



TC01490

Appeal number: TC/2011/00182

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

FIRST-TIER TRIBUNAL

TAX

BRIAN THOMPSON

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE ALEKSANDER

The Tribunal determined the appeal on 6 October 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 22 December 2010, HMRC's Statement of Case dated 8 February 2011 and the Appellant's Reply received on 11 March 2011.

DECISION

1. Mr Thompson appeals against surcharges levied following the late payment of tax for the tax year ended 5 April 2009.

5 **The Law**

2. 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. However no such notice need be given if the taxpayer's income all falls within certain exceptions, in particular where the taxpayer's income is subject to deduction of tax under PAYE (section 7(4)).

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

15 4. The time for payment of income tax is governed by section 59B TMA. Subsection (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.

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

6. Section 59C TMA provides for surcharges if tax is not paid by the due date. A 5% surcharge of the unpaid tax 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.

7. 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.

The Facts

30 8. On the basis of the documents before me, I find that the following are the background facts:

9. Mr Thompson used to live and work in the middle east. In 2007 Mr Thompson was notified by HMRC that he no longer needed to file UK tax returns unless his circumstances changed, as he was living and working outside the UK.

35 10. In August 2008, Mr Thompson retired and moved to live near Cadiz, Spain. He started to receive pension payments from a UK pension plan. Form P46 was filed pursuant to regulation 57, Income Tax (Pay As You Earn) Regulations 2003 ("PAYE

Regulations"). According to HMRC the P46 was incomplete (although it is not clear what information was omitted), and HMRC issued form P161 seeking further information. Form P161 was never returned to HMRC.

5 11. In August 2008 Mr Thompson received a "lump sum" payment from his former employers in lieu of future increases in his pension, from which tax at basic rate (20%) was withheld, and in respect of which national insurance contributions were paid.

12. On 11 January 2009 Mr Thompson received a PAYE coding notice in respect of his pension.

10 13. On 24 January 2010, Mr Thompson telephoned HMRC's Cosham office and spoke to Mr J Bolger about filing a tax return for 2008/9. According to Mr Thompson, he was advised by Mr Bolger that he was not "active" on HMRC's systems. Mr Thompson explained that he was anxious to make any payments due before the relevant deadline. Mr Bolger explained that Mr Thompson's status would
15 be changed to "active", and that he now had a further three months to complete and file his tax return, from which the tax due calculation could be made. According to HMRC's statement of case, their records show that Mr Thompson telephoned the self-assessment helpline on 24 January for "general advice", and that he was provided with all relevant and correct information as he requested to make informed choices and
20 decisions concerning his tax obligations. I address this conflict in the evidence before me in the conclusions set out below.

14. Following the end of the tax year, the pensions administrators prepared and delivered (by the relevant due date) forms P35 and P60 which showed Mr Thompson's pension income (including the lump sum payment) and the amount of tax
25 withheld.

15. Mr Thompson filed a tax return for the tax year 2008/09, which was received by HMRC on 11 May 2010. The tax return was processed by HMRC on 9 June 2010 and showed a tax liability of £54,907.10. The tax was paid on 21 June 2010.

30 16. HMRC levied a surcharge of 5% of the unpaid tax, namely £2475.35, on the basis that the tax had not been paid on the date which was 28 days after the due date. The Appellant now appeals against this surcharge.

HMRC's case

35 17. In essence HMRC's case is that (i) Mr Thompson was under an obligation to notify HMRC of his liability to pay income tax by 5 October 2009 and he did not do so; (ii) the due date for payment of the tax was therefore 31 January 2010; and (iii) as he had not paid the income tax he owed within 28 days of the due date, the surcharge was due.

18. HMRC submit that Mr Thompson does not have a reasonable excuse for his default. This is because self-assessment is not a specialist or obscure area of law. Mr

Thompson was familiar with the principles of self-assessment, since prior to his transfer to the middle east, he was within the self-assessment system, and therefore was familiar with the requirement to pay tax by 31 January in each year. This information is also available on HMRC's website and publications. In any event, 5 ignorance of the law cannot amount to a reasonable excuse.

19. Mr Thompson asked that HMRC make available a transcript of the telephone conversation on 24 January 2010. HMRC refused to do so (nor did they include a copy in the Tribunal papers of their written or computer notes of the conversation) on the basis that the onus is on Mr Thompson to establish a reasonable excuse, and so 10 HMRC are not required to produce a recording of that telephone conversation.

