Appeal number: TC/2014/04895

INCOME TAX – HMRC determination for 2006-2007 – appellant out of time to displace determination - claim for special relief under TMA Sch 1AB para 3A – appeal against surcharges and penalties – whether enforcement of the determination is "unconscionable"- reasonableness of HMRC's decision that enforcement was not unconscionable – held decision was unreasonable - appeal against refusal to grant special relief upheld – appeal against penalties dismissed – surcharges reduced

FIRST-TIER TRIBUNAL
TAX CHAMBER

DR MONTSHIWA DOUG MONTSHIWA **Appellant**

- and -

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

TRIBUNAL: JUDGE NIGEL POPPLEWELL
MRS JANE SHILLAKER

Sitting in public at Bristol on 18 May 2015

Mr Joseph Howard, Counsel, instructed by Virbix Ltd, for the Appellant

Mr Michael Riordan, Officer of HM Revenue and Customs, for the Respondents

DECISION

Introduction and outline

1. This case concerns the availability of a claim for recovery of overpaid tax under Schedule 1AB of the Taxes Management Act 1970 ("TMA"), (commonly known as "special relief"), and in particular whether it would be "unconscionable" under paragraph 3A(4) of that Schedule for the respondents to recover the tax of £17,121 it claims is owed by Dr Montshiwa for the tax year 2006-2007.

2. Dr Montshiwa has also been assessed to late filing penalties of £200 ("penalties") and surcharges of £1,712.10 ("surcharges") for that year.

3. The respondents determined Dr Montshiwa's tax liability for that year as being £17,121. It is agreed that the actual amount of tax due from Dr Montshiwa on the basis of his income and expenditure for the 2006-2007 tax year is £325.71. Since Dr Montshiwa was out of time to challenge the determination by way submitting a self-assessment, his only remedy is to claim special relief.

4. In response to Dr Montshiwa's claim, the respondents opened an enquiry which they then closed on the basis that no special relief was available.

5. Dr Montshiwa sought a review of this decision, which upheld the conclusion that no relief was available. Dr Montshiwa, by way of a notice of appeal dated 3 September 2014, appealed to this Tribunal. This notice included an appeal against the surcharges and the penalties.

6. For the reasons given below, it is our decision that:

> (1) Dr Montshiwa's appeal against the closure notice issued in respect of his claim to special relief is upheld, and his tax liability for the year 2006-2007 is reduced to £325.71.
>
> (2) Dr Montshiwa's appeal against the penalties is dismissed.
>
> (3) The surcharges are reduced to £32.57.

The Relevant Legislation

Special relief

7. A person who is liable to pay income tax for a year of assessment is obliged to notify HMRC that he is so chargeable (Section 7 TMA).

8. HMRC may notify a person that he should complete and deliver a self-assessment tax return which identifies the amount of income tax to which that person is chargeable (Section 8 TMA).

9. In the absence of such return, HMRC are entitled to issue a person with a determination under Section 28C TMA. This Section is set out below.

> 28C 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) Where—

(a) proceedings have been commenced for the recovery of any tax charged by a determination under this section; and

(b) before those proceedings are concluded, the determination is superseded by such a self-assessment as is mentioned in subsection (3) above,

those proceedings may be continued as if they were proceedings for the recovery of so much of the tax charged by the self-assessment as is due and payable and has not been paid.

(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.

10. As can be seen from the foregoing:

(1) There is no right of appeal against a determination. The amount in the determination can only be displaced by the submission of a self-assessment.

(2) That self-assessment must be made within a three year period starting with the filing date. The filing date for Dr Montshiwa's 2006-2007 tax return was 31 January 2008, so any self-assessment to displace that determination had to be filed on or before 31 January 2011.

11. The specific provisions dealing with special relief which are relevant to the appeal are in paragraph 3A of Schedule 1AB TMA. These are set out below:

DETERMINATIONS UNDER SECTION 28C: SPECIAL RULES

3A(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) the claim falls within Case C (see paragraph 2(4)),

(ii) the claim falls within Case F(a) (see paragraph 2(7)(a)), or

(iii) more than 4 years have elapsed since the end of the relevant tax year (see paragraph 3(1)), and

(c) if the claim falls within Case F(a), the person was neither present nor legally represented during the enforcement proceedings in question.

(2) A claim under this Schedule for repayment or discharge of the amount may be made, and effect given to it, despite paragraph 2(4), paragraph 2(7)(a) or paragraph 3(1), as the case may be.

(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) For the purposes of sub-paragraph (6)—

(a) a person has relied on this paragraph on a previous occasion if the person has made a claim (or a composite set of claims involving one or more determinations, taxes and tax years) in reliance on this paragraph on a previous occasion, and

(b) it does not matter whether that claim (or set of claims) succeeded.

(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.

12. The procedure for making a claim for special relief is dealt with in Schedule 1A TMA . Paragraph 2 sets out details of the information that must be made as part of the claim. Paragraph 5 gives an officer power to enquire into a claim, and paragraph 7 provides that an enquiry into a claim is completed once HMRC issue a closure notice. If that closure notice allows or amends the claim, then HMRC must give effect to that amendment. A taxpayer has a right of appeal against the conclusion set out in the closure notice under paragraph 9 of Schedule 1A TMA.

13. Under Section 49A TMA, a taxpayer has a right to request HMRC to undertake a statutory review of the conclusion that HMRC have come to in the closure notice.

14. Section 49E TMA deals with the nature of such a review which in particular must "take account of any representations made by the appellant at a stage which gives HMRC a reasonable opportunity to consider them" (Section 49E (4)TMA).

15. Once the review has been concluded, the taxpayer has a right to notify his or her appeal to the Tribunal in which case the Tribunal is to determine the "matter in

question". Section 49I(1)(a) defines "matter in question" as the "matter to which an appeal relates".

Penalties

16. The legislation which is relevant to the penalties is Section 93 TMA which is set out below.

93 – Failure to make return for income tax and capital gains tax

(1) This section applies where –

(a) any person (the taxpayer) has been required by a notice served under or for the purposes of section 8 or 8A of this Act (or either of those sections as extended by section 12 of this Act) to deliver any return; and

(b) he fails to comply with the notice.

(2) The taxpayer shall be liable to a penalty which shall be £100.

(3) If, on an application made to them by an officer of the Board, the General or Special Commissioners so direct, the taxpayer shall be liable to a further penalty or penalties not exceeding £60 for each day on which the failure continues after the day on which he is notified of the direction (but excluding any day for which a penalty under this subsection has already been imposed).

(4) If –

(a) the failure by the taxpayer to comply with the notice continues after the end of the period of six months beginning with the filing date; and

(b) no application is made under subsection (3) above before the end of that period,

the taxpayer shall be liable to a further penalty which shall be £100.

(5) Without prejudice to any penalties under subsections (2) to (4) above, if –

(a) the failure by the taxpayer to comply with the notice continues after the anniversary of the filing date; and

(b) there would have been a liability to tax shown in the return,

the taxpayer shall be liable to a penalty of an amount not exceeding the liability to tax which would have been so shown.

(6) No penalty shall be imposed under subsection (3) above in respect of a failure at any time after the failure has been remedied.

(7) If the taxpayer proves that the liability to tax shown in the return would not have exceeded a particular amount, the penalty under subsection (2) above, together with any penalty under subsection (4) above, shall not exceed that amount.

(8) On an appeal against the determination under section 100 of this Act of a penalty under subsection (2) or (4) above, neither section 50(6) nor section 100B(2) of this Act shall apply but the Commissioners may –

(a) if it appears to them that, throughout the period of default, the taxpayer had a reasonable excuse for not delivering the return, set the determination aside; or

(b) if it does not so appear to them, confirm the determination.

(9) References in this section to a liability to tax which would have been shown in the return are references to an amount which, if a proper return had been delivered on the filing date, would have been payable by the taxpayer under section 59B of this Act for the year of assessment.

(10) In this section –

"the filing date" means the day mentioned in section 8(1A) or, as the case may be, section 8A(1A) of this Act;

"the period of default" in relation to any failure to deliver a return, means the period beginning with the filing date and ending with the day before that on which the return was delivered.

Surcharges

17. The legislation which is relevant to the surcharges is Section 59C TMA which is set out below.

59C.— Surcharge on unpaid income tax and capital gains tax.

(1) This section applies in relation to any income tax or capital gains tax which has become payable by a person, (the taxpayer) in accordance with section 55 or 59B of this Act.

(2) Where any of the tax remains unpaid on the day following the expiry of 28 days from the due date, the taxpayer shall be liable to a surcharge equal to 5 per cent. of the unpaid tax.

