



**TC01380**

**Appeal number: TC/2010/09157**

*INCOME TAX – surcharge for late payment of income tax – reasonable excuse – can reliance on accountants amount to a reasonable excuse – yes – appeal allowed*

**FIRST-TIER TRIBUNAL**

**TAX**

**STEPHEN RICH**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: NICHOLAS ALEKSANDER (TRIBUNAL JUDGE)**

**The Tribunal determined the appeal on 21 July 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 1 December 2010, HMRC's Statement of Case dated 11 January 2011, the Appellant's Reply and further written submissions from the parties.**

## DECISION

### *Introduction*

1. This is an appeal by Stephen Rich against surcharges imposed under section 59C (2) and (3) Taxes Management Act 1970 for the years ended 5 April 2008 and 5 April 2009.
2. The appeal was allocated by the Tribunal to the default paper category.
3. On 17 March 2011 I issued directions allowing for submission of further evidence by Mr Rich and for further written submissions by the parties.

### 10 *Evidence*

4. The evidence before the Tribunal was contained in the following documents:
  - (1) Mr Rich's Notice of Appeal of 1 December 2010
  - (2) HMRC's Statement of Case of 11 January 2011 sent to Mr Rich and the Tribunal
  - 15 (3) Written submissions made by Mr Rich, by DJM Accountants LLP on his behalf and by HMRC
  - (4) The following documents:
    - (a) Copies of Mr Rich's bank statements
    - (b) Copies of correspondence between Mr Rich and DJM Accountants LLP
    - 20 (c) Copies of correspondence between DJM Accountants LLP and HMRC
    - (d) Electronic receipts for the electronic submission of Mr Rich's tax returns
    - 25 (e) Print-outs from HMRC's computer system

### *Facts*

5. From these documents I find the following facts.
6. Mr Rich manages a web site. During the tax year 2006/7 the web site started to generate income. On 24 April 2007, Mr Rich e-mailed his accountant, Mr Mendlesohn of DJM Accountants LLP, to inform him of this fact, and instructed Mr Mendlesohn to notify HMRC of his taxability.
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7. On 15 April 2008, Mr Rich wrote to Mr Mendlesohn enclosing ledgers for 2007/8 and informing them that he had heard nothing from HMRC in respect of the 2006/7 tax year.

8. On 18 April 2008, the accountants wrote to HMRC notifying them that Mr Rich had commenced self-employment as a sole trader on 1 April 2006, enclosing form 64-8, and requesting a UTR number. HMRC have no record of having received the letter or the form, and their computer records only show that Mr Rich notified his chargeability on 23 April 2010. The accountants note that they have experience of HMRC mislaying these forms, and that on one occasion they sent a batch of approximately forty 64-8s to HMRC, of which only twelve were processed. I am satisfied, and find, that the accountants sent the letter and the form, and that it was either mislaid in the post or by HMRC on receipt. The accountants state that HMRC refuse to accept tax returns without a valid UTR.

9. On 9 April 2009, Mr Rich wrote to his accountants with ledgers for 2008/9, and noting that he still had heard nothing from HMRC in respect of either 2006/7 or 2007/8.

10. Eventually the accountants lodged notice that Mr Rich had commenced business electronically (with an online form CWF1) on 23 April 2010. HMRC issued a tax reference to Mr Rich on 28 April 2010. Tax returns for 2007/8 and 2008/9 were submitted electronically by Mr Rich's accountants on 30 April 2010. A paper return for 2006/7 was received by HMRC on 7 May 2010. On 9 June 2010 HMRC wrote to Mr Rich acknowledging receipt of the paper return for 2006/7 and stating that HMRC would treat the return as if it had been sent in response to a notice requiring it to be submitted by the date on which they received it.

11. Payment of the tax due was made on 7 June 2010 and 9 July 2010.

12. Surcharges were raised in respect of the late payment of income tax for 2007/8 and 2008/9. By concession no surcharge was raised in respect of the late payment of tax for 2006/7.

13. Mr Rich maintained a separate savings account into which he made regular deposits out of his web site income to ensure that he had sufficient funds to meet his tax liabilities. I find that Mr Rich had at all material times sufficient funds to meet his tax liabilities.

### 30 *The Law*

14. Section 7, Taxes Management Act 1970 ("TMA") requires an individual to notify HMRC of his chargeability to income tax in the event that he or she has not received a tax return (or HMRC have not issued a notice requiring a tax return to be filed). Such notification must be given no later than 5 October following the end of the relevant tax year.

15. Section 8 TMA requires an individual to file a tax return if HMRC have given the individual notice so to do.

16. The time for payment of income tax is governed by section 59B TMA. Subsections (3) deals with circumstances where the taxpayer had given notice of his

chargeability to HMRC by 5 October, but did not receive notice to file a tax return until after 31 October. In such cases, the due date for payment of any income tax is three months after the notice requiring a tax return was given.

5 17. In all other cases, the due date for payment is 31 January following the end of the relevant tax year.

18. Section 59C TMA provides for surcharges if tax is not paid by the due date. A 5% surcharge is levied if the tax is not paid within 28 days of the due date. A further surcharge of 5% is levied if the tax remains unpaid more than 6 months after the due date.

10 19. In the event that the taxpayer has a reasonable excuse for his failure to pay tax by the due date, and the excuse existed throughout the period of default, the surcharge can be set aside. Inability to pay the tax cannot be a reasonable excuse.

#### *HMRC's contentions*

15 20. HMRC contend that as notice of his chargeability was not received by 5 October 2007, the due date for payment of tax for 2007/8 was 31 January 2009 and the due date for payment of tax for 2008/9 was 31 January 2010. As the tax was paid on 7 June 2010 and 9 July 2010, two surcharges are due in respect of the late payment of tax for 2007/8 and one surcharge for 2008/9.

20 21. HMRC accept that Mr Rich took some steps to meet his responsibility of ensure that his tax affairs were dealt with correctly and on time. However HMRC contend that these steps fall short of those that would be taken by a prudent person exercising reasonable foresight and due diligence, and that therefore Mr Rich does not have a reasonable excuse for the late payment of tax. HMRC contend that it is unreasonable for Mr Rich to believe that his tax affairs were in order given that he was aware of his  
25 chargeability but had not received his tax returns. It was Mr Rich's responsibility to contact HMRC to make sure that notification of his chargeability had been received, returns had been issued and filed on time, and that payment of tax for 2007/8 and 2008/9 were made on the relevant due dates.

#### *Discussion and Conclusion*

30 22. There is no doubt that Mr Rich was under an obligation to notify HMRC that he had commenced trading. As he commenced business during the 2006/7 tax year, he was under a requirement to notify HMRC of his chargeability no later than 5 October 2007. As noted above, Mr Rich's accountants did not write to notify HMRC of Mr Rich's chargeability until April 2008, even though they had been instructed by Mr  
35 Rich to do so in April 2007.

23. It is not in dispute that on any basis notice of Mr Rich's chargeability to income tax was given after 5 October 2007. I agree with HMRC that due date for payment of income tax for 2007/8 was 31 January 2009 and the due date for payment of tax for 2008/9 was 31 January 2010. As the tax was paid on 7 June 2010 and 9 July 2010,

two surcharges are due in respect of the late payment of tax for 2007/8 and one surcharge for 2008/9, unless Mr Rich can demonstrate that he had a reasonable excuse for the late payment.

5 24. Therefore, the issue for me to determine is whether he has a reasonable excuse for that failure and whether that the excuse continued throughout the period of default.

25. Since commencing in business, Mr Rich appointed accountants, and provided details of his income to them in good time for his accountants to prepare tax computations and returns by the statutory time limits. I consider that it was reasonable for Mr Rich to rely on his accountants to submit the notice of chargeability to HMRC.  
10 I see no reason for Mr Rich to think that his accountants would fail to notify HMRC of his chargeability to income tax within the statutory time limit.

26. I now have to consider whether this amounts to a reasonable excuse. This is not defined in the legislation but “is a matter to be considered in the light of all the circumstances of the particular case” (see *Rowland v HMRC* [2006] STC (SCD) 536  
15 at [18]).

27. Although reliance on a third party is specifically precluded from being a reasonable excuse for VAT purposes by s 71 Value Added Tax Act 1994, there is no similar provision in relation to income tax. As this legislation came into effect many years after the VAT provisions had been in force it would have been open to the  
20 draftsman to adopt a similar restriction to the definition of “reasonable excuse” for income tax purposes. However as he did not do so I conclude that, in the absence of a specific provision to the contrary, reliance on a third party can amount to a reasonable excuse in cases such as this.

28. I find support for my view from the decision of the Special Commissioner  
25 (Adrian Shipwright) in *Rowland* where he said at [22 – 26]:

30 “The issue arises as to whether reliance on a third-party is prevented from being a reasonable excuse. For VAT purposes there is specific provision that where "reliance is placed on any other person to perform any task, neither the fact of that reliance nor any dilatoriness or inaccuracy on the part of the person relied on is a reasonable excuse." There is also specific provision that insufficiency of funds is not a reasonable excuse (see section 71 VATA). The legislation that I am concerned with in this case was passed after the VAT legislation but only contains a provision that insufficiency of funds is not a reasonable  
35 excuse. There is no equivalent provision that reliance on a third party is not a reasonable excuse for direct tax purposes.

40 Whilst in the VAT context it was thought necessary to exclude reliance on a third party as presumably otherwise it could be a reasonable excuse in the direct tax context it is, at most only a indication that reliance on a third party can be a reasonable excuse. However, I consider it a very telling indication especially as it is a limited exclusion for VAT (see *Enterprise Safety Coaches* notwithstanding *GB Capital Ltd*).

The *Thorne* case and *Enterprise Safety Coaches* are clear authority that reliance on a third party can be a reasonable excuse.

I conclude that in the direct tax context reliance on a third party can be a reasonable excuse.

5 The issue then becomes, did Mrs Rowland have an effective reasonable  
excuse? Having found that it was reasonable from Mrs Rowland to rely  
on her then accountants and that it was this reliance that led to the  
underpayment, I consider that this was an excuse for making the  
10 underpayment and as the reliance was reasonable the excuse was at  
first blush reasonable. Having further concluded that reliance on a third  
party can be a reasonable excuse I conclude that Mrs Rowland has a  
reasonable excuse in the particular circumstances of this case for not  
having paid the tax on time and had this reasonable excuse throughout  
the period of default.”

15 29. I agree with the conclusion of the Special Commissioner in *Rowland* that reliance  
on a third party, such as the accountants in this case, can be a reasonable excuse. Like  
him, I find that it was reasonable for Mr Rich to rely on his accountants and that it  
was this reliance that led to the failure to notify his chargeability to income tax on  
time. This failure was the causal factor of the subsequent chain of events. Until such  
20 time as HMRC had received that notice, no UTR could be issued. The experience of  
the accountants was that without a UTR, HMRC would not accept a tax return. In  
very short order after the UTR was issued, the relevant tax returns were filed and the  
tax due was paid in full.

30. I find that Mr Rich had a reasonable excuse throughout the period of default.

25 31. The appeal is therefore allowed and I set aside the surcharges.

32. 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  
30 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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**Nicholas Aleksander**

**TRIBUNAL JUDGE**

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**RELEASE DATE: 8 AUGUST 2011**