Mr Thompson's case

20. Mr Thompson submits that in 2007 he was advised by HMRC that he was no longer required to make tax returns unless his circumstances changed. His circumstances did change, and HMRC were aware of his chargeability because of the 15 returns his former employer and the pensions administrator made to HMRC.

21. Mr Thompson submits that he is not a tax expert, and that he was incorrectly advised by HMRC on 24 January 2010 as to his filing and payment obligations. Had he been correctly advised, he would have complied with his filing and payment obligations by the due date.

20 22. Mr Thompson submits that he could not pay the tax due as he did not know the correct amount, and HMRC took in excess of two months from the filing of the tax return to provide a tax calculation

23. Finally Mr Thompson submits that at no time was he made aware that there was a surcharge for late payment, and that the surcharge is unfair and unjustified.

25 Conclusions

24. The issues before the Tribunal are whether Mr Thompson was liable to pay income tax by 31 January 2010 pursuant to section 59B TMA. It is not disputed that income tax was not paid until 21 June 2010. It follows therefore that if the deadline for payment was 31 January 2010, then a surcharge under section 59C is prime facie 30 payable. The Tribunal then needs to determine whether Mr Thompson has a reasonable excuse for the late payment, and whether that reasonable excuse existed throughout the period of default.

25. HMRC do not address in their submissions whether the exclusion in section 7(4) TMA applies and the interaction between self-assessment and PAYE.

35 26. So far as I can ascertain from the papers before me, all of Mr Thompson's UK taxable income (including the lump sum) was liable to be taken into account in the making of deductions or repayments of tax under the PAYE Regulations. Mr Thompson was therefore under no obligation to notify his chargeability to income tax

because of the exception in section 7(4) TMA. The submissions made by the parties as to Mr Thompson's duty to give notice of his chargeability, and whether in fact HMRC were aware of his chargeability because of the returns filed by Mr Thompson's former employer and his pension provider are therefore irrelevant.

- 5 27. Even though Mr Thompson was under no obligation to notify HMRC of his chargeability, the due date for payment of income tax falling due under self-assessment remained as 31 January by virtue of section 59B TMA. To the extent that Mr Thompson did not pay the tax due under self-assessment by 28 February 2010, absent a "reasonable excuse" or HMRC giving an extension of time, a surcharge of
10 5% of the unpaid tax is payable under section 59C TMA. A further surcharge of 5% is levied if the tax remains unpaid by 31 July 2010.

Reasonable Excuse

28. I deal first with the question as to whether the deadline for payment had been extended by HMRC.

- 15 29. Section 118(2) TMA provides:

"For the purposes of this Act, a person shall be deemed not to have failed to do anything required to be done within a limited time if he did it within such further time, if any, as the Board or the tribunal or officer concerned may have allowed ..."

- 20 30. If Mr Thompson was advised by HMRC during the course of the call on 24 January that he had three months to file a tax return and pay any tax shown as due, this would amount to an extension of time under section 118(2).

31. Alternatively, Mr Thompson could not be criticised for relying upon information provided by HMRC in circumstances where he had fully informed them of all
25 relevant facts. He would therefore have had a reasonable excuse for his default providing he complied with the extended deadline.

32. On either basis Mr Thompson would not be liable to a surcharge if the tax due was paid within 28 days of 24 April 2010.

33. Although HMRC submit that self-assessment is straightforward and Mr
30 Thompson would have been familiar with self-assessment as a result of his earlier UK employments, I consider that self-assessment is not always quite as simple as HMRC suggest. In particular Mr Thompson was not resident in the UK, and the liability of non-UK residents to income tax is complicated. He was in a process of transition from being wholly outside the tax net to being a non-resident but with UK source
35 pension income. This would have been outside his experience, and he rightly called HMRC to ask what to do. There is a conflict of evidence as to what HMRC actually said, and it is not helpful that HMRC have refused to supply a copy of either a transcript or a print-out of their computerised notes of the call. The fact that HMRC in their statement of case expressly refuse to provide a transcript implies to me that
40 the call must have been recorded (as if there had been no recording I would have

expected them to have said so rather than refuse to produce it). I can understand that trawling through tapes to find the particular call and then to engage a stenographer to transcribe it might be regarded as disproportionate – and one of the Tribunal's overriding objectives is to deal with cases in a manner which is proportionate.

