Claiming special relief and the meaning of 'unconscionable'

Management of taxes

01 October 2015

LITRG discusses the recent FtT case John Clarke and the Commissioners for HMRC

Special relief (see TMA 1970 Sch 1AB para 3A) is a claim of ‘last resort’ for the taxpayer who has failed to comply with their tax obligations on time and has had a determination issued by HMRC but can show that the amount determined was excessive. The normal remedy for this situation would be a claim under para 3 (claim for relief for overpaid tax), but that is only possible within a four-year limit. Special relief may be claimed after the normal time limit has expired and so a safety net for taxpayers who have inadvertently missed deadlines.

Of course, there are conditions to be satisfied:

- it would be unconscionable to collect (or not to repay) the sum in question;
- the claimant’s tax affairs are up to date or arrangements are in place to make them so; and
- the claimant has not used special relief before (or there are exceptional circumstances why they should be allowed to use it again).

The recent First-tier Tribunal case of *John Clark v HMRC* [2015] UKFTT 0324 (TC) considered the meaning of the term ‘unconscionable’.

The facts of the case were relatively straightforward:

- Mr Clark was self-employed from some time in 2002/03 until around March 2004, and did not recommence self-employment until around 2013.
- HMRC had raised determinations, in the absence of tax returns for 2002/03 and the five subsequent tax years, showing a liability of more than £17,000.

- Mr Clark did not understand the nature of the correspondence issued to him and during that time had to deal with separation from his wife, caring for his daughter alone and a serious fire at his house in 2006 (when some of the tax returns were issued to him).
- Mr Clark was dyslexic and had severe learning difficulties, as evidenced by a report prepared by a chartered educational psychologist.
- In 2011 he wrote to HMRC, with the assistance of his daughter, to try to progress matters but the letter was returned to him because it had been sent to the incorrect department.
- Subsequently he had had meetings with an HMRC official in their tax offices. At one of these he took more than 10 minutes to write four lines of script that were spelled out for him: HMRC did not recognise that he was vulnerable.
- The tribunal accepted that Mr Clark had managed to deal with other administrative issues only because he had had support from family or friends in similar situations.
- Mr Clark had found a professional representative who had brought his affairs up to date and a special relief claim was lodged. HMRC rejected the claim on the basis that it was not unconscionable to reject the claim.

The tribunal noted there was only limited case law dealing with this point. But it accepted that unconscionable, in accordance with the judgment in *William Maxwell v HMRC* [2013] UKFTT 459 (TC) should mean 'completely unreasonable, unreasonably excessive, or (we would add) inordinate, or outrageous. We also note Judge Redston's comments at paragraph 95 of her decision in *Donald F Currie v HMRC* [2014] UKFTT 882 (TC) and her references to the Oxford English Dictionary 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."'

The tribunal also considered the scope of its jurisdiction and concluded it had to consider whether HMRC's view was unreasonable: it could not substitute its own view.
Finally, the tribunal considered when one had to apply the test of being 'unconscionable'. HMRC had argued that the test needed to be satisfied when the determinations were made. The tribunal rejected that argument and instead stated: '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.’

On that basis, the tribunal felt it was necessary to take into account the full facts on Mr Clark’s vulnerability and condition. These had been made available by Mr Clark’s agent to HMRC.

The tribunal allowed Mr Clark claim to special relief.