

## Overpayment relief (Lecture P1313 – 13.03 minutes)

When a taxpayer has paid insufficient tax, most advisers will understand the situations where HMRC can collect the additional tax. If there is no open enquiry, then it is a question of whether a discovery assessment can be raised and over what period.

The position is not as flexible where there has been an overpayment of tax. There is the possibility of claiming 'overpayment relief' (previously this was called 'error or mistake relief') but it is much more limited in application than the ability of HMRC to collect underpaid tax.

The legislation was amended for claims made on or after 1 April 2010 and is found in Sch.1AB TMA 1970 for income tax and capital gains tax and Para.51 Sch.18 FA1998 for corporation tax.

This applies where a taxpayer has paid tax (and this includes tax under a contract settlement) which he subsequently believes is not due. The taxpayer can make a claim for the tax to be repaid or the assessment (if applicable) to be discharged. The claim must be a standalone claim and cannot be made in a self-assessment return.

The claim must be made within four years of the end of the relevant tax year, which is relatively short deadline. The case of *Lauricella* [2012] TC02218 found that an out of time claim cannot be made. Additionally, the Court of Appeal (in the case of *R&C Commrs v Raftopoulou* [2018] BTC17) found that the provisions of s118(2) TMA1970 did not apply in the case of overpayment relief. This provides that a time limit is not to be treated as missed provided that the taxpayer had a reasonable excuse for missing the deadline and any failure is remedied without unreasonable delay once the reasonable excuse ceases to exist. The reason it does not apply in relation to overpayment relief is because the claim is a voluntary act and not a requirement.

Taxpayers have also tried to claim repayment of tax under common law where the claim has been outside the time limit (most recently in *Wallace v R&C Commrs* [2018] BTC2) but the High Court held that this regime sits in parallel with common law and cannot be superseded by it.

There are a number of circumstances where HMRC are not required to give effect to a claim to overpayment relief.

These are as follows:

- Where the amount paid is excessive by reason of:
  - A mistake in a claim, election or notice;
  - A mistake in making/giving or not making/giving a claim, election or notice;
  - A mistake in allocating expenditure to a pool or in bringing a disposal value into account for capital allowances purposes; or
  - A mistake in making or not making an allocation of expenditure or bringing into account or not bringing into account a disposal value for capital allowances purposes.
- Where the taxpayer can take other action in order to obtain relief

- Where the taxpayer could have taken action but a time-limit has expired and where the taxpayer knew, or ought reasonably to have known that relief was available
- Where the grounds for the claim have already been put to a court or tribunal or to HMRC in appealing against the amount determined by a tribunal
- Where the taxpayer knew, or ought reasonable to have known, of the grounds for the claim before the latest of:
  - the date on which an appeal in the course of which the grounds could have been put forward was determined by a court or tribunal;
  - The date on which the taxpayer withdrew a relevant appeal to a court or tribunal; or
  - The end of the period in which the taxpayer was able to make a relevant appeal to a court or tribunal.
- Where the amount paid, or is to be paid, as a result of proceedings brought by HMRC enforcing the payment or in accordance with an agreement between the taxpayer and HMRC settling such proceedings
- Where the amount paid, or liable to be paid, is excessive by reason of a mistake in calculating the taxpayer's liability to income tax or capital gains (other than a mistake in a PAYE assessment or PAYE calculation) and the liability was calculated in accordance with the practice prevailing at the time.

The final one of these is probably the most controversial. This point was discussed recently in a case involving top slicing relief. This relates to a technical issue with the arguments being led by Tim Good in what amounts to something of a crusade. His view has been that the calculation of top slicing as undertaken by HMRC has been wrong for many years. A case involving Mariana Silver was lost by HMRC in the FTT and the legislation was then changed with effect from 11 March 2020. HMRC have been trying to apply that legislation retrospectively, but his case shows that this is not correct. It is likely the case will be appealed by HMRC but Tim Good is suggesting that advisers review all cases involving top slicing relief and make claims for repayment under the overpayment relief provisions for all cases which are still in time. It is also likely (in his view) that HMRC will reject such claims on the basis that the HMRC computer was preparing calculations following practice generally prevailing until the decision in the Silver case (which was 19 April 2020). However, he first notified HMRC that their calculation was incorrect on 9 August 2017 so there may need to be further litigation to decide when HMRC's incorrect calculations ceased to be 'practice generally prevailing'.

### *Special relief*

Before 1 April 2011, if a taxpayer had no statutory way of reducing an excessive assessment or displacing a determination because the time limit for submitting a return had passed, HMRC would in some cases be prepared not to recover the full amount due. This practice was known as 'equitable liability'. This was a non-statutory process and so it was replaced with 'special relief'.

With an excessive assessment, taxpayers may be better to put in a late appeal application if they can argue they had a reasonable excuse for not having appealed within the time limit. However, if HMRC have issued a determination where a taxpayer has not submitted a self-assessment return, there is no right of appeal and the determination can only be superseded by submission of the

return. If this is not done in time, the taxpayer is stuck with the figures as assessed unless they can claim special relief.

Special relief applies only to amounts charged in HMRC determinations for income tax self-assessment or corporation tax self-assessment where no other statutory remedy is available. There is no time limit for claiming special relief and the claim is not automatically excluded (as it would be for overpayment relief purposes) if:

- the taxpayer knew, or ought reasonably to have known, that they had some other means of correcting an overpayment or over-assessment, but they failed to use those other means within the relevant time limit, or
- HMRC have already taken court action to recover amounts due under a determination (unless the person was present or was legally represented during the proceedings, or an agreement was reached to settle the proceedings).

The conditions to claim the relief are:

- it would be unconscionable for HMRC to seek to recover the amount which has been charged by a determination, or refuse to repay it if it has already been paid;
- the person's tax affairs are otherwise up to date or satisfactory arrangements have been made to bring them up to date as far as possible; and
- the person has not previously claimed special relief or sought equitable liability, whether or not relief was given (this condition may be disregarded in exceptional circumstances).

The part which is often difficult to understand is whether it would be unconscionable for HMRC to collect the tax. The easiest way to think of this is that there is evidence that the tax is not due and the reason that this was not sorted out before was because the taxpayer was disadvantaged in their dealings with HMRC.

The HMRC guidance on this point gives some circumstances where it may apply:

- the taxpayer was suffering from a temporary or sporadic illness, including mental illness, and consequently find it particularly difficult to engage with the tax system;
- they had not received notices or other communications for reasons outside their control; or
- they are insolvent and pursuing the amount in the determination would be to the detriment of other creditors.

The taxpayer must explain why it would be unconscionable for HMRC to collect that tax and it is not going to apply where someone has just been lax in dealing with things. In practical terms, it is unlikely that it will be shown that HMRC's actions are unconscionable unless it can be clearly proven that the tax payable is excessive but that is not the only test.

In relation to the affairs being up to date, it applies to all taxes and any other issues which HMRC have responsibility for administering and also applies to the affairs of any partnership of which the individual is a member or any company they have controlled. A matter will still be outstanding even if the person has a reasonable excuse for not dealing with it.

It is important to note that penalties for late delivery of a return will remain payable even where the claim is successful, but surcharges and interest will be reduced to reflect the amount of tax due after the relief has been applied.

*Contributed by Ros Martin*