectual capacity is that of a primary school child of about 12 years. The Report (Tab 6) of Patricia Duggan, a Chartered Educational Psychologist, and relating to the appellant, is admitted and referred to for its terms.

(vi) The appellant's dwellinghouse at 8 Whinniehill Terrace, Carnock, Dunfermline, was extensively damaged by fire in early 2006. Certain contents including personal papers were destroyed. The appellant was unable to re-occupy the house for almost one year. The delivery and receipt of his personal mail was disrupted over an extended period.

(vii) In an effort to resolve his tax dispute with HMRC the appellant, with the assistance of his daughter, sent a letter dated June 2011 to them. It was handwritten by his daughter. It was returned by HMRC who did not act upon it. They advised that it had been sent to the wrong department.

(viii) Also and to that end the appellant attended personally at the respondents' offices at Dunfermline on three occasions in August and September 2011. He was afforded only limited assistance by the respondents' staff and the dispute remained unresolved. His literacy problems should have been obvious.

(ix) Since about April 2013 John Lynch & Co, CA, has acted on behalf of the appellant in this dispute. It has provided all supporting information relating to the Claim to the respondents. Their letter of 2 April 2013 (tab 4, p7) indicates that no tax was due by the appellant.

(x) The respondents presently seek to sequestrate the appellant in respect of tax liabilities of £17,779.94 as now amended for the relevant six Years.

(xi) The appellant suffered and was treated for depression during various periods since his wife left him in March 2003.

26. The appellant seeks *special relief* in terms of TMA 1970, Schedule I AB, para 3A, against his liabilities in terms of the respondents' determinations. (This measure superseded the earlier practice concession of *equitable relief* available until 2011.) The respondents refuse the claim, maintaining that condition A has not been satisfied (see sub-para (4)). That requires recovery of the tax to be *unconscionable*. There is only limited case-law dealing with the interpretation of para 3A, and that at First-tier Tribunal level.

27. The first aspect to be addressed is the sense of *unconscionable*. The term is not statutorily defined and recourse may be had to the dictionary sense. We agree with the general meaning of the term noted in *William Maxwell* at para 13, *viz* completely unreasonable, unreasonably excessive, or (we would add) inordinate, or outrageous. We are influenced also by Judge Redston's comments at para 95 of her decision in *Donald F Currie* and her references to the OED where the term is defined as meaning "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."

28. Next, we have to consider the nature and scope of our jurisdiction. Judge Redston considered helpfully the nature of the decision to be made by the Tribunal in the *Currie* case. She suggests (at para 19) that the Tribunal is to consider whether or not HMRC's decision was unreasonable, not to substitute its own view. We agree with this interpretation which is consistent with the reading of other similar provisions noted by her (paras 23 and 25).

29. Thirdly, it appears critical to us that we should consider the time and context in which recovery of the tax assessed in the Determinations is being contemplated. It is at that stage that the test of its being *unconscionable* is to be assessed in our view. Subsection (3) contemplates a claim having been made and the Commissioners assessing it. Subsection (4) refers to the process of recovery. Taken in conjunction the context then is that of recovery of tax where a claim under para 3A is made and supporting information provided. It is, in our view, pursuing recovery in light of the making of the claim for Special Relief and all the supporting information being provided for the Commissioners' consideration, which is critical. We found the respondents' reasoning set out in their letter of review (tab 4, p67-69) too narrow, inadequate, and lacking in consideration of the appellant's peculiar vulnerability. It ignores his inability to engage fully and satisfactorily with the tax authorities. It neither recognises nor makes any concession to his vulnerability.

30. Accordingly, the question of whether it was *unconscionable* for the respondents to refuse the appellant's claim is to be considered against a known background of the appellant's dyslexia, his general learning difficulties, his reliance on other family members in the absence of his wife, and the probable destruction of much of the relevant notifications from HMRC. We appreciate the thrust of Mrs Cowan's cross-examination that the appellant did "function" reasonably satisfactorily, considering his dealing with the house insurance claim, Miners' Pension's Option, and the transfer of payment of child benefit. However, each of these, we feel, had its distinct context. His wife had an interest in the insurance claim. The pension matter was one of popular discussion in the mining communities. The officials dealing with the transfer of payment of child benefit seem to have been more supportive. By contrast HMRC's response to the letter of June 2011 and at the interviews shortly after were inadequate and unsatisfactory given the appellant's personal difficulties. A further distinction in relation to these other matters is that the appellant was aware of there being a "live" issue. However, he did not appreciate the urgency and significance of the dispute with HMRC. We appreciate that at the interview when the tax officer spelled out the words of the response, only one – possibly inexperienced – officer was present. But it was an opportunity which should have at least alerted HMRC to the peculiar circumstances of this case. Since Mr Lynch became involved (this appears to have been in about April 2013 – Tab 4 p7), full information as to the appellant's condition and circumstances was made available. Notwithstanding the respondents still refuse the claim. The appellant appears to have been fully cooperative at all material times.

31. Given that context we consider that the respondents' refusal of the claim was unreasonable. We consider that pursuing recovery of the tax was *unconscionable* for purposes of Condition A. Accordingly the appeal is allowed.

32. 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.

KENNETH MURE
TRIBUNAL JUDGE

RELEASE DATE: 2 July 2015