5 However it is clear that HMRC must at the very least have accessed their computerised records of the conversation in order to be able to include a description of the call in their statement of case. I consider that it is particularly unhelpful of HMRC not to include a print-out of those records in the papers before the Tribunal when this is clearly a key element in the case. It is true that the onus is on Mr

10 Thompson to show that he has a reasonable excuse, but it is equally true that HMRC is under a duty to act fairly in exercising its powers, and if it had advised a taxpayer (having had full knowledge of the facts – as it did in this case) that tax was not payable until a particular date, it can be held to stand by that advice. In the absence of HMRC's record of the call, I have no hesitation in preferring Mr Thompson's account

15 of the conversation to that of HMRC. His description of the conversation is consistent throughout all correspondence, giving details of the individual he spoke to, the tax office that he called and the date of the call. I therefore find that HMRC advised Mr Thompson that he had three months from 24 January 2010 to file his tax return and pay any tax shown as due on the face of the return – namely until 24 April 2010. On

20 this basis a surcharge would only be payable in the event that Mr Thompson did not pay his tax within 28 days of 24 April 2010.

34. However his tax return was not received by HMRC until 11 May 2010, and the tax was not paid until 21 June 2010. Even if the filing and payment deadline had been extended under section 118(2) TMA to 24 April 2011, this is more than 28 days after

25 that date.

35. Alternatively, although Mr Thompson may have had a reasonable excuse for not paying his income tax by 31 January 2010, that excuse was only "good" until 24 April 2010. It therefore did not exist throughout the period of default (31 January 2010 to 20 June 2010). Section 118(2) provides that "... where a person had a reasonable

30 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." I do not consider that making payment on 21 June amounts to a reasonable delay after the date the excuse ceased on 24 April. The excuse therefore

35 does not nullify the surcharge.

36. Mr Thompson submits that he could not pay the tax due as he did not know the correct amount, and HMRC took in excess of two months from the filing of the tax return to provide a tax calculation.

37. It has always been the case that the onus for calculating the tax due can only be

40 placed on HMRC if a tax return is submitted sufficiently in advance of the payment deadline to allow HMRC time to calculate the tax due and inform the taxpayer of the calculation before the deadline. Ordinarily the return must be filed by 31 October (three months before the payment deadline), if a taxpayer wants HMRC to calculate the tax payable. If the tax return is submitted any later, the onus is on the taxpayer to

5 calculate (or estimate) the tax payable - although HMRC will try to tell the taxpayer the amount of tax due by the payment deadline, they do not guarantee to do so. If Mr Thompson had submitted his return significantly in advance of 24 April, his submission may have carried some weight. However the return was submitted after 24 April, and therefore Mr Thompson could not legitimately expect HMRC to calculate the tax payable in the short span of time left before the default surcharge would arise.

10 38. I note that Mr Thompson lives in Spain, and it can take several days for post to reach the UK. It has always been the case that the filing and payment deadlines relate to the date on which HMRC receives the relevant return or payment, not the date on which the item was posted. Taxpayers may have a reasonable excuse if they can show that they posted the return or payment in good time for the item to be received by HMRC by the deadline, but for some reason the post was unusually delayed. The onus is on Mr Thompson to post his return and cheque in sufficient time (taking account of international posting times) to reach HMRC by the deadline. There is nothing in the papers before me which suggest that Mr Thompson posted his tax return (never mind his payment) in sufficient time for it to have arrived in the ordinary course of international post by 24 April, but that there were long postal delays.

20 39. Finally Mr Thompson submits that at no time was he made aware that there was a surcharge for late payment, and that the surcharge is unfair and unjustified.

25 40. Ignorance of the surcharge is no excuse for its non-payment. Surcharges are levied in order to encourage timely compliance with the filing and payment obligations. In the circumstances of this case, I do not consider that the surcharge operates unfairly or is disproportionate.

41. For the reasons given above, I therefore dismiss this appeal.

30 42. 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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NICHOLAS ALEKSANDER
TRIBUNAL JUDGE
RELEASE DATE: 7 OCTOBER 2011