(3) Where any of the tax remains unpaid on the day following the expiry of 6 months from the due date, the taxpayer shall be liable to a further surcharge equal to 5 per cent. of the unpaid tax.

(4) Where the taxpayer has incurred a penalty under section 7, 93(5), 95 or 95A of this Act no part of the tax by reference to which that penalty was determined shall be regarded as unpaid for the purposes of subsection (2) or (3) above.

(5) An officer of the Board may impose a surcharge under subsection (2) or (3) above; and notice of the imposition of such a surcharge—

(a) shall be served on the taxpayer, and

(b) shall state the day on which it is issued and the time within which an appeal against the imposition of the surcharge may be brought.

(6) A surcharge imposed under subsection (2) or (3) above shall carry interest at the rate applicable under section 178 of the Finance Act 1989 from the end of the period of 30 days beginning with the day on which the surcharge is imposed until payment.

(7) An appeal may be brought against the imposition of a surcharge under subsection (2) or (3) above within the period of 30 days beginning with the date on which the surcharge is imposed.

(8) Subject to subsection (9) below, the provisions of this Act relating to appeals shall have effect in relation to an appeal under subsection (7) above as they have effect in relation to an appeal against an assessment to tax.

(9) On an appeal under subsection (7) above section 50(6) to (8) of this Act shall not apply but the Commissioners may—

(a) if it appears to them that, throughout the period of default, the taxpayer had a reasonable excuse for not paying the tax, set aside the imposition of the surcharge; or

(b) if it does not so appear to them, confirm the imposition of the surcharge.

(10) Inability to pay the tax shall not be regarded as a reasonable excuse for the purposes of
subsection (9) above.

(11) The Board may in their discretion—

(a) mitigate any surcharge under subsection (2) or (3) above, or

(b) stay or compound any proceedings for the recovery of any such surcharge, and may also, after judgment, further mitigate or entirely remit the surcharge.

(12) In this section—

'the due date', in relation to any tax, means the date on which the tax becomes due and payable; *'the period of default'*, in relation to any tax which remained unpaid after the due date, means the period beginning with that date and ending with the day before that on which the tax was paid.

Case law and legal principles

Special relief

18. There is little case law on special relief generally and paragraph 3A(4) of Schedule 1AB ("Condition A") in particular. The relevant cases are *William Maxwell v HMRC* [2013] UKFTT 459 (TC) ("*Maxwell*"), *Donald Fitzroy Currie v HMRC* [2014] UKFTT 882 (TC) ("*Currie*"), *John Clark v HMRC* [2015] UKFTT 0324 (TC) ("*Clark*") and *James Ronaldson Scott v HMRC* [2015] UKFTT 0420 (TC) ("*Scott*").

19. Of these, the cases we have found most helpful are *Currie* and *Scott*. *Currie* contains a comprehensive analysis of the various relevant legal principles which are germane to a consideration of special relief, and in particular Condition A and we gratefully adopt them; this was the approach taken in *Scott*.

20. In particular we, like the Tribunal in *Scott*, prefer *Currie* to *Maxwell* on the point of the Tribunal's jurisdiction when assessing HMRC's opinion. In *Maxwell*, the Tribunal considered that it was able to consider, afresh, whether it would be unconscionable for HMRC to enforce the determinations.

21. In contrast, *Currie* decided that in considering whether HMRC's opinion that Condition A does not apply, the Tribunal has to consider whether that was an unreasonable decision in the judicial review sense. The Tribunal could not look at matters afresh. It has to consider the evidence that was before the reviewing officer when coming to a decision as to whether his decision was a reasonable one.

22. Before us, neither party considered that we should follow *Maxwell*.

23. We prefer the *Currie* approach for the same reasons identified in both *Currie* and *Scott*. But it also seems right to us given that the consequence of a finding that a decision is unreasonable is that we can allow a taxpayer's appeal, (and so reduce the amount due by the amount of special relief claimed). In these circumstances it would be unfair to HMRC to admit additional facts which were not available to the reviewing officer at the date of his decision, but which had come to light since then. The reviewing officer's decision could then be impugned in the light of that subsequent information, and we do not think that is right, given he had no chance to consider it at the time that he came to his review decision.

24. There is one situation, of which we are aware, where this normal regime is ousted, and that concerns reviewing a decision to restore goods etc under the Finance Act 1994 and in particular Section 16(4) thereof.

25. In the case of *Gora & Others v Customs & Excise Commissioners* [2003] EWCA Civ 525 (Court of Appeal Decision) ("*Gora*"). Pil LJ accepted the arguments for Counsel appearing for the Commissioners regarding the Tribunal's jurisdiction;

> "Strictly speaking, it appears that under s 16(4) of the 1994 Act, the Tribunal would be limited to considering whether there was sufficient evidence to support the Commissioners' finding of blameworthiness. However, in practice, given the power of the Tribunal to carry out a fact-

finding exercise, the Tribunal could decide for itself this primary fact. The Tribunal should then go on to decide whether, in the light of its findings of fact, the decision on restoration was reasonable. The Commissioners would not challenge such an approach and would conduct a further review in accordance with the findings of the Tribunal".

26. As was pointed out by Judge Hellier in the case of *Harris v Director of Border Revenue* [2013] UKFTT 134 (TC)

> "11. There is one other oddity about this procedure. We are required to determine whether or not the UKBA's decision was "unreasonable"; normally such an exercise is performed by looking at the evidence before the decision maker and considering whether he took into account all relevant matters, included none that were irrelevant, made no mistake of law, and came to a decision to which a reasonable Tribunal could have come. But we are a fact finding Tribunal, and in *Gora and others v Customs & Excise Commissioners* [2003] EWCA Civ 525 Pill LJ approved an approach under which the Tribunal should decide the primary facts and then decide whether, in the light of the Tribunal's findings, the decision on restoration was in that sense reasonable. Thus we may find a decision is "unreasonable" even if the Officer had been, by reference to what was before him, perfectly reasonable in all senses." (emphasis added)

27. So the "normal" position is to consider the reviewing officer's decision in light of the information known to him at the time of making the decision.

28. Although this was not mentioned in *Gora*, one rationale for the different approach in *Gora* might arise from the sanctions available to the Tribunal under Section 16(4) Finance Act 1994.

29. Unlike the position relating to special relief, Section 16(4) Finance Act 1994 sets these sanctions out in detail; and limits the Tribunal's powers to a direction that the restoration decision (or otherwise) should cease to have effect; to require the Commissioners to conduct a review (or further review) of the original decision; and, where the review decision has been acted upon and cannot be remedied, a declaration that the decision is unreasonable. In none of these cases does the Tribunal have the right to make a substantive decision, (which we have in a special relief case). In the case of a restoration appeal, such a substantive decision would be one to restore the goods. There is simply the power to ask the Commissioners to undertake a second (or further review). In those circumstances, it would be open for the Tribunal to direct that the Commissioners should take into account facts which were available at the date of the subsequent review (i.e. the position is brought up to date). And so in these circumstances, it would seem reasonable that the Tribunal may take into account such up to date information when deciding whether the reviewing officer's decision is reasonable in a restoration case.

30. But, as mentioned above, there is no such sanction in the case of special relief. Our jurisdiction is to allow or dismiss the appeal (see paragraph 31(7)) below). And, as we say above, we think in these circumstances it is only fair to HMRC that the normal position applies; and the decision as to whether or not the reviewing officer has made a reasonable decision should be looked at in light of the information that was available to him and it should not be affected by information which has become available, subsequently.

31. From the legislation and the relevant cases we identify the following as the legal principles which are relevant to Dr Montshiwa's claim for special relief.

(1) "Condition A is that in the opinion of the Commissioners it would be unconscionable….". The Tribunal's jurisdiction when considering this condition 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 (*Currie* at paragraph 29(2)).

(2) The opinion of the Commissioners (and the decision of the Commissioners) which we are required to review is that of the reviewing officer who has undertaken the statutory review pursuant to Section 49A-C TMA (*Currie* at paragraph 32).

(3) "Unconscionable" is not defined in the statute. In *Currie* it was accepted as meaning "unreasonably excessive" or "completely unreasonable". In the bundle before this Tribunal, an extract from the Concise Oxford English Dictionary (1978 impression) defines "unconscionable" as "having no conscience; contrary to the dictates of conscience… not right or reasonable; unreasonably excessive…". We adopt such definition.

(4) The information which the reviewing officer has to take into account is set out in paragraph 3A(8) of Schedule 1AB TMA. The reviewing officer must take into account all relevant information provided by the taxpayer. A failure to take any such information into account may well vitiate the decision. That does not mean, however, that the reviewing officer has to unquestionably accept that information (*Currie* at paragraph 35).

