



TC01352

Appeal number: TC/2010/06724

INCOME TAX- self-assessment - default surcharge for late payment of tax - reasonable excuse - S59C(9) TMA 1970 - no - appeal dismissed.

FIRST-TIER TRIBUNAL

TAX

MR S R KOTECHA T/A HEWLETT STORES

Appellant

- and -

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

Respondents

**TRIBUNAL: PAULENE GANDHI (TRIBUNAL JUDGE)
GEORGE BARDWELL (MEMBER)**

The Tribunal determined the appeal on 3 December 2010 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 28/08/10 and HMRC's Statement of Case submitted on 22/09/10.

© CROWN COPYRIGHT 2011

DECISION

1. This is an appeal against the income tax surcharge for late payment of tax for the year 2008/09 of £1423.57.

5

2. The appellant, Mr Kotecha, requested full written findings of fact and reasons for the decision on 11 January 2011. This application was made out of time but he was subsequently given permission to apply out of time by the tribunal by letter of 31 May 2011.

10 3. This decision sets out our findings of fact and reasons.

The evidence

4. We were provided with documentation by HMRC and Mr Kotecha. We have considered all the documentary evidence before us with the following being the most pertinent to our decision:

- 15
- Appeal to HMRC dated 22 April 2010
 - HMRC's response to the appeal against the Surcharge Notice dated 27 May 2010
 - Request for a review dated 17 June 2010
 - Review conclusion dated 28 July 2010
 - Appeal to the Tribunal dated 20 August 2010
- 20
- HMRC's Statement of Case dated 22 September 2010

The law

25 5. Section 7 Taxes Management Act 1970 ("TMA") states that every person who is chargeable for income tax and has not received a notice requiring them to complete a Tax Return for that year shall within six months of the end of the year give notice to an officer of the Board of HMRC that they are so chargeable.

6. Section 9(1) TMA states that every return should contain the self-assessment, unless the return is made and delivered in line with s9(2) TMA, in which case HMRC will do the calculation.

7. Section 59B(3) TMA states that in a case where the person -

30 “(a) gave the notice required by Section 7 of this Act within six months from the end of the year of assessment, but

 (b) was not given notice under Section 8 or 8A of this Act until after the 31st October next following that year,

The difference shall be payable or repayable at the end of the period of three months beginning with the day on which the notice under Section 8 or 8A was given.”

8. Section 59B (4) TMA states that in any other case, the difference shall be payable or repayable on or before 31 January next following the year of assessment.

5 9. Section 59C(2) TMA states that where any 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 % of the unpaid tax.

10 10. Section 59C(3) TMA states that where any of the tax remains unpaid following the expiry of 6 months from the due date, the taxpayer shall be liable to a further surcharge equal to 5 % of the unpaid tax.

11. Section 59C(7) TMA states that an appeal may be brought against the imposition of a surcharge under sub-s (2) or (3) above within the period of 30 days beginning with the date on which the surcharge is imposed.

15 12. Section 59C(9) TMA states on an appeal under sub-s (7) above s 50(6) to (8) of this Act shall not apply but the Tribunal 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.”

20 13. Section 59C(10) TMA states that inability to pay is specifically excluded as a reasonable excuse for the purpose of s9.

14. Section 59C(12) TMA defines the period of default and means the period beginning with the due date and ending with the day before that on which the tax due was paid.

15. Section 118(2) TMA, so far as is material to this appeal, provides as follows:

25 “... where a person has a reasonable excuse for not doing anything required to be done he shall be deemed not to have failed to do it unless the excuse ceased and after the excuse ceased he shall be deemed not to have failed to do it if he did it without unreasonable delay after the excuse had ceased.”

The Facts

30 16. We make the following findings of fact which are not in dispute:

a) The notice to file for the year ending 5 April 2009 was issued on 6 April 2009.

35 b) The filing date for a paper return was 31 October 2009 or 31 January 2010 if filed online.

- c) The return was filed online on 28 January 2010.
- d) The tax liability for the year was £28,471.42.
- 5 e) The tax was due to be paid on or before 31 January 2010
- f) £28,471.42 was paid on 5 March 2010
- 10 g) A surcharge notice was issued on 3 April 2010 in the amount of £1,423.57.

