



TC01867

Appeal number: TC/2011/06815

Income tax – surcharge for late payment of tax – whether HMRC’s earlier repayment of payment on account a reasonable excuse – no – whether family member’s illness a reasonable excuse – no – appeal dismissed and surcharge confirmed

**FIRST-TIER TRIBUNAL
TAX**

CHARLES ROGER METELERKAMP

Appellant

- and -

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

Respondents

**TRIBUNAL: ANNE REDSTON (PRESIDING MEMBER)
DUNCAN McBRIDE (TRIBUNAL MEMBER)**

Sitting in public at 30-31 Friar Street, Reading on 7 February 2012

The Appellant in person

Mrs E Gardiner of HM Revenue & Customs’ Appeals and Reviews Unit, for the Respondents

DECISION

1. This was Mr Metelerkamp's appeal against a surcharge of £2,711.83 charged for late payment of tax due for 2008-09.

5 2. There was no dispute that the payment was late. The issue in the case was whether Mr Metelerkamp had a reasonable excuse for the late payment.

3. If Mr Metelerkamp has a reasonable excuse, the Tribunal can set aside the surcharge¹. The statute does not define a reasonable excuse. It has recently been held by this Tribunal that "an excuse is likely to be reasonable where the taxpayer acts in the same way someone who seriously intends to honour their tax liabilities and obligations would act." *B&J Shopfitting Services v R&C Commrs* [2010] UKFTT 78 (TC) at [14].

The evidence

4. The Tribunal was provided with a bundle of documents. This included the correspondence between the parties in relation to the appeal, along with a number of other documents, including the following:

(1) Page 5 of Mr Metelerkamp's 2008-09 tax return as originally submitted.

(2) The self-calculation page for Mr Metelerkamp's 2008-09 return as originally submitted and the self-calculation page of the amendment to that return.

(3) The 2008/09 SA Return Summary.

(4) A page headed "Tax returns due/received" displaying the summary for the 2008-09 tax year.

5. Shortly before the hearing, HMRC provided the following extra documents:

(1) Two versions of Mr Metelerkamp's 2008-09 Tax Calculation for 2008-09, amended in manuscript with the words "1st version" and "2nd version".

(2) A document headed "View Statement" showing Mr Metelerkamp's SA transactions as at 10 November 2010.

6. Mr Metelerkamp provided us with a document headed "calculation of tax payment to be made January 2010", with the logo of KPMG and a covering note from Mr Metelerkamp to "George", identified by Mr Metelerkamp as George Venn of KPMG. This document referred to payments due in January 2010 and we therefore found it not relevant to the issue under appeal.

7. Mr Metelerkamp also gave oral evidence to the Tribunal and was cross-examined by Mrs Gardiner.

¹ Taxes Management Act 1970 ("TMA"), s 59C(9), see the Appendix to this Decision.

The facts

8. The Tribunal noted that the evidence and submissions appeared to contain inconsistencies, particularly in relation to dates. The following facts were therefore confirmed during the course of the Tribunal hearing.

5 9. In February 2009 Mr Metelerkamp, who had previously been a partner with KPMG, left that firm.

10. In March 2009 his daughter had an operation for a serious illness. She remained in hospital until February 2010. She still needs a significant level of care.

10 11. On 30 January 2010 Mr Metelerkamp filed his tax return for the 2008-09 tax year. He completed the self-calculation online. The resulting “calculation summary” showed that the tax for 2008-09 was £128,416.06.

12. Mr Metelerkamp paid the tax for 2008-09 in full and also the first payment on account for 2009-10.

15 13. Following advice from George Venn of KPMG, Mr Metelerkamp put a cross in Box 9 of the calculation summary. This Box asks “if you are claiming to reduce your 2009-10 payments on account, put X in the Box.” Box 10 asks “Your first payment on account for 2009-10”. This Box was completed with “0.00”.

14. On page 5 of the tax return, under the heading “If you have paid too much tax”, Mr Metelerkamp provided HMRC with the details of his bank account.

20 15. HMRC processed the return, together with the information provided in Boxes 9 and 10 of the calculation notice.

25 16. On 22 February 2010, because Mr Metelerkamp had reduced his 2009-10 payments on account to zero, HMRC refunded £65,069.90. This sum was paid into the bank account for which details had been provided on Mr Metelerkamp’s 2008-09 tax return.

30 17. In February 2010, a week after his daughter left hospital, Mr Metelerkamp took up employment with Lodestone Management Consultants. He headed that company’s UK operations and was global leader for the HR part of their business. In a letter to HMRC dated 11 June 2011, he describes this as a “very demanding job (working 12 to 14 hour days and many hours at weekends).” He remained in this role until the end of 2011; in January 2012 he moved to another company.

18. In answer to questions from the Tribunal, Mr Metelerkamp said that since he resumed work, his wife has day-to-day responsibility for his daughter’s care.

35 19. In August 2010 Mr Metelerkamp and his family temporarily moved from their home, a listed building, so that builders could carry out some repairs. This work was non-urgent and Mr Metelerkamp decided to carry it out at that time because he thought it was “a good time financially” because builders were relatively cheap in the depressed property market. Until around March 2011, the family stayed at a friend’s

house which was otherwise unoccupied. In answer to questions from the Tribunal, Mr Metelerkamp confirmed that there was “probably” a post-forwarding arrangement in place during this period, and that their home was visited “weekly at least” to check on the building work.

5 20. On 6 October 2010 an amendment was made to Mr Metelerkamp’s 2008-09 tax return, by including a higher figure in the box entitled “profit from partnerships”. There was some uncertainty about who carried out this amendment, and we discuss this below.

10 21. The result of the amendment was that Mr Metelerkamp’s tax liability increased from £128,162.56 to £182,398.82. The extra tax was therefore £54,326.26.

22. On 10 November and 12 December 2010 HMRC sent SA Statements of Account to Mr Metelerkamp, setting out the further tax which was due as a result of the amendment. There is some dispute about whether these Statements were delivered, and again we discuss this below.

15 23. Mr Metelerkamp paid the extra tax on 21 December 2010, together with interest (because the amendment related to 2008-09, for which the due date of 31 January 2010 had already passed). The total payment was £56,664.23.

24. On 17 February 2011, HMRC issued a surcharge for late payment of £2,711.83, being 5% of the extra tax arising from the amendment.

20 25. On 13 March 2011, Mr Metelerkamp appealed the surcharge.

Mr Metelerkamp’s submissions

26. Mr Metelerkamp submitted that he was “way over the threshold” for a reasonable excuse, for the following reasons:

25 (1) If HMRC had not repaid him the payment on account of £65,069.90 in February 2010, this would have more than covered the extra tax arising from the later amendment. When he put the X in Box 9 of the calculation page of the 2008-09 return, he meant only to stop future payments on account: he “did not know that this would cause [HMRC] to refund an amount that I have now had to pay again.” He says that “an average person such as me would assume that the request relates only to future payments...so the original cause of this whole situation was HMRC. I had paid the tax and HMRC paid it back to me, so as to give me a surcharge for not paying it is wholly inappropriate.”

35 (2) He called HMRC “to query the payment made to me by HMRC and to ask whether this was mine to keep if I had overpaid in the previous periods or whether I needed to pay it again. The person I spoke to did not know.” The Tribunal notes that there appears to be some inconsistency around the date of this call: in his appeal notice to HMRC it is stated as taking place on 14 July 2010; his letter of June 2011 says it was made in April 2010. However, we accept as a fact that at least one call was made.

(3) His daughter was seriously ill and therefore “I did not work during this period due to the effort required to look after my daughter and support the other members of my family.”

5 (4) Because of his daughter’s illness, his wife “is unable to always stay on top of the administration. This has impacted...the whole issue in relation to payments on account.”

10 (5) He said that at the time HMRC sent out the Statement of Account showing the tax due, he had moved house, and the fact that there was “probably” a post forwarding arrangement with the post office “doesn’t mean that the mail was opened or kept.”

(6) He did not receive an instruction from HMRC to pay the extra tax within 30 days of the amendment and was not told that if he did not pay within 58 days he would suffer a surcharge.

HMRC’s submissions

15 27. For HMRC, Mrs Gardiner said that the £65,069.90 was repaid because it had been requested by Mr Metelerkamp. It was the result of him putting the X in Box 9 of the calculation page.

20 28. However, she emphasised that this repayment was something of a distraction. The main issue was that Mr Metelerkamp’s 2008-09 return had been amended on 6 October 2010. She said that:

(1) if a taxpayer amends a return after the due date, any tax arising must be paid within 30 days of the amendment: this is a statutory obligation.

25 (2) HMRC allow a further six days for posting and processing delays. As a result the further tax should have been paid by 11 November 2010. Mr Metelerkamp had not paid the extra tax within this statutory time limit.

(3) The surcharge trigger date does not arise for a further 28 days: in this case, 2 December 2010. Had Mr Metelerkamp paid the extra tax by that date, there would have been no surcharge.

30 (4) In fact, the tax was not paid until 21 December 2010, nineteen days after the surcharge trigger date.

29. In response to Mr Metelerkamp’s submission that he did not receive the SA Statements of Account sent on November 10 and December 12 2010 , Mrs Gardiner asked how he had known what sum to pay. Mr Metelerkamp said that he “phoned someone up, maybe George”.

35 30. Mrs Gardiner submitted that Metelerkamp knew perfectly well that the tax was due, well before the 58 day trigger for the surcharge.