(5) Under Section 49E TMA, the reviewing 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 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".

(6) Since this Tribunal's jurisdiction is limited to considering whether the reviewing officer's decision was unreasonable, we need to establish the information which was before that reviewing officer, and cannot take into account further evidence produced by either party at the hearing.

(7) The Tribunal has an appellate jurisdiction which limits it to allowing or dismissing the appeal (*Currie* at paragraph 42).

(8) We can allow the taxpayer's appeal if we find that HMRC's decision is unreasonable unless it is inevitable that the reviewing officer would have come to the same decision on the evidence before him (as per Lord Justice Neill in John Dee) *John Dee Limited v Commissioners of Customs and Excise* 1995 STC 941.

> "I turn therefore to the second matter raised in the appeal, I can deal with this very shortly.
>
> It was conceded by Mr Engelhart, in my view rightly, that where it is shown that, had the additional material been taken into account, the decision would inevitably have been the same, a Tribunal can dismiss an appeal. In the present case, however, though in the final summary the Tribunal's decision was more emphatic, the crucial words in the Decision were:
>
> > "I find that it is most likely that, if the Commissioners had had regard to paragraph (iii) of the conclusion to Mr Ross' report, their concern for the protection of the revenue would probably have been fortified."
>
> I cannot equate a finding "that it is most likely" with a finding of inevitability.
>
> On this narrow ground I would dismiss the appeal."

(9) In deciding whether the reviewing officer's decision was unreasonable, we should follow the approach summarised by Lord Greene MR in *Associated Provisional Picture Houses Limited v Wednesbury Corporation* [1948] 1 KB 223:

> "The court is entitled to investigate the action of the local authority 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. Once that question is answered in favour of the local authority, it may be still possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it."

(10) As Lady Hale has recently said, in *Braganza v BP Shipping* [2015] UKSC 17 at [24], this test has two limbs:

> "The first limb focuses on the decision-making process - whether the right matters have been taken into account in reaching the decision. The second focusses upon its outcome – whether even though the right things have been taken into account, the result is so outrageous that no reasonable decision-maker could have reached it. The latter is often used as a shorthand for the Wednesbury principle, but without necessarily excluding the former."

(11) The Tribunal is, therefore, not concerned with reviewing the merits of the decision, but rather the lawfulness of the decision-making process (*Scott* at paragraph 32).

Penalties

Late appeal

32. As regards the late appeal against the penalties (and indeed the surcharges) the respondents raise two points.

33. Firstly, the appeal itself was made out of time in that Dr Montshiwa, knowing and realising on his return to the UK in September 2011 that he had been assessed to penalties and surcharges in his absence, made no appeal against these until 10 October 2012.

34. As regards a late appeal, the position is governed by Section 49 TMA. Broadly speaking, an appellant may seek to agree with the respondents that he should be permitted to submit a late appeal, but in the absence of any such agreement, the Tribunal has a discretion to admit a late appeal if it gives permission to the appellant to do so.

35. The respondents consider that Dr Montshiwa's appeal against the penalties (and indeed the surcharges) was made in his letter to them of 10 October 2012. He made no request for a review, and so the appeals should have been notified to the Tribunal on or before 11 December 2012. The appeals were not so notified until 3 September 2014. Section 49H TMA requires the appeal to be notified within 30 days from the date on which an offer of review was sent to Dr Montshiwa (that date was 12 November 2012).

36. In these circumstances, under Section 49H(3) TMA, Dr Montshiwa can only make a valid notification to the Tribunal if we give permission for him to do so.

37. Our discretion is set out in the Tribunal Procedure (First-tier Tribunal (Tax Chamber) Rules 2009 SI 2009/273 (as amended) ("the Rules", each a "Rule")

38. Under Rule 20(4) provides that if a notice of appeal is provided after the end of any period specified in an enactment, but the enactment provides that an appeal may be made or notified after that period with the permission of the Tribunal, "the notice of appeal must include a request for such permission and the reason why the notice of appeal was not provided in time....".

39. Rule 20 is however subject to the overriding objective of the Rules which is contained in Rule 2 ie.to enable the Tribunal to deal with cases fairly and justly.

40. Rule 2(2) then states:

"(2) Dealing with a case fairly and justly includes-

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, and the anticipated costs and the resources of the parties;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Tribunal effectively;

(e) avoiding delay, so far as compatible with proper consideration of the issues."

41. Rule 2(3) states:

"(3) the Tribunal must seek to give effect to the overriding objectives when it-

(a) exercises any power under these rules; or

(b) interprets any rule or practice direction.

42. The matters that this Tribunal should consider as to whether the time limit should be extended, (and so admit Dr Montshiwa's late appeal), have been set out in the case of *Leeds City Council v The Commissioners for Her Majesty's Revenue & Customs* [2014] UKUT 0350 (TCC) ("*Leeds City Council*").

43. In that case, Judge Bishopp approved the approach adopted by Morgan J, sitting in the Upper Tribunal, in *Data Select* and identified the relevant passage from Morgan J's decision as being:

"[34]…Applications for extensions of time limits of various kinds are commonplace and the approach to be adopted is well established. As a general rule, when a court or tribunal is asked to extend a relevant time limit, the court or tribunal asks itself the following questions. (1) what is the purpose of the time limit? (2) how long was the delay? (3) is there a good explanation for the delay? (4) what will be the consequences for the parties of an extension of time? and (5) what will be the consequences for the parties of a refusal to extend time. The court or tribunal then makes its decision in the light of the answers to those questions".

44. Judge Bishopp went on to say, at paragraph 19 of *Leeds City Council*:

"19 In my judgment therefore the proper course in this tribunal, until changes to the rules are made, is to follow the practice which has applied hitherto, as it was described by Morgan J in *Data Select.*

Reasonable excuse

45. If we decide that we should give Dr Montshiwa permission to make and notify his appeal against the penalties out of time, we then have to consider whether he has a reasonable excuse for failing to submit a tax return for the year 2006-2007 in which he should have included his income from self-employment between 6 April 2006 and 8 May 2006 of £6,844 (Section 93(8)(a) TMA).

46. The test for determining whether a taxpayer has a reasonable excuse is, we consider, an objective test. with subjective elements; and we adopt, with gratitude, the principles promulgated by Judge Brannan in the case of *Stuart Coales -v- The Commissioners for Her Majesty's Revenue & Customs* [2012] UKFTT (477), set out below:

> *"Meaning of "reasonable excuse"*
>
> 25. Under Section 59C(9)(a) I can, however, set aside the surcharge determination if it appears that, throughout the period of default, the taxpayer had a reasonable excuse for not paying the tax. The onus is on the appellant to satisfy me that there was a reasonable excuse. The statute provides (Section 59C(10)) that inability to pay the tax shall not be regarded as a reasonable excuse.
>
> 26. In this context, I consider the reasonable excuse exception to be an objective test applied the individual facts and circumstances of the appellant in question.
>
> 27. In *Bancroft and another v Crutchfield (HMIT)* [2002] STC (SCD) 347 in relation to Section 59C (9)(a) the learned Special Commissioner (Dr John Avery Jones CBE) stated:
>
> > "A reasonable excuse implies that a reasonable taxpayer would have behaved in the same way. A reasonable taxpayer would at least have read the literature issued by the Revenue…"
>
> 28. The concept of "reasonable excuse" appears throughout VAT and direct tax legislation in respect of the imposition of surcharges on penalties. There is a considerable amount of case law in this tribunal as well as its predecessors (the VAT and Duties Tribunal and the Special and General Commissioners). It is not possible to do justice to all these decisions but I think that helpful guidance can be obtained from the decision of the VAT Tribunal in *The Clean Car Company Limited v C & E Commissioners* [1991] VATTR 239 and I can do no better than quote from the passage where the Tribunal (HH Judge Medd OBE QC) said:
>
> > "So I may allow the appeal if I am satisfied that there is a reasonable excuse for the Company's conduct. Now the ordinary meaning of the word 'excuse' is, in my view, “that which a person puts forward as a reason why he should be excused”.