17. Accordingly we find that Mr Kotecha failed to pay his self assessment tax on time on the occasion set out above.

Mr Kotecha's submissions in outline

15 18. He was waiting for a VAT refund of £16,000 which he should have received by mid February and which he needed to be able to pay his outstanding tax. HMRC were holding his money thus preventing him from paying his self assessment tax. On 3 March 2010 he secured an overdraft and thereafter paid his tax on 5 March 2010.

20 **HMRC's submissions in outline**

19. Mr Kotecha has been making self-assessment returns since 1996/97 and therefore he is considered experienced with the self-assessment system.

20. A notice to file warned that interest and a surcharge may be charged if tax was
25 paid late.

21. It is reasonable to expect Mr Kotecha to have contacted HMRC to explain his
circumstances and make an appropriate time to pay arrangement, which could have
included any VAT repayment that he was expecting. Providing this was done within
28 days of the due date and the tax is paid in accordance with the agreement, no
30 surcharge would have been imposed.

22. The surcharge was not imposed until the balancing payment of the year was more
than 28 days overdue. Once 31 January 2010 payment deadline had passed Mr
Kotecha could have arranged an overdraft with his bank to pay his outstanding
liability before the surcharge trigger date.

35 23. Inability to pay is not a reasonable excuse. Further Mr Kotecha knew how much
to pay and knew this in advance of the due date.

Discussion

40 24. It is not in dispute that Mr Kotecha paid his tax more than 28 days after the due
date. We then go on to consider whether Mr Kotecha, on balance, has shown that he
has a reasonable excuse for the late payment of his tax.

25. There is no definition in the legislation of a “reasonable excuse” which “is a matter to be considered in the light of all the circumstances of the particular case” (see *Rowland v HMRC* [2006] STC (SCD)). Although this is a VAT case the proposition set out is equally relevant to direct tax cases).

5

26. However *Stephoe v R&C Commrs* [1992] STC 527 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.

10 27. As set out in *Stephen Mutch v HMRC* [2009] UKFTT 288 (TC) the assumed reasonable competent business person must be taken to have exercised reasonable foresight. Then the reasonable business person must be taken to have exercised due diligence and a proper regard for their tax obligations.

15 28. An inability to pay the tax due to an insufficiency of funds does not amount to a reasonable excuse. The reasons for the insufficiency of funds may however amount to a reasonable excuse.

20 29. Mr Kotecha did not pay his tax on time because he was waiting for a VAT refund which he needed to pay his tax liability. He was chasing the VAT office for the refund and when it became clear to him that he was not going to receive the refund in time he secured an overdraft with his bank on 3 March 2010 and then paid his tax liability on 5 March 2010.

25 30. We note that the VAT refund was £15,188.08 and yet the tax due was approximately £28,000. Mr Kotecha has not provided any explanation as to why he did not pay the rest of the tax due even if he could not pay £15,188.08. We would have expected a reasonable business person exercising ‘due diligence’ and with ‘a proper regard for their tax obligations’ to have paid as much of their tax as they could.

30 31. Further although Mr Kotecha states that he was chasing the VAT office for his refund there must have come a point when he realised that his VAT was not going to be refunded in time for him to make his tax payment by the due date. Neither the date for payment of his tax nor the amount of tax would have come as any surprise to Mr Kotecha. Further he had a further 28 days to pay his tax after the due date.

35 32. Either before the due date or during this 28 day ‘grace’ period, in our view, a reasonable businessman would have either contacted HMRC to organise a time to pay arrangement or have obtained an overdraft from their bank. There is no explanation as to why Mr Kotecha did not do this but instead waited for 28 days after the due date to pass before arranging an overdraft.

33. For the above reasons we find there was no reasonable excuse for the late payment of Mr Kotecha’s tax.

40

Decision

34. We confirm the imposition of the surcharge and dismiss the appeal.

5 35. 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.

10

Signed 

Tribunal Judge

15

Issue Date: