



**TC01330**

**Appeal number: TC/2011/01522**

*Self-assessment - surcharge for late payment of tax - whether insufficiency of funds a reasonable excuse – no – appeal dismissed*

**FIRST-TIER TRIBUNAL**

**TAX**

**JUDITH GOLDWATER (deceased)**

**Appellant**

**- and -**

**THE COMMISSIONERS FOR HER MAJESTY'S  
REVENUE AND CUSTOMS**

**Respondents**

**TRIBUNAL: ANNE REDSTON (PRESIDING MEMBER)**

**The Tribunal determined the appeal on 2 June 2011 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 15 February 2011 and HMRC's Statement of Case submitted on 8 April 2011.**

## DECISION

1. This is the appeal by Mr Daniel Goldwater, executor of Mrs Goldwater's estate, against:

- 5 (1) two surcharges, each of £204.45, in respect of Mrs Goldwater's 2008-09 self-assessment ("SA") tax; and  
(2) two further surcharges, each of £310.45, in respect of her 2007-08 SA tax.

2. There is no dispute that the tax for both years was not paid by the surcharge trigger dates. The issue in the case is whether there was a reasonable excuse, such that  
10 the surcharges should be discharged.

3. The Tribunal decided that there was no reasonable excuse for either year and the appeal was dismissed.

### **The law**

4. The statutory provisions relating to the imposition of surcharges are at Taxes  
15 Management Act s 59C. So far as relevant to this Appeal, they are as follows:

#### **Surcharges 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.

20 (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  
25 surcharge equal to 5 per cent of the unpaid tax.

(4)-(5) ...

(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  
30 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.

35 (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 that is notified to the tribunal section 50(6) to (8) of this Act shall not apply but the tribunal may—
- (a) if it appears 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, 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.

### **The evidence**

5. The Tribunal was provided with a bundle of documents. This comprised the correspondence between the parties in relation to the Appeal; Mrs Goldwater's SA Statement of Account dated 9 December 2010 showing the surcharges; copies of the SA self-calculations for 2007-08 and 2008-09, and HMRC's Calculation Notice for the same two years.

### **The facts**

#### *Background*

6. Mrs Goldwater died in July 2010 at the age of 94.
7. In 2007 Mrs Goldwater fell and fractured her hip. After a period in hospital she was discharged but required 24 hour care. This was provided at her home, a flat in Hampstead, and cost around £800 a week. In addition her food and living expenses had to be paid for.
8. She owned 50% of the equity in her flat, on which a mortgage of £66,000 was taken out. Some of the money raised was used to settle earlier (unspecified) income tax liabilities; some was spent on her care. A further £6,000 was borrowed from another son, Mr Stephen Goldwater.
9. By 21 August 2008 Mr Daniel Goldwater had Power of Attorney and thus the authority to manage his mother's financial affairs.
10. At the time of her death Mrs Goldwater owed six months of service charges in relation to her flat and had an overdraft (of unspecified amount) at the bank.

11. Mr Daniel Goldwater was appointed as the executor of her estate (together with his brother Mr Stephen Goldwater) and it is in that capacity that he makes this Appeal.

*Tax year 2007-08*

5 12. On 30 January 2009 Mrs Goldwater's 2007-08 return was filed online by her accountants, Kershen Fairfax.

13. Her income for the year was £37,302, of which £27,980 derived from land and property. After deduction of her personal allowance she had a tax liability of £5,954.34.

10 14. This sum was due to be paid on or before 31 January 2009. No tax was paid, and on 1 April 2009 HMRC issued the first surcharge notice for 5% of the outstanding amount, namely £204.45.

15. The tax remained unpaid, and on 11 August 2009 HMRC issued the second surcharge notice, a further £204.45.

15 16. As at the date HMRC filed their Statement of Case for this Appeal (8 April 2011), over two years after the due date, the tax remained unpaid.

*Tax year 2008-09*

17. On 26 January 2010 Mrs Goldwater's 2008-09 return was filed by the same accountants.

20 18. Her income for the year was £31,665, of which £27,980 derived from land and property. After deduction of her personal allowance, her taxable income was £31,655 and the tax due was £6,209.

25 19. This tax was due to be paid on or before 31 January 2010. No payment was made, and on 1 April 2010 HMRC issued the first surcharge notice, for 5% of the outstanding tax, being £310.45.

20. The tax remained unpaid, and on 11 August 2010 HMRC issued the second surcharge notice, being a further £310.45.

21. Again, as at the date HMRC filed their Statement of Case for this Appeal (8 April 2011), the tax remained unpaid.

30 **Mr Daniel Goldwater's submissions**

22. Mr Daniel Goldwater submitted that Mrs Goldwater had a reasonable excuse for non-payment of the tax because she did not have sufficient liquid assets to make the payments.

23. He also said he 'was unable to borrow any money from the bank because I was informed I was too old'. Although Mr Stephen Goldwater had lent his mother £6,000 'no more money was available'.

5 24. He submitted that 'there was no question of Mrs Goldwater trying to avoid paying the tax. If she had not intended to pay the tax, a tax return would not have been submitted on time each year.'

25. Finally, he said that, as executors of his mother's estate, he and his brother will pay the tax at some point between January 2011 and January 2012.

### **HMRC's submissions**

10 26. HMRC say that all statements of account after 21 August 2008 were sent to Mr Daniel Goldwater, who had power of attorney for his mother. He was thus aware of the amounts due and the payment dates.

27. They submit that insufficiency of funds is precluded from being a reasonable excuse by TMA s 59C(10).

15 28. The surcharges were correctly imposed because the tax was not paid by the due dates and there is no reasonable excuse for late payment.

### **Decision**

29. Under TMA s 59C(9)(a) the Tribunal may set aside the surcharge if the Appellant had a reasonable excuse for the late payment of her 2007-08 and 2008-09 income tax.

20 30. The Tribunal notes that the only excuse put forward by Mr Goldwater is the lack of liquid funds available to pay Mrs Goldwater's tax. He made no submission on the grounds of his mother's state of health. The Tribunal has been told only that she had a fall causing a fractured hip; it has been given no information as to her mental capacity in the period leading up to her death.

25 31. In any event, Mrs Goldwater had given her son power of attorney to act on her behalf, and this was in place by August 2008, well before the first due date for payment of the 2007-08 tax liability. HMRC have stated that Mr Daniel Goldwater was fully aware of the amounts due and the payment dates and he has not disputed this.

### *30 Assessment of the evidence*

32. The evidence provided to the Tribunal is that Mrs Goldwater's gross income was around £32,000 in both years. This is £615 a week, less than the £800 cost of her care. In addition there would be food, utility and other bills.

35 33. The care alone thus cost around £41,600 (52 x £800), so it is reasonable to assume that her overall expenditure was at least £45,000 in each of the years in question.

34. To fund the shortfall between income and outgoings, £66,000 was raised from the mortgage and £6,000 from her younger son. The evidence is incomplete as to how much of the former was used to pay for her care, and how much for other things, including the settling of earlier income tax liabilities. The Tribunal has also not been told when the mortgage was raised.

35. It is thus not possible to establish, from the evidence, how much money was available to Mrs Goldwater between 31 January 2009 (when she was required to pay her 2007-08 tax liability) and 31 July 2010 (the trigger date for the second surcharge on her 2008-09 liability).

36. However, the Tribunal accepts that on the balance of probabilities, all Mrs Goldwater's liquid funds were being used to pay for her care and her other basic needs.

*Insufficiency of funds – the Steptoe approach*

37. The reason the tax was not paid on time was because insufficient liquid funds were available, once Mrs Goldwater's home care and other outgoings were accounted for.

38. Mr Daniel Goldwater submits that this is sufficient to establish a reasonable excuse; HMRC say that an insufficiency of funds is barred by statute from constituting a reasonable excuse.

39. Although HMRC are correct, the courts have held that, on occasion, the reason for the shortage of funds can constitute a reasonable excuse, see *Customs & Excise Commissioners v Steptoe* [1992] STC 757 ("*Steptoe*"). Although that decision was in a VAT context, this Tribunal has accepted that the same approach should be taken to direct taxes - see for example the decision of Sir Stephen Oliver QC in *Stephen Mutch v Revenue & Customs Commissioners* [2009] UKFTT 288(TC).

40. The *Steptoe* approach requires the Tribunal to take for comparison a person in a similar situation to that of the actual taxpayer who is relying on the reasonable excuse defence. The Tribunal must then ask itself - with that comparable person in mind - whether, notwithstanding that person's exercise of reasonable foresight and of due diligence and a proper regard for the fact that the tax would become payable on the particular dates, those factors would not have avoided the insufficiency of funds which led to the failures.

41. The Tribunal thus applied the approach set out in *Steptoe* to the facts of this case.

*Mrs Goldwater's liquid funds*

42. The Tribunal first looked at her liquid funds. A decision was made to spend at least £45,000 a year on Mrs Goldwater's care and her other outgoings. There is no evidence that any regard at all was paid to the statutory obligation to pay Mrs Goldwater's tax on time. There was no 'proper regard for the fact that the tax would become payable on the particular dates'. The statutory obligation cannot be displaced

simply because taxpayers, even elderly and sick taxpayers, decide to spend their available funds on home nursing.

43. This is the case even where, as here, the executors now say that the liability will be settled from her estate (although the Tribunal notes in passing that this was not communicated to HMRC until 19 December 2010, when Mr Daniel Goldwater asked for a HMRC review of the decision not to allow his appeal).

44. The Tribunal also considered whether the use of some of the £66,000 to pay earlier tax liabilities changed the position, and found that it did not. The requirement in *Stepto* is that the taxpayer should have regard to the tax liabilities that are becoming due (here, Mrs Goldwater's 2007-08 and 2008-09 SA income tax); the use of funds to settle historic liabilities is thus irrelevant.

#### *Mrs Goldwater's other possible sources of funds*

45. Mrs Goldwater owned 50% of the flat in which she lived, in an expensive part of London. A mortgage of £66,000 had been raised on her share of the flat but the Tribunal was not told how much equity remained in the property. There is no evidence before the Tribunal that the mortgage on the flat was the maximum that could be borrowed.

46. Mrs Goldwater also had land and property assets giving rise to an annual income of £27,980. The identity of these assets has not been communicated to the Tribunal, and in particular, no evidence has been provided as to whether they could have been sold or mortgaged.

47. The Tribunal accepts that Mrs Goldwater had debts at the time of her death, including an overdraft (of unspecified amount). It also accepts that she had borrowed £6,000 from Mr Stephen Goldwater, and Mr Daniel Goldwater has told the Tribunal that he was 'too old' to be accepted as a borrower from a bank. However, in the Tribunal's view, it is far from clear that all available sources of funds had been explored.

48. The Appellant has thus not met the evidential burden of proof necessary to demonstrate to the Tribunal, on the balance of probabilities, that the insufficiency of funds was an inevitable consequence of Mrs Goldwater's financial position.

#### *Decision*

49. The Tribunal thus finds that, whether Mrs Goldwater's liquidity or her other possible resources, or both together, are considered, the *Stepto* exception to the statutory provision has not been satisfied. As a result, the reason for the insufficiency of funds does not provide a reasonable excuse.

50. The appeal is therefore dismissed.

51. 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

5 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.

10 **Anne Redston**

**TRIBUNAL PRESIDING MEMBER**  
**RELEASE DATE: 15 JULY 2011**

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