



TC01366

Appeal number: TC/2010/09145

*Late payment surcharge - Whether reasonable excuse on the facts - No -
Appeal dismissed - Section 59C Taxes Management Act 1970*

FIRST-TIER TRIBUNAL

TAX

MARK SWEENEY

Appellant

- and -

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

Respondents

TRIBUNAL: JOHN BROOKS (TRIBUNAL JUDGE)

The Tribunal determined the appeal on 11 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 29 November 2010 and HMRC's Statement of Case submitted on 10 January 2011.

DECISION

Introduction

1. This is an appeal, by Mr Mark Sweeney, against a late payment surcharge in the sum of £72.03 imposed by HM Revenue and Customs (“HMRC”) under s 59C of the Taxes Management Act 1970 (“TMA”) following the late payment of tax for 2008-09.

2. Having considered the papers provided by both parties, a Decision Notice dismissing the appeal and containing a summary of the Tribunal’s findings of facts and reasons for the decision was released on 19 April 2011.

3. On 22 April 2011, following receipt of the Decision Notice, Mr Sweeney applied to the Tax and Chancery Chamber of the Upper Tribunal for permission to appeal against the decision on the grounds that:

(1) His surname is spelt as “Sweeney” not “Sweeny”; and

(2) The decision should be set aside as the Tribunal would not have been aware of his letter to HM Revenue and Customs (“HMRC”) dated 30 December 2010 which identified the “Double Counting of Benefits and Expenses received which mean that my account for 2008-09 was overpaid not underpaid.”

4. This application was forwarded to the First-tier Tribunal (to which an application for permission to appeal must first be addressed) and a letter was sent to Mr Sweeney by the Tribunal on 16 May 2011 advising him that before an application for permission to appeal could be made it was necessary, under Rule 35 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the “Rules”) to request full written findings of fact and reasons for the decision and that his application for permission to appeal would be treated as such a request.

5. However, having considered Mr Sweeney’s application to the Upper Tribunal, I came to the conclusion that it should be treated as two separate applications. First, an application for a correction under the “slip rule” (Rule 37 of the Rules) as Mr Sweeney’s name has been spelt incorrectly which was allowed and an amended summary decision, in which Mr Sweeney's name was correctly spelt, was subsequently issued by the Tribunal; and secondly, an application to set aside the decision (under Rule 38 of the Rules) which was dismissed.

6. Given that Mr Sweeney’s application to set aside the decision has been dismissed and that he did seek for permission to appeal against the decision to the Upper Tribunal which requires a request for full written findings of fact and reasons for the decision, it would seem appropriate in the circumstances to provide Mr Sweeney with such a decision to enable him to decide whether to apply for permission to appeal and to assist him in formulating any such appeal.

Evidence

7. The evidence before the Tribunal was contained in the following documents:

- (1) Mr Sweeney's Notice of Appeal dated 29 November 2010.
- (2) The following documents attached to the Notice of Appeal:
 - 5 (a) Letter dated 2 September 2010 from HMRC to Mr Sweeney with HMRC's view of appeal;
 - (b) Request to HMRC by Mr Sweeney for a Review dated 2 September 2010; and
 - 10 (c) Letter dated 1 November 2010 from HMRC to Mr Sweeney with Conclusion of Appeal Review.
- (3) HMRC's Statement of Case submitted 10 January 2011.
- (4) The following documents attached to HMRC's Statement of Case:
 - 15 (a) Letter dated 2 September 2010 from HMRC to Mr Sweeney (as giving HMRC's view of view of the appeal;
 - (b) Request for Review by Mr Sweeney dated 2 September 2010;
 - (c) HMRC's record of telephone conversation between Mr Sweeney and HMRC officer dated 29 September 2010;
 - 20 (d) Copy of Fax dated 29 September 2010 from Mr Sweeney to HMRC confirming telephone conversation that he wished HMRC to review surcharge;
 - (e) Letter dated 1 November 2010 from HMRC to Mr Sweeney with Conclusion of Review;
 - (f) Notice of Appeal;
 - (g) Pages 20 -21 of HMRC's the Tax Return Guide (TRG 20);
 - 25 (h) Screen print of Mr Sweeney's online self-assessment;
 - (i) Letter dated 30 January 2010 from Mr Sweeney to HMRC;
 - (j) Screen prints of Mr Sweeney's online return for pension contributions and business mileage; and
 - (k) Mr Sweeney's tax payment record for 2008-09.