> A reasonable excuse would seem, therefore, to be a reason put forward as to why a person should be excused which is itself reasonable. So I have to decide whether the facts which I have set out, and which Mr Pellew-Harvey [for the Appellant] said were such that he should be excused, do in fact provide the Company with a reasonable excuse.
>
> In reaching a conclusion the first question that arises is, can the fact that the taxpayer honestly and genuinely believed that what he did was in accordance with his duty in relation to claiming input tax, by itself provide him with a reasonable excuse. In my view it cannot. It has been said before in cases arising from default surcharges that the test of whether or not there is a reasonable excuse is an objective one. In my judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do? Put in another way which does not I think alter the sense of the question: was what the taxpayer did not an unreasonable thing for a trader of the sort I have envisaged, in the position the taxpayer found himself, to do? … It seems to me that Parliament in passing this legislation must have intended that the question of whether a particular trader had a reasonable excuse should be judged by the standards of reasonableness which one would expect to be exhibited by a taxpayer who had a responsible attitude to his duties as a taxpayer, but who in other respects shared such attributes of the particular appellant as the tribunal considered relevant to the situation being considered. Thus though such a taxpayer would give a reasonable priority to complying with his duties in regard to tax and would conscientiously seek to ensure that his returns were accurate and made timeously, his age and experience, his health or the incidence of some particular difficulty or misfortune and, doubtless, many other facts, may all have a bearing on whether, in acting as he did, he acted reasonably and so had a reasonable excuse. Such a way of interpreting a statue which requires a court to decide an issue by judging the standards of the reasonable man is not without precedent of the highest authority, though in a very different field of the law. (See *DPP v Camplin* ([1978] 2 All ER 168)."

29. I agree with the Tribunal's views. In my view, this decision clearly explains that the test is an objective one: it involves considering the actual circumstances of the taxpayer in question but applying an objective analysis of those circumstances."

Surcharges

Late appeal

47. The respondents take the same point in respect of late notification of the appeal against the surcharges as they do in respect of the penalties. Accordingly, the same principles set out at paragraphs 32 - 44 above apply to the appeal against the surcharges.

Reasonable excuse

48. Under Section 59C(9) TMA, we can set aside the surcharges if Dr Montshiwa has a reasonable excuse for not paying the tax on which they are based. The principles which we should adopt in respect of reasonable excuse here are the same as those in respect of the penalties, and are as set out at paragraphs 45-46 above.

Evidence

49. The Tribunal was provided with two substantial bundles of documents which contained the correspondence between the parties, the notice of appeal, HMRC's Statement of Case, a synopsis of the penalties visited on the appellant, and the appellant's Statements of Account. Both parties also provided extremely helpful Skeleton Arguments and, in respect to a Direction to this effect, written submissions following the adjourned hearing.

50. Dr Montshiwa gave oral evidence on oath and was cross-examined by Mr Riordon. We found him to be an honest and credible witness.

51. We remind ourselves at this stage, however that as set out in paragraph 31(6) above we can consider only the information which was available to the reviewing officer at the time that he was undertaking his review. So we cannot take into account fresh evidence provided thereafter, including evidence provided to this Tribunal at the hearing and in subsequent submissions.

Findings of fact

52. Dr Montshiwa was born and educated up to secondary level in Botswana and then came to the UK to train as a medical doctor (paediatrician) at the Queen's Medical Centre in Nottingham. In 1992 he returned to Botswana to work in a hospital and then returned to the UK in January 1994 to specialise in paediatrics. He remained in the UK until 8 May 2006 when he returned to Botswana with his family in order to work for the health authority and run a paediatric clinic there.

53. Between 30 October 1997 and 31 January 2006 Dr Montshiwa delivered completed self-assessment returns for the 9 years 1996-1997 to 2004-2005 inclusive.

54. A notice requiring a 2005-2006 return was sent to Dr Montshiwa at his address at 17 Rotton Park Road, Birmingham B16 9JH ("Rotton Park Road") on or shortly after 6 April 2006.

55. A notice requiring a 2006-2007 return was sent to Dr Montshiwa at Rotton Park Road on or shortly 6 April 2007.

56. Dr Montshiwa did not receive either of the foregoing notices.

57. Penalty notices for the years 2005-2006 and 2006-2007 were also sent to Dr Montshiwa at Rotten Park Road in 2008.

58. Dr Montshiwa owned two apartments in the UK at the time of his departure in May 2006 and put the letting of those apartments into the hands of letting agents (Fishers) who collected the rents and deducted tax therefrom under the non-resident landlord scheme.

59. Prior to leaving the UK in May 2006, Dr Montshiwa's tax affairs were undertaken by his accountants Clark Darby (later Clark & Deen).

60. These accountants ceased to represent Dr Montshiwa in 2009.

61. Notices of the first and second surcharges imposed on Dr Montshiwa for the year 2006-2007 were sent to Rotton Park Road on or around 5 November 2009.

62. Determinations made under Section 28C TMA for 2005-2006 and 2006-2007 were sent to Dr Montshiwa at the address above on or around 22 September 2009.

63. HMRC's determination for 2006-2007 was in the sum of £17,121 (comprising two statutory payments on account of £6,848, each derived from the amount payable for 2005-2006, plus an additional amount of £3,425).

64. On 7 February 2011 HMRC telephoned Dr Montshiwa in Botswana.

65. On 18 July 2011 an unsigned 2005-2006 paper return was received by HMRC which was sent back to Dr Montshiwa (in Botswana) for signature.

66. On 6 September 2011 completed and signed "paper" returns for 2005-2006 and 2006-2007 were received by HMRC.

67. Dr Montshiwa returned to live in the UK on 11 September 2011.

68. On 29 September 2011 HMRC wrote to Dr Montshiwa indicating (incorrectly) that the time limit for displacing the 2006-2007 determination by way of a self-assessment ran out on 5 April 2011. They also indicated that "all penalties for 2006-2007 had been cancelled". (This is clearly not the case.)

69. In a letter dated 12 November 2012 HMRC correctly noted the date for displacing the 2006-2007 determination was 1 February 2011 and not 5 April 2011, as set out in their letter of 29 September 2011.

70. On 10 October 2012 Dr Montshiwa wrote to HMRC indicating he wished to appeal for a reduction in his tax bill.

71. HMRC responded to this letter on 12 November 2012 indicating, amongst other things, there was no right of appeal against the determinations; the only way the

determinations could be displaced was by submission of a self-assessment, and Dr Montshiwa was out of time for submitting such a self-assessment for the years 2005-2006 and 2006-2007.

72. On 14 February 2013 Dr Montshiwa's new agent, Tania Oxley, acting on behalf of the accountancy firm AIMS, wrote to HMRC and included with that letter a revised self-assessment tax return for the year 2006-2007, which identified that Dr Montshiwa had profits from his self-employment between 6 April 2006 and the date on which he left for Botswana (expressed to be 20 May 2006 in that letter, but this appeared to be a mistake since he left on 8 May 2006) of £6,844 (as well as rental property losses), and included a revised self-assessment tax return, which indicated that the tax due for the 2006-2007 tax year was £325.71.

73. Following the exchange of further correspondence in 2013, Tania Oxley submitted a formal claim for special relief to HMRC on 1 October 2013.

74. On 3 February 2014, HMRC wrote to Dr Montshiwa giving notice of enquiry into the claim for relief.

51. On 1 May 2014 HMRC wrote to Dr Montshiwa telling him that they had concluded their enquiry. That letter comprised a closure notice. In the opinion of the Commissioners, the criteria for a claim for a special relief had not been met and Dr Montshiwa's claim for special relief for the years 2005-2006 and 2006-2007 was rejected.

75. On 20 May 2014 Tania Oxley appealed against the decision in the closure notice and indicated that Dr Montshiwa was to be represented by a new agent, Simon Bruce of Virbix Limited ("Virbix") since Dr Montshiwa had moved to live in Somerset.

76. On 5 June 2014 HMRC wrote to Tania Oxley offering Dr Montshiwa a statutory review, which offer was taken up by Virbix on 17 June 2014.

77. On 8 August 2014 HMRC wrote to Virbix giving the review conclusion, which was that the original decision was upheld.

78. On 3 September 2014 the appellant notified an appeal by way of a notice of appeal to this Tribunal, appealing against the decision not to grant special relief following the enquiry (as evidenced in the closure notice) and the failure to amend that decision on review. The appeal was also against the penalties and surcharges which had been assessed on Dr Montshiwa.

Special relief

The review decisions

79. As mentioned at paragraph 31(1) above, our role is to consider whether the HMRC reviewing officer came to an unreasonable decision in refusing the claim for special relief.

80. In this case, there appear to be three review decisions contained in three letters ("the Review Letters") sent to the appellant's agent.

81. The latest, dated 8 August 2014 reflects the review undertaken in response to the offer, made by HMRC, and accepted by Virbix, to undertake a statutory review of the decision of 1 May 2014 rejecting Dr Montshiwa's claim for special relief ("the August 2014 Review").

