



TC 01346

Appeal number: TC/2011/00822

Sections 8, 93 and 59 TMA 1970 - Appeal against penalties and surcharges for late filing of return and payment of tax – Appellant claimed returns filed by agent on time and that HMRC misplaced return resulting in delayed processing of the tax statement - causing late payment – whether reasonable excuse – no – appeal dismissed

FIRST-TIER TRIBUNAL

TAX

MR KANE SWEETMAN

Appellant

- and -

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

Respondents

TRIBUNAL: MICHAEL S CONNELL (TRIBUNAL JUDGE)

The Tribunal determined the appeal on 28 April 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 31 January 2011, HMRC's Statement of Case submitted on 01 March 2011 and the Appellant's Reply dated 24 March 2011.

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DECISION

- 5 1. This an appeal against the first and second fixed penalties imposed for the late filing of the Appellant's personal tax return for the year ending 05 April 2009.
2. The Appellant also appeals first and second surcharges imposed because of the late payment of tax due for the year ending 05 April 2009.
3. HMRC issued a return for the year ending 05 April 2009 to the Appellant on 06 April 2009. Under s.8(1D) Taxes Management Act 1970 a paper return for the period 10 2008-2009 must be filed by 31 October 2009 or online by 31 January 2010. If HMRC do not receive the tax return by the due date a penalty of £100.00 is charged. The return issued on 06 April 2009 warned that penalties would be charged if the return is received after the appropriate deadline.
4. As no return had been filed by the due date, the first penalty notice was issued on 15 16 February 2010 under s.93(2) TMA 1970. A second fixed penalty of another £100.00 is charged if the return is still outstanding on 31 July 2010 and the second penalty notice was issued on 03 August 2010 under s.93(4) TMA 1970.
5. The Appellant's paper return was filed on 28 September 2010.
6. The Appellant appeals the penalties, saying that his tax agent was unable to use 20 the online filing system to lodge his 2009 return by 31 January 2010 and therefore filed a paper return by ordinary post on 27 January 2010. It appears that the agent did not have the necessary activation code for filing the Appellant's return electronically. The Appellant suggests that the return sent by his agent, which was not received by HMRC, was possibly misplaced or lost in the post.
- 25 7. HMRC says there is no record of the Appellant's return having been received either electronically or on paper for the year ending 05 April 2009 until the paper return was received on 28 September 2010. The Appellant is unable to provide any actual evidence of posting of the return.
- 30 8. HMRC contend that, even if the Appellant thought that the return had been filed on time, the first penalty notice issued on 16 February 2010 would have alerted him to the fact that this was not the case. Additionally, the notice provided instruction on what to do next and contact details if assistance was required. The Appellant acknowledged that he received the first penalty notice in March and became aware at that stage that the return had not been received by HMRC. It was evident from the 35 copy emails between the parties that the Appellant was aware there was a problem with the return's submission.
9. The Appellant did not contact HMRC until mid-September 2010, several weeks after the issue of the second fixed penalty notice on 03 August 2010, when he was again advised that HMRC had not received his 2009 tax return. At that stage the 40 Appellant contacted his tax agent, who he says prepared 'another' paper return which was then submitted to HMRC on 24 September 2010.

10. The grounds of the Appellant's appeal against the imposition of the penalties are that he made all attempts to prepare and lodge the return by the due date and assumed that his agents would be able to submit the return electronically but that, as they were unable to do so, a paper return was submitted manually but not received by HMRC, possibly due to 'lost mail' and that, upon receiving the penalty notice from HMRC, he immediately contacted his agent who then took 'relevant steps to rectify the problem'.

11. The Appellant by his own admission received the first penalty notice in March and at that stage therefore knew that the return had not been received by HMRC. He appears however, without good reason, to have failed to contact his agent or ensure that a return was filed with HMRC, albeit late, until September 2010. It was clearly the Appellant's responsibility to ensure that the relevant regulations are adhered to and he should have ensured that his return was filed on time. An appeal against a late filing penalty can only be successful when the Appellant is able to show that there is a reasonable excuse for filing late which has existed throughout the whole period of default. 'Reasonable excuse' is not defined in legislation and the expression is given its normal everyday meaning, being that an exceptional event (for example bereavement or severe illness) beyond the Appellant's control prevent him from filing the return by the due date.

12. The Appellant's appeal against the first and second surcharges imposed because of the late payment of tax due for the year ending 05 April 2009 relates to the late payment of a balancing payment of £16,793.65 which was due for payment by 31 January 2010.

13. When a balancing payment or payment on account remains unpaid more than 28 days from the due date, a surcharge automatically arises. This initial surcharge is equal to 5% of the tax unpaid at that date. A further 5% surcharge applies where payment remains unpaid for more than 6 months after the due date.

14. On 01 November 2010 a surcharge notice was issued for both the first (£839.68) and second (£839.68) surcharges, totalling £1,679.36 under s.59(c) TMA 1970.

15. The Appellant paid his 2008-2009 tax liability in full on 12 November 2010 and therefore the period of default to 11 November 2010 had been 285 days.

16. The Appellant appeals the imposition of the surcharges for the reasons that, following the 'misplacement' of his original tax return and the filing of a subsequent replacement tax return on 24 September, he had not received his self-assessment tax calculation and statement from HMRC until 09 November 2010, whereupon he immediately arranged for payment of the outstanding tax due.

17. HMRC contends that the processing of a paper tax return received late cannot be regarded as a reasonable excuse for the Appellant's failure to pay his 2008-2009 tax liability on time. The Appellant was in any event required to self-calculate his tax liability under s.9(1)(b) TMA1970 and could not depend on, or wait for, HMRC to issue a calculation or statement prior to making payment of the tax due.

18. The late filing penalties issued on 16 February 2010 and 03 August 2010 contained advice under the heading ‘What you should do now’, to pay and outstanding tax to avoid further interest and surcharges.

5 19. It is the taxpayer’s responsibility to ensure that the relevant regulations are adhered to and that tax is paid when due. Ignorance of the legislation or the taxpayer’s obligations cannot be deemed a reasonable excuse. The Appellant should have been aware after the issue of the first late filing penalty notice that tax was outstanding and should be paid to avoid further interest and surcharges. However, the Appellant chose to disregard the advice and information.

10 20. There was no reason why the Appellant could not have self-calculated his tax and paid by the due date. The surcharges were therefore a direct consequence of his failure to pay the outstanding tax by the due date or by the surcharge trigger dates.

15 21. An appeal against a late payment surcharge can only be successful where the Appellant shows that there was a reasonable excuse for late payment which existed throughout the entire period of default.

20 22. Taking all the facts and circumstances into account, the Tribunal concluded that completion and delivery of the Appellant’s tax return was entirely within his control and that nothing exceptional prevented him from filing the return by the due filing date. The Tribunal finds that there was no continuing reasonable excuse throughout the period of default for the late delivery of the Appellant’s tax return for the year ending 05 April 2009 and accordingly dismisses the appeal and confirms the penalty determinations.

25 23. The Tribunal also concluded that the Appellant had not been able to show a reasonable excuse for the late payment of the outstanding tax and accordingly the Tribunal dismissed the Appellant’s appeal and determined the surcharges in the sum of £1,679.36.

30 24. 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.

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MICHAEL S CONNELL

TRIBUNAL JUDGE

RELEASE DATE: 25 JULY 2011

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