



**TC01722**

**Appeal number: TC/2011/6452**

**INCOME TAX – SURCHARGE FOR LATE PAYMENT OF TAX – *Did HMRC discharge its burden of proof on whether the tax remained unpaid on the day following the expiry of 28 days from due date – No – should the Appeal be adjourned to clarify the ambiguity – No – Appeal allowed***

**FIRST-TIER TRIBUNAL**

**TAX**

**JANE JACKSON**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: MICHAEL TILDESLEY OBE (TRIBUNAL JUDGE)**

**The Tribunal determined the appeal on 12 December 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 17 August 2011 and HMRC's Statement of Case submitted on 23 September 2011. The Appellant did not submit a reply.**

## DECISION

1. The Appellant appealed against the imposition of a surcharge issued on 6 May 2011 in the amount of £74.14 for the late payment of the tax due for the year ending 5 April 2010.

2. On 6 April 2010 HMRC issued the Appellant with a notice to file her 2009/10 tax return by 31 October 2010 for a paper return, and if online by 31 January 2011. The Appellant filed her return online on 28 January 2011 which contained a self calculation of the tax due. The Appellant's tax liability for the year was £1,482.92 which according to HMRC was paid on 1 March 2011.

3. The Appellant made an electronic payment for the tax due from her bank account on the 27 February 2011 which according to her was credited to HMRC's account on the 28 February 2011. The Appellant had struggled to get the monies together because of severe financial difficulties.

4. HMRC characterised the dispute as one of reasonable excuse. The Tribunal is satisfied that this case was not one of reasonable excuse but about when the payment was made and received by HMRC.

5. HMRC in its review letter stated that it did not receive the payment until 1 March 2011. The statement of case said that the total liability was paid on 1 March 2011.

6. Section 59C (2) of the TMA 1970 states that

“Where any of the 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 per cent of the unpaid tax”.

7. In this Appeal the day following was the 1 March 2011. The High Court in *Thompson (Inspector of Taxes) v Minzly* [2002] STC 450 interpreted section 59C(2) as follows:

“Section 59C(2) only came into play when the tax remained unpaid for a period of at least 28 days from the due date. The inquiry which needed to be made was whether that state of affairs remained in existence on the day after that period had expired. That had to be answered in respect of a particular point of time, not in respect of the whole of an additional period. In practice, one had to look to the first moment of the day in question. In the instant case, tax was unpaid on the 29th day because it remained unpaid during the earlier part of that day. The fact that it was paid later on in the day did not alter that fact”.

8. Thus in this Appeal the Tribunal has to consider whether the tax owed by the Appellant was unpaid on the first moment of the 1 March 2011. As this is a penalty the burden of proving that the legal requirements for issuing the surcharge have been met rests on HMRC.

9. HMRC has provided the Tribunal with two versions: payment was not received until 1 March 2011 and the Appellant paid the liability on 1 March 2011. HMRC has

not said when on the 1 March payment was received or made. Also HMRC has not used the word *during* to qualify receipt or making of payment. The Appellant's version was that she instructed her bank on 27 February 2011 (a Sunday) and that the money was transferred to HMRC on 28 February 2011.

5 10. The manner in which HMRC has stated its case permits the possibility that the outstanding tax had been paid on the first moment of the 1 March 2011. In view of this ambiguity the Tribunal has two choices, either to resolve the ambiguity against the person who relies on it or adjourn the proceedings to clarify the ambiguity.

10 11. Having regard to the overall objective of dealing with cases fairly and justly I am not minded to adjourn the proceedings. In reaching this decision I consider it is disproportionate to add complexity and further delay to what is a straightforward dispute about a modest penalty and where HMRC has had two opportunities to state its case unequivocally. I am satisfied those factors outweigh any potential unfairness to HMRC.

15 12. Given the above circumstances, HMRC has failed to satisfy the Tribunal that the outstanding tax from the Appellant remained unpaid on the day following the expiry of 28 days from the due date (1 March 2011). Thus the requirements of section 59C(2) have not been met, which means that HMRC had no authority to issue the surcharge against the Appellant.

20 13. The Tribunal allows the Appeal, and sets aside the surcharge in the sum of £74.14.

25 14. 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 TILDESLEY OBE**  
**TRIBUNAL JUDGE**  
**RELEASE DATE: 5 January 2012**