82. This review was undertaken by Mr P S Harbord, a special relief technical manager.

83. In that letter he says (amongst other things).

> "*My review has accordingly been limited to the year 2006-2007 and my conclusion is that the decision in the letter dated 1 May 2014 should stand.*
>
> *My reason for this is:*
>
> *I have reviewed all of the information available to HMRC at the time the determination for 2006-2007 was raised on 22 September 2009 and have also taken into account any other subsequent information provided in support of the claim for relief. There is no evidence to show that, in addition to the amount of the determination which has been made to the best of information and belief, there is any other circumstance which shows it to be unconscionable to recover the full amount due under the determination. I have also had regard to a letter from Dr Montshiwa to HMRC dated 10 October 2012 when he stated that he may have omitted informing HMRC that he had relocated abroad and the examples in HMRC manual SACM12240 which refers to moving on without providing a forwarding address and taking responsibility to file returns on time.*
>
> *Based on all the available information, I can find nothing to show that your client was prevented by any reason outside of his control from completing a return of income for the year 2006-2007 and submitting it at any time between 31 January 2008 and 30 January 2011.*
>
> *If you accept my conclusion please write to let me know".*

84. The letter of 1 May 2014 which comprises the closure notice provides no reasons as to why the Commissioners consider Condition A not to have been satisfied. It simply says:

> "*In the opinion of the Commissioner of HMRC condition A, as defined in paragraph 3A(4) Schedule 1AB TMA 1970 has not been satisfied and the claim for special relief in the sum of £8,369.88, and £17,121.00 for the years 2005/ 2006 and 2006/2007 respectively is refused*".

85. The possibility of a claim for special relief was first raised in a letter from Tania Oxley to HMRC of 17 April 2013 in which she indicates that having taken specialist

tax advice she wishes to claim that Dr Montshiwa's affairs be dealt with under the special relief conditions, and indicates that:

> "*We consider a determination of £17,121 is excessive when the actual tax liability for this year was only £326*".

86. In response to this, on 19 August 2013 (the "August 2013 Review"), Mr M Shaddick, Collector, responded that:

> "*in order to satisfy the conditions for special relief a proper claim for relief made by your client is necessary. However, based upon 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 of his control at the relevant time.*
>
> *The legislation states that HMRC cannot simply disregard the time limit for making self-assessments if it appears that a determination might be excessive. There must be further circumstances that make it unconscionable to review the full amount due under the determination or not to repay an amount already paid.*"

87. The letter goes on to indicate that the definition of "unconscionable" is explained in an extract (included with the letter) from the HMRC guidance at SACM12240.

88. It was on 1 October 2013 that Tania Oxley, on behalf of Dr Montshiwa, made a formal claim for special relief, as requested by Mr Shaddick. In her letter of that date she states:

> "*I note that SACM12240 defines unconscionable as "completely unreasonable" or "unreasonable excessive". I would argue that this case falls within both definitions, particularly the latter. To determine a tax bill of £17,121 (with subsequent penalties and interest of over £6k on top of this) when the actual tax liability was £326 has to be, I suggest, considered unreasonably excessive.*
>
> *On this basis, I believe that it is unconscionable for HMRC to seek to recover tax and penalties of this magnitude.*
>
> *I do not intend to reiterate any of the background information here (with my client leaving the UK etc, but if any further details are needed please do not hesitate to contact me and I will be happy to provide them).*"

89. This letter prompted a response some three days later on 4 October 2013 (the "October 2013 Review") in which Mr Shaddick says as follows:

"*Having reviewed the content of your letter, the previous correspondence in our records, it remains my view that your client's claim does not meet the criteria for special relief as 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 of his control at the relevant time.*

I note that in your letters you refer to the amounts and the determinations made by HMRC as "unreasonably excessive" compared with the tax liabilities shown on the returns submitted. However, at the time that the determinations were made they were based on the last tax return submitted by your client for the year 2004-2005, which showed a tax liability due of £11,414.00, plus appropriate increases in accordance with HMRC guidance at that time. Your client did not indicate on the 2004-2005 tax return submitted that his self-employment income or his income from property sources had ceased, and therefore the determinations were made based on the tax liability shown on the last return submitted.

I would also refer you to my letter dated 19 August 2013 which stated that "the legislation states that HMRC cannot simply disregard the time limits for making self-assessments if it appears that a determination might be excessive. There must be further circumstances that make it unconscionable to recover the full amount due under the determination or not to repay an amount already paid."

90. Mr Shaddick, the author of this letter, then refers Ms Oxley to certain elements of HMRC's guidance at SACM12240, which relate to Condition A, which include a person ceasing self-employment; moving abroad and failing to respond to HMRC; and being negligent in that they have failed to act appropriately in relation to their tax affairs, notwithstanding that they have a responsibility to pay tax and file returns on time. These are the same provisions to which Mr Harbord refers in the August 2014 Review.

Submissions on behalf of the respondents

91. The respondents submit as follows:

(1) The structure of the self-assessment regime, and the special relief regime, in TMA, is that the four year time limit to displace a determination, by way of a self-assessment, is the norm, and should only be exceeded in exceptional circumstances.

(2) This approach is consistent with the everyday meaning of unconscionable and the view taken by the Tribunal in *Maxwell*.

(3) In particular the four year time limit also applies to HMRC's ability to make an assessment where there has been a loss of tax, unless it is attributable to careless or deliberate behaviour. The assessment time limit is intended to provide finality and certainty for both the public and HMRC and should be applied consistently to both.

(4) It would be inconsistent to allow the claim simply because the amount sought exceeds the amount that would otherwise have been due.

(5) Dr Montshiwa's explanation for failing to provide a return at the appropriate time was that he mistakenly forgot to advise HMRC of his departure from the UK and didn't complete a self-assessment form for that year. The respondents believe that the background to this failure is such that their decision was not unreasonable.

(6) In the context of the information available at the time HMRC made the Section 28C determination for 2006-2007, the amount sought was reasonable.

(7) Dr Montshiwa knew that he had to make returns in lights of the nine returns that he provided for 1996-1997 – 2004-2005 in respect of the 2006-2007 tax year.

(8) He failed to notify HMRC that he was leaving the UK, and he failed to submit a return for the short period the tax year 2006-2007 when he was in the UK. It was reasonable for him to have realised that he needed to submit such a return.

(9) The determination was made to the best of information and belief.

(10) The determination was correctly raised and is legally enforceable.

(11) The self-assessment return to displace that determination was submitted out of time. The fact that the determination may have been higher when compared to the liability is not in itself sufficient for a successful claim to special relief.

Submissions on behalf of Dr Montshiwa

92. In his original and supplemental submissions, Mr Howard made five substantive submissions as to relevant and irrelevant matters which should or should not have been taken into account by the reviewing officer and, by failing to do so (or doing so), the decision not to give special relief is an unreasonable one.

93. In a nutshell these are:

(1) Dr Montshiwa had no opportunity to challenge the determination, and submit a self-assessment to displace it, since he was outside the UK.

(2) At the time that Dr Montshiwa became aware of the determination on 7 February 2011 (at the earliest) he was already out of time to file a self-assessment (and in this regard, HMRC supplied him with misleading information as to the date by which he had to submit a self-assessment to displace that determination).

(3) Dr Montshiwa did not act deliberately or carelessly in causing HMRC to know that he was non-resident. He believed that Fishers would operate the non-resident landlord scheme in respect of his letting income and

that HMRC would, as a consequence, know that Dr Montshiwa was non-resident (and so out of the country).

(4) The weight attached to HMRC's view that the appellant has acted carelessly if not deliberately in trying to avoid his UK tax liability has been given too much weight. It is an irrelevant factor and should not have been taken into account by the reviewing officer.

(5) The amount of tax that HMRC are seeking to collect is so excessive compared to the amount due that it is unconscionable to collect it. The amount determined is £17,121, the amount of tax due is £325.71. HMRC do not dispute this amount. The determination is 52 times the amount of tax actually due. This is "inordinately excessive" on any reasonable basis. It is manifestly unjust to seek to collect this amount in light of the amount actually due.

Burden and standard of proof

94. This is an appeal, by Dr Montshiwa, against the decision made in the closure notice that he is not entitled to special relief. Dr Montshiwa appeals on the ground that Condition A is satisfied and the respondents have come to an unreasonable decision that Condition A is not satisfied. As such, it is governed by paragraph 9(1)(a) of Schedule 1A TMA.

> "If, on an appeal notified to the tribunal, the tribunal decides that a claim which was the subject of a decision contained in a closure notice under paragraph 7(3) above should have been allowed or disallowed to an extent different from that specified in the notice, the claim shall be allowed or disallowed accordingly to the extent that appears appropriate, <u>but otherwise the decision in the notice shall stand good</u>" (emphasis added).

95. The wording emphasised above reflects the tail piece in Section 50(6) TMA in respect of which there is considerable jurisprudence. The implication of the tail piece wording in Section 50(6) TMA is that it is the taxpayer that has the burden of proving that the assessment is excessive. It is the view of this Tribunal that the same principle applies to an appeal under paragraph 9 of Schedule 1A TMA. The standard of proof is the usual civil standard; namely, the balance of probabilities.

Discussion

96. We start this discussion by reminding ourselves that our jurisdiction is limited to considering whether, in the judicial review sense, the reviewing officer's decision that Condition A was not satisfied (i.e. it would be conscionable to enforce the determination) is an unreasonable one, unless it is inevitable that the reviewing officer would have come to the same decision on the evidence before him.

97. Secondly, we can only consider the information which is available to the reviewing officer and not information that has been made available since then.

98. We start, therefore, by looking at the decisions contained in the Review Letters namely the August 2014 Review, the August 2013 Review and the October 2013 Review.

99. We have done this, notwithstanding that the relevant decision is that of the reviewing officer (i.e. Mr Harbord) who undertook the August 2013 review, since Mr Harbord's review letter does build on, and take into account, the contents of the August 2013 review and October 2013 review.

100. Taking these together, it is our view that the bases of the decision by HMRC that it would not be unconscionable (or to put it more neatly, it would be conscionable) to enforce the determination of £17,121, when the actual tax liability was only £325.71, are:

(1) There was either insufficient information to show, or the information available to HMRC showed, that Dr Montshiwa was prevented from complying with his legal obligation to complete the appropriate tax returns within the time allowed by a reason outside of his control at the relevant time ("reason outside of his control").

(2) The determinations were made to the best of the information and belief of HMRC/based on the last tax returns submitted by Dr Montshiwa for 2004-2005 ("best judgment").

(3) The reviewing officer had regard to the examples in HMRC Manual SACM 12240.

(4) There must be further circumstances that make it unconscionable to review the full amount due under the determination or not to repay an amount already paid.

101. Pausing there, the statement in paragraph 100(4) above is no real reason. It is simply a statement of principle, but we mention it since the respondents do appear to be citing it as a reason for justifying that it would be conscionable to recover the full amount.

102. The August 2013 Review shows that HMRC reviewed all information available to them at the time the determination was made on 22 September 2009. Mr Harbord also had regard to Dr Montshiwa's letter of 10 October 2012, and also makes it clear that he has considered "all the available information". We consider that this means that he had reviewed the file and so would have been aware of all the correspondence passing between the parties up to that date. In particular, he would have been aware of the letter of 1 October 2013 in which Tania Oxley made a formal claim for special relief, and in which she indicates that the tax bill determined by HMRC of £17,121 (on top of which there are surcharge penalties and interest) is considerably greater than the actual tax liability of £325.71.

103. HMRC accept that £325.71 is the correct amount, and there is nothing in any of the review letters which suggests otherwise.

104. What, however, is abundantly clear is that neither Mr Harbord, nor Mr Shaddick (who undertook the August 2013 Review and the October 2013 Review) have addressed the point raised by Tania Oxley in her letter of 1 October 2013.

105. The definition of unconscionable which we have adopted and which is accepted by HMRC includes the phrase "unreasonably excessive". Excessive here means excessive in a numerical or arithmetical sense.

106. The sum of £17,121 is substantial in absolute terms. It is also significant in relative terms, being some fifty two times the amount for which Dr Montshiwa is actually liable (£325.71). It is also some two and half times the amount of self-employed income earned by Dr Montshiwa for the period in question. It is our view that both in absolute and relative terms, the amount determined is substantially greater, or substantially in excess, of the amount actually due.

107. In the circumstances, it is incumbent on the respondents to take this substantial excess into account, and to consider whether that excess is an unreasonable one.

108. There were a number of opportunities for the reviewing officers to do this, but none took it. Nowhere in any of the Review Letters is any mention made of the numbers submitted by Tania Oxley. All that is said is that "there must be further circumstances that make it unconscionable to review the full amount under determination...".

109. We think that once a taxpayer has identified that the amount sought by HMRC is numerically excessive, it is then incumbent on HMRC to consider whether that excess in association with other factors (such as those identified in SACM 12240) is unreasonable. The reasonableness or otherwise of that excess is a function, therefore, of the interplay of the excess with these other factors. Where the excess is very large in absolute and relative terms the impact of the other factors will need to be considerable if it is to displace that excess as the determining factor. Where the excess is numerically smaller, the other factors will carry more weight in determining reasonableness.

110. In addition to the information that Tania Oxley gave in her letter of 1 October 2013, she also offered to provide further information should HMRC require it. HMRC sought no further information regarding the numerical discrepancy identified by her.

111. It seems to us that no further information was required to deal with the numerical disparity between the amount determined and the amount actually due. HMRC should have considered that disparity. There is nothing in the Review Letters which suggests that they considered that it was either an irrelevant factor or a relevant factor but one which did not render their decision unconscionable because it was not unreasonably excessive. This might have been due to Dr Montshiwa leaving the UK without putting his tax affairs in order (for example).

112. But, either way, HMRC should have addressed the point. It is not for us to say what conclusion HMRC should have come to had they addressed it. But it is up to us

to decide whether or not, having addressed it, they would have inevitably come to the same conclusion (namely that it was conscionable for them to enforce the determination). We find that it was not inevitable that this was the case.

113. HMRC's failure to take this information into account (they might have done so but the reasons given for their Review Letters does not evidence this) renders the decision that Contention A is not satisfied as Wednesbury unreasonable. They have failed to take into account a hugely significant matter which they should have taken into account. We also consider that the amount determined is manifestly excessive in relative and absolute terms and note that HMRC did not consider Tania Oxley's representations about this at all. In our view this renders the decision so outrageous that no reasonable decision-maker could have reached it.

114. So we find that the decision is flawed since HMRC failed to take into account relevant information. But it is also flawed in that they failed to give reasons why it was the case that the amount was reasonably excessive. Clearly, it is difficult for HMRC to give reasons if they have not addressed the point in the first place, and there is no evidence that they considered the numerical discrepancy at all.

115. As set out by Kenneth Parker J in the case of *R (on the application of Lunn and others*) *v Revenue & Customs Commissioners* [2011] EWHC240 (admin), there is currently no general duty at common law to give reasons for a decision. However, the courts have recognised many circumstances in which procedural fairness requires that reasons should be afforded to a person affected by an adverse decision.

> "[56] The general position was explained by Sedley J (as he then was) in *R v Higher Education Funding Council exp Institute of Dental Surgery* [1994] 1 All ER 541 at 666:
>
> "In the light of such factors each case will come to rest between two poles or possibly at one of them: The decision which cries out for reasons, and the decision for which reasons are entirely inapposite. Somewhere between the two poles, is the dividing line separating those cases in which the balance of factors calls for reasons from those where it does not. At present there is no sure indication of where the division comes. Asked to give an example of the kind of decision in which in the light of his submission fairness will *not* require reasons to be given, Mr Pannick was unable or unwilling, at least without further reflection, to commit himself. No doubt the common law will develop, as the common law does, case by case. It is not entirely satisfactory that this should be so, not least because experience suggests that in the absence of a prior principle irreconcilable or inconsistent decisions will emerge. But from the tenor of the decisions principles will come and if the common law's pragmatism has a virtue it is that these principles are likely to be robust. At present, however, this court cannot go beyond the proposition that, there being no general obligation to give reasons, there will be decisions for which fairness does not demand reasons. It follows that in appraising each case, the present included, too catholic an approach will amount to generalising what is still a

particular obligation….. though we are not prepared to accept Mr Beloff's contention that it is any longer an exceptional one.

[57.] In my view this was a case where fairness required that reason should be given to explain the termination of CLAC's authorised tax agency".

116. In *Patsy Barber White v HMRC* [2012] UKFTT 364 (TC), a case involving special circumstances under Schedule 24 Finance Act 2007, a regime where, like the special relief regime, HMRC have a discretion, the court said

"68. It is true that the common law "at present", does not recognise a general duty to give reasons for administrative decisions..... however in many cases if a public body, such as HMRC, fails to give reasons for its decision it will be found to have acted unlawfully....