30 *Facts*

8. On the basis of this evidence I make the following findings of fact:

- 35 (1) HMRC issued Mr Sweeney, who had been filing such returns since October 1996, with a self-assessment tax return for 2008-09 on 6 April 2009. The filing date for the paper return was 31 October 2009 but 31 January 2010 if the return was filed online. Any tax due was required to be paid by 31 January 2010.

(2) Having previously filed paper returns Mr Sweeney decided that he would file his 2008-09 self-assessment return online. When he attempted to do so on 30 January 2010 he found that he had to wait seven days for a password and for his account to be activated due to an error in the online registration process.

5 (3) Once these details had arrived Mr Sweeney did not complete his return as he was not sure where, on the return, to show his pension contributions and business mileage.

10 (4) He therefore contacted HMRC's call centre to seek advice and was told to submit his return and wait until a statement was received showing his tax liability. Normally he would expect this to show a slight overpayment of tax as a result of the higher rate tax relief on his pension and the fact that his then employer paid less than the rate accepted by HMRC for business mileage.

15 (5) Mr Sweeney filed the return online on 2 March 2010. On filing the return he would have received an automatic calculation, and therefore been aware that his tax liability for 2008-09 was £1,440.75 which should have been paid by 31 January 2010.

(6) HMRC's records show that Mr Sweeney telephoned them on 3 March 2010 to enquire about the amount of tax due and was issued with a calculation on the same day.

20 (7) Mr Sweeney paid the tax on 23 March 2010.

Law

9. Section 59C TMA provides that where tax remains unpaid 28 days after the due date for payment a taxpayer is liable to a surcharge equal to 5% of the unpaid tax. However, The Tribunal may set aside a surcharge if it appears that the taxpayer had a
25 reasonable excuse for not paying the tax throughout the period of default but if there does not appear to be a reasonable excuse or it does not continue throughout the period of default the surcharge will be confirmed. "Reasonable excuse" which is not defined in the legislation "is a matter to be considered in the light of all the
30 circumstances of the particular case" (see *Rowland v HMRC* [2006] STC (SCD) 536 at [18]).

Discussion and Conclusion

10. Mr Sweeney accepts that he did not pay his tax on time and that this is the reason for the imposition of the surcharge but contends that this was because he was, as he put it in his Notice of Appeal, he was:

35 "… only following the advice given to me by your call centre. Had this recommended course of action attracted fees, then your call centre should have pointed this out at the time they issued their guidance, and provided an alternative course of action that didn't attract fees. It is unreasonable for you to penalise me following advice given to me by
40 your call centre"

11. Therefore the issue for me to determine is whether this amounts to a reasonable excuse and if so whether it continued throughout the period of default.

12. However, before considering this issue, as is apparent from the above passage from his Notice of Appeal, Mr Sweeney has on several occasions referred to “you” or “your” meaning HMRC and not the Tribunal and, for the avoidance of doubt and, as is stated on the Tribunal’s website and literature, I must first emphasise that this Tribunal is completely independent from and not part of HMRC.

13. Turning to the question of whether Mr Sweeney has a reasonable excuse for the late payment of tax and whether it continued throughout the period of default I find that, as someone who had been submitting self-assessment tax returns since 1996, Mr Sweeney would have been aware of the due date for payment and the possibility that a surcharge would be imposed if he did not pay his tax on time.

14. Given that there is an automatic calculation of tax on filing a tax return online Mr Sweeney, who filed his tax return online on 2 March 2010, would, in my judgment, have been aware of the amount of tax due and that the due date for payment of the tax had passed. Even if, despite the automatic calculation, he were in any doubt as to the amount of tax due this was confirmed by HMRC when he telephoned on 3 March 2010.

15. Having regard to the circumstances of this case even if I were to find that Mr Sweeney had a reasonable excuse for the late payment of tax I do not consider that it could have continued beyond 3 March 2010 or a few days thereafter. As the tax was paid on 23 March 2010 the reasonable excuse could not have continued throughout the period of default as required by s 59C(9)(a) TMA and, as such, his appeal cannot succeed.

16. I therefore dismiss the appeal and confirm the surcharge.

17. 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.

JOHN BROOKS

**TRIBUNAL JUDGE
RELEASE DATE: 30 JULY 2011**