69. In this case, paragraph 17(3)(b) envisages this tribunal having to decide whether HMRC's decision is flawed in the judicial review sense of that term. A failure to give reasons for a decision makes this task almost impossible. It would not then be possible to determine whether the decision-maker applied the correct legal test, whether he took into account all relevant factors or whether he took account of irrelevant factors. In short a failure to give reasons makes it almost impossible for the tribunal to determine the issue of *Wednesbury* unreasonableness. Parliament must have envisaged that an officer of HMRC deciding whether to exercise the discretion in paragraph 11 would give reasons for the decision. For this reason, we consider that the failure by Mr Bains to give reasons for his conclusion that there were no special circumstances with the result that no reduction of the penalty should be made under paragraph 11, meant that HMRC's decision was flawed".

117. We accept that in Dr Montshiwa's case, HMRC did give some reasons for their decision. But they gave no reasons as to why the numerical disparity between the amount determined and the amount actually due was reasonably excessive.

118. Given that the definition of unconscionable means something which is unreasonably "excessive", it is our view that Parliament must have intended that the reviewing officer would give reasons as to why, in the face of a numerical disparity, he considered the excess to be a reasonable one.

119. It is our decision, therefore, that the decision by HMRC that Condition A was not satisfied by Dr Montshiwa is an unreasonable one. That is sufficient for us to dispose of this appeal. However, other grounds were advanced by Dr Montshiwa as to why the review decision was unreasonable.

120. Before addressing those we make a further point.

121. We think it is almost inevitable that all cases involving a claim for special relief will involve a numerical disparity between the amount determined and the amount actually due.

122. A failure by reviewing officers to give adequate reasons to their decision that an amount determined is reasonably excessive (and so conscionable) runs the risks of having that decision being overturned by a Tribunal.

123. But this is not just a question of the appellate jurisdiction of the Tribunal; it is a matter of courtesy. If a taxpayer provides reasons why he thinks his claim should succeed, it is, with respect to HMRC, incumbent as a matter of good (if not best) practice to address that argument and to explain, if that argument is found wanting, why that is.

124. We also note that the Taxpayer's Charter which identifies what a taxpayer might expect from HMRC, identifies that one such expectation is that HMRC will "be professional and act with integrity" which includes the statement that HMRC will "make decisions in accordance with the law and published guidance and explain them clearly to you" (emphasis added).

125. This has clearly not happened to Dr Montshiwa in this case.

126. We turn now to Mr Howard's further submissions.

127. He considers that HMRC's view that Dr Montshiwa has acted carelessly if not deliberately in trying to avoid his UK tax liabilities has been given too much weight. With respect to Mr Howard, we are not certain that HMRC are saying that Dr Montshiwa acted carelessly if not deliberately in respect of the special relief claim. They are saying it only in respect of the penalties and surcharges. No submissions were made by Tania Oxley to the reviewing officers regarding Dr Montshiwa's behaviour. We do not think, therefore, that the reviewing officers took this into account and therefore it was an irrelevant matter. We reject this submission.

128. Similarly, we reject the submission that the reviewing officer should have taken into account the fact that by the time Dr Montshiwa became aware that he had to file a self-assessment (February 2011) he was already out of time to do so. The subsequent "misleading" of Dr Montshiwa that he was still in time to submit a return to displace the determination is, equally, unpersuasive. Since there was no possibility of Dr Montshiwa displacing the determination because he was out of time, it is our view that it could only be a relevant factor if it could be shown that HMRC had deliberately withheld that information from Dr Montshiwa when they knew of his whereabouts before February 2011 and yet decided they would not contact him with the Machiavellian intention of preventing him from availing himself from the possibility of displacing the determination by contacting him out of time. There is no evidence to that effect. This point does not affect the conscionability of HMRC's enforcement on the determination. We would also observe that Tania Oxley made no submissions on this point to the reviewing officers.

129. Similarly, Mr Howard's submission that Dr Montshiwa did not act deliberately or carelessly in causing HMRC to know that he was non-resident is not a submission that attracts us per se. However, in conjunction with his submission that Dr

Montshiwa had no opportunity to challenge the determination to submit his self-assessment since he was outside the UK, we consider this submission has more merit.

(1) We remind ourselves that what we are considering is whether this is something that HMRC should have taken into account. And whilst we are interested in whether, having taken this into account, it is inevitable they would have come to the same conclusion, it is not for us to judge what the outcome of an enquiry into that matter, would have been.

(2) Even though Tania Oxley did not specifically mention this in her submissions, it was known to HMRC at the time that the reviews were undertaken, that Dr Montshiwa had left the UK in May 2006 and it was not until February 2011 that he was contacted by them. As mentioned at paragraph 83 above, Mr Harbord in the August 2014 Review Letter says that his conclusion is "based on all the available information". We believe this would include the information that Dr Montshiwa was not contacted until February 2011.

(3) In these circumstances, Dr Montshiwa's ability to displace the determination by a timeous self-assessment is, we believe, a relevant factor.

(4) To take two extreme examples. Let us say that Dr Montshiwa had contacted HMRC, in writing, in May 2006 before he left the UK, and told them that he was leaving, and that all communications should be sent to him at an address in Botswana. Nothing should be sent to his Rotton Road address since no-one would be living there, and that he would deal with any communications from HMRC from his address in Botswana. Contrary to those instructions, HMRC then send all communications to his address at Rotton Road. In these circumstances we believe that it would be unconscionable for HMRC to then enforce a determination that had been sent to Rotton Road contrary to specific instructions.

(5) In contrast, if Dr Montshiwa had left the UK and given no instructions regarding the forwarding of mail, etc, and everything was then sent to Rotton Road, then it is, frankly, less easy for Dr Montshiwa to say that it was unconscionable that any adverse consequence arising from that failure should be something from which he should be exonerated.

(6) The point, however, is that the opportunity to displace the determination is a relevant factor and the circumstances surrounding that opportunity (or lack of it) should have been considered by the reviewing officers.

(7) In HMRC's submissions, considerable emphasis is placed on this which illustrates that they too consider it to be a relevant factor.

(8) In both the August 2014 Review and the October 2013 Review, reference is made to the examples in HMRC Manual SACM 12240 (in the former by reference, in the latter they are set out in full). In the August 2014 Review, Mr Howard says that he has "had regard" to these examples. In the October 2013 Review Mr Shaddick says simply "I would refer you to HMRC's guidance …… which states that ….."

(9) Can it really be said that they made their decisions having taken into account the relevant matter of Dr Montshiwa's ability to displace the determination by a timeous self-assessment? HMRC's submissions make many points on the circumstances of Dr Montshiwa's departure and failure to notify HMRC. But were those really taken into account by the reviewing officer? It is difficult for us to substantiate Mr Harbord's assertion. It is easy to put an extract of the manuals in a letter or to say that regard has been had to them. But what is required in our view, is an explanation as to why those examples (and equally importantly, the principles which those examples reflect) apply to the particular circumstances under review. The points made in HMRC's submissions to us are good ones, but the appropriate time to make them was in the Review Letters.

(10) And so by failing to give sufficient reasons as to why the principles evidenced by the examples in SACM 12240 applied to Dr Montshiwa, and rendered the decision to enforce the determination a conscionable one, HMRC's decision is unreasonable in the Wednesbury sense.

130. We should also say, in passing, that the best judgment reason is irrelevant. Although Mr Howard made no specific submission on this point in the context of reasonableness, he did mention it in his supplemental written submission where he says in passing:

> "The points made by the Respondents in relation to "best judgement" are irrelevant. There has been no challenge to the determination on the basis that HMRC has not used best judgement in making the determination. It is manifestly a fair, reasonable determination to have made based on the appellant's past tax returns."

131. We agree with both points. HMRC have behaved wholly reasonably in using the 2004-2005 returns as the basis for the determination in the absence of any clear indication from Dr Montshiwa that he was leaving the UK about one month into the 2006-2007 tax year. In these circumstances, the determination has been made to best judgment.

132. But like Mr Howard, we do not see the relevance of this. There is no challenge to the best judgment determination.

133. We would make one final point regarding the respondent's submissions. It seems to us that these were aimed more at showing why it was inevitable that, even if the reviewing officer had taken into account all relevant matters, and had disregarded all irrelevant matters, he would have come to the same conclusion. They do not deal with justifying why the reviewing officer arrived at a reasonable decision.

Decision- special relief and closure notice

134. For the foregoing reasons, we uphold Dr Montshiwa's appeal against the closure notice and reduce his tax liability for the year 2006-2007 to £325.71.

Penalties and surcharges

Submissions

135. The respondents submit as follows.

(1) As regards the late appeal and late notification of the appeal, Dr Montshiwa returned to the UK on 11 September 2011 where he would have found (even if he did not know about them before) notifications of the penalties and surcharges. Yet he did not make any appeal against those until 10 October 2012, and even then did not notify the appeal until 3 September 2014. He had been in correspondence (either himself or through his agents) with HMRC throughout 2013 and he should have realised that he had to appeal, and to notify that appeal, within the time limits provided by statute. He should have given some thought to the documents that he had received and it is reasonable to expect him to have realised that he either hadn't responded to HMRC's offer of a review or, having made a conscious decision not to seek one, to then proceed in accordance with the information given by HMRC in their letters to him.

(2) Furthermore, Dr Montshiwa, contrary to Rule 20, has given no explanation as to why the appeals were made, (and then notified) late.

(3) If, however, the Tribunal does give permission to appeal, out of time, then the respondents do not believe that Dr Montshiwa has a reasonable excuse either against the penalties (for failing to submit the relevant self-assessment tax returns on time) or the surcharges (for failing to make the payments identified in the determinations on time). The respondents believe that the delay in delivering the returns and paying late were due to Dr Montshiwa's neglect if not deliberate behaviour.

(4) The 2005–2006 and 2006–2007 paper returns delivered by Dr Montshiwa included warnings about penalties, surcharges and interest on the front pages, and the previous nine years returns provided by Dr Montshiwa contained similar warnings.

(5) The respondents had previously charged a late return penalty for 2002-2003 to Dr Montshiwa which was subsequently capped at "nil" in line with the amount due for the year, and had previously imposed surcharges for 1998-1999 of £46.24, and for 2003-2004 of £496.60.

(6) Had Dr Montshiwa looked at the returns or given any thought to the appropriate matters, it is reasonable to expect him to have appreciated the consequences of failing to provide the return on time and failing to pay the correct amount of tax and NIC on time.

136. In respect of the penalties and surcharges, Mr Howard made few, if any, submissions in either his original skeleton argument, or supplemental submissions, or at the hearing himself. He appeared to concede that if we were to deny the claim for special relief, Dr Montshiwa would not take any point on the penalties or the surcharges; by which we take him to mean that Dr Montshiwa would accept his liability to pay the penalties and surcharges imposed by HMRC.

Discussion

Late appeal

137. It is clear that Dr Montshiwa was late in both making his appeal against the penalties and surcharges, and in notifying that appeal to the Tribunal.

138. It is equally clear that, contrary to Rule 20, his notice of appeal included no request for permission to notify his appeal late, nor did it provide any reasons why his notice of appeal was not notified in time.

139. Mr Howard has made no submissions on these points.

140. But we are obliged to consider Rule 20 in light of our overriding obligation in Rule 2, and in accordance with the principles set out in *Leeds City Council* as regards giving permission for an out of time appeal and notification thereof.

141. Notwithstanding the reasons given by the respondents as to why we should not permit the late appeal, and the fact that no reasons were given by Mr Howard on behalf of Dr Montshiwa as to why we should do so, we do give Dr Montshiwa permission to appeal, and notify that appeal, out of time for the following reasons:

(1) Although the delay is considerable, no prejudice has been caused to the respondents, (nor will it be caused) by granting permission and hearing the appeal. HMRC have not submitted that there have been any wasted costs (or will be any wasted costs) associated with this late appeal. And there are, nor will there be, adverse consequences for the respondents by granting permission.

(2) If the appeal had been made and notified on time, we have no doubt that it would have been held over pending clarification of the claim for special relief. It would not have been heard independently of that claim. One reason for this is that the surcharges are calculated as a percentage of the tax due. If, therefore, this Tribunal decides (as it has) that the tax due should be reduced, then the surcharges must be reduced too. It is inconceivable that a Tribunal would hear an appeal against the surcharges independently of the hearing for the claim for special relief. In these circumstances, the appeal against the penalties would also be stood over in order that all the relevant issues could be heard at one time. So even if the appellant had made an in time appeal and notification against the penalties and surcharges, the hearing itself in relation to those two matters would not have taken place until now.

(3) We recognise that one reason for imposing time limits is to ensure that there is finality in litigation. But, as mentioned above, in the circumstances of this case finality as regards the penalties and surcharges would have had to wait until finality was achieved in respect of the special relief claim.

Reasonable excuse

Penalties

142. However, having permitted Dr Montshiwa to appeal and notify out of time, we find that he has no reasonable excuse for failure to submit his tax return for 2006 - 2007.

143. We remind ourselves that the burden of proving that he has a reasonable excuse is on Dr Montshiwa, the standard of proof being on the balance of probabilities.

144. As mentioned at paragraph 136 above, Mr Howard has made no, or no substantive, submissions that Dr Montshiwa has a reasonable excuse for having failed to submit the 2006-2007 tax return.

145. On a review of the papers, and Dr Montshiwa's witness statement, it seems to us that the only possible grounds for reasonable excuse are that Dr Montshiwa put his tax affairs in the hands of his accountants before he left for Botswana in May 2006; and/or he relied on Fishers, his property agents to ensure that the correct amount of tax was deducted, under the non-resident landlord scheme, in respect of the letting income that was generated by his rental properties during that tax year.

146. As regards any reliance on Fishers, this submission has no substance save in respect of the rental income. It is clear that Fishers jurisdiction did not extend to advice or compliance relating to Dr Montshiwa's income from self-employment of £6,844 for the period between 6 April 2006 and 8 May 2006.

147. Reliance on an agent can, (and has been) a reasonable excuse in certain circumstances. Cases tend to show that this depends on whether the agent is acting as a compliance agent, or whether the agent is providing substantive tax advice which proves to be incorrect. Courts tend to be more sympathetic as regards the latter (as does HMRC) where the taxpayer has done everything in his reasonable power to ensure that his tax affairs are correct, as opposed to the former, where the cases tend to show that reliance on an agent to complete and submit a tax return, which is submitted out of time, cannot be a reasonable excuse even if the reliance is reasonable.

148. All cases turn on their own facts. We think it is feasible that a taxpayer would have a reasonable excuse even if his agent was acting only in a compliance capacity if the taxpayer has done everything in his power to ensure that the agent has the information and the penalty arises only because of the agents failure.

149. However, Dr Montshiwa is miles away from establishing that he did everything in his power to provide his agents with the information that they needed in order to submit his tax return for 2006-2007 both timeously and accurately. Indeed there is no evidence that Dr Montshiwa asked them to do this, at all.

150. Dr Montshiwa had submitted UK tax returns for his income for nine years between 1996-1997 and 2004-2005 and was clearly aware that he had an obligation to pay tax in the UK in accordance with the self-assessment regime. Indeed, he has not suggested otherwise.

151. So he would have known (or had he given it any thought he should have known) that he was liable to tax in 2006-2007 for the income generated whilst he was in the UK from his self-employment (and thereafter in respect of his property rental income). And should, therefore have completed and submitted a self-assessment tax return reflecting his tax position for that year.

152. He failed to do so until 14 February 2013.

153. In these circumstances we reject any claim by Dr Montshiwa that he had a reasonable excuse for failing to submit his tax return for the year 2006-2007 on time.

Decision - penalties

We dismiss Dr Montshiwa's appeal against the penalties and uphold HMRC's assessments for the penalties in the amounts of £200.

Surcharges

154. However, the position regarding surcharges is very different. In light of the decision we have made in respect of special relief, Dr Montshiwa's reliance on reasonable excuse for failing to pay the surcharges is largely irrelevant.

155. The reason for this is that under Section 59C(7) and (8). TMA:

> "(7) an appeal may be brought against the imposition of a surcharge under subsection (2) or (3) above in the period of 30 days beginning with the date on which the surcharge is imposed.
>
> (8) subject to subsection (9) below, the provisions of this Act relating to appeals shall have the effect in relation to an appeal under subsection (7) above as they have affect in relation to an appeal against an assessment to tax".

156. Under Section 50(6) TMA:

> "If on an appeal notified to the Tribunal, the tribunal decides:
>
> (a) .....
>
> (b) ……
>
> (c) ….that the appellant is overcharged by an assessment other than a self-assessment.
>
> The assessment or amount shall be reduced accordingly, but otherwise the assessment or statement shall stand good"

157. Taken together these provisions permit this Tribunal to treat the appeal against the surcharge as if it were an appeal against an assessment, and to reduce the assessment (and thus the surcharge) if we so decide.

158. In light of our decision to grant special relief, and thus reduce Dr Montshiwa's tax liability to £325.71, it is our view that the surcharges, too, should be reduced to 10% of that amount i.e. £32.57.

Decision - surcharges

159. It is our decision that Dr Montshiwa's liability for surcharges for the tax year 2006-2007 is £32.57.

Appeal Rights

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.

NIGEL POPPLEWELL
TRIBUNAL JUDGE

RELEASE DATE: 26 OCTOBER 2015