Mr Metelerkamp's response to questions from the Tribunal

31. The Tribunal asked Mr Metelerkamp the following questions:

- (1) *Who filed the return on 30 January 2010?* Mr Metelerkamp said he completed it, having spoken to George Venn at KPMG.
- 5 (2) *Who made the amendment to his tax return in October 2010?* Mr Metelerkamp said he “couldn’t remember anything” about the amendment.
- (3) *When he thought the extra tax arising from the amendment was due for payment?* He said he “wasn’t clear” and “didn’t know”.
- 10 (4) *Why he thought that HMRC should not have repaid the £65,069.90?* He said George Venn had indicated that there would be some further liability on partnership profits. Mr Metelerkamp had expected that the X on the return would stop future payments on account, not trigger a repayment. It was a surprise when the payment on account was all repaid.

Discussion

15 32. We did not find Mr Metelerkamp to be a wholly credible witness. We found it extremely unlikely that he could remember nothing about the amendment to the return made in October 2010. It was not trivial: it augmented his 2008-09 partnership profits by some £132,000, an increase of almost 40%.

20 33. When we asked who filed the amendment on 6 October 2010, he said he did not remember. However, he accepted that he had filed his own 2008-09 SA return on 30 January 2010 and completed the online calculation.

34. On the balance of probabilities, we find that Mr Metelerkamp filed the amendment to the 2008-09 return on 6 October 2010, together with the associated calculation, and that he therefore knew the amount due as a result of that amendment.

25 35. The normal due date for paying tax due for the 2008-09 fiscal year was 31 January 2010. Our starting point is that a taxpayer who amends his return after the normal due date would be alert to his statutory responsibilities, and settle the further tax within the thirty day deadline – and certainly, before the elapse of a further twenty-eight days.

30 36. From that starting point what we consider whether Mr Metelerkamp had a reasonable excuse for his late payment.

Lack of awareness of the due date

35 37. Mr Metelerkamp said that he was unaware that he had to pay the extra tax within 30 days. This is a statutory provision. Ignorance of the law rarely provides a taxpayer with a reasonable excuse.

38. It certainly does not do so in this case: Mr Metelerkamp could quickly and simply have established the due date for payment, by contacting HMRC, or perhaps by speaking to Mr Venn at KPMG.

The repayment

39. It is true that had Mr Metelerkamp not received a repayment of £65,069.90 in February 2010, HMRC would have been holding sufficient tax to have covered the liability arising following the amendment.

5 40. But no blame attaches to HMRC for repaying this sum. While we accept that Mr Metelerkamp did not realise that his entries in Boxes 9 and 10 would trigger a tax refund, it was his own completion of the SA return form and calculation which caused it to be made: HMRC did not take the initiative.

10 41. We therefore find that HMRC's repayment of the £65,069.90 does not in any way provide Mr Metelerkamp with a reasonable excuse.

Mr Metelerkamp's calls to HMRC

42. We also find that the response given by the HMRC officer when Mr Metelerkamp called to query the repayment does not provide a reasonable excuse.

15 43. Whether the call took place in April 2010 or in June 2010, or both, the amendment to Mr Metelerkamp's 2008-09 return had not yet been made; the HMRC officer would therefore have been unable to advise whether all or part of the £65,069.90 repaid would be required to cover that future adjustment.

The alleged non-receipt of the Statements of Account

20 44. We accepted, and have found as a fact, that the SA Statements of Account dated 10 November and 12 December 2010 were sent to Mr Metelerkamp's address by HMRC. Mr Metelerkamp submits that he did not receive these Statements.

45. We find his submissions on what happened to the post during this period to be unconvincing. On the balance of probabilities we find that both Statements were delivered, for the following reasons:

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- (1) they were posted to his address;
 - (2) he said he "probably" had a forwarding arrangement in place; and
 - (3) Mr Metelerkamp and/or his wife visited the house weekly and were likely to collect any post.

30 46. Even if the Statements of Account had gone astray, this would not provide Mr Metelerkamp with a reasonable excuse. We have found as a fact that he amended the return, and completed the attached recalculation: he must therefore have been aware of the amount that was due. When asked by Mrs Gardiner how he knew how much to pay on 21 December, had the Statements of Account had not been received, Mr Metelerkamp's answer was that he called someone, possibly George Venn. We found
35 this response vague and unconvincing.

47. For these reasons we reject Mr Metelerkamp's submission that he had had reasonable excuse because he had failed to receive the Statements of Account and thus did not know what to pay.

His daughter's illness

48. Mr Metelerkamp also submits that his daughter's illness provided him with a reasonable excuse.

5 49. The Tribunal fully accepts that this has been an extremely painful and distressing experience for the whole family. However, we did not find that his daughter's illness provided Mr Metelerkamp with a reasonable excuse, for the following reasons:

10 (1) From February 2010 onwards, he was working full time at an extremely demanding job. We found it to be inconsistent with that role that he was, because of the stress of his daughter's illness, unable to organise his affairs so as to pay the tax he owed by the surcharge trigger date.

15 (2) In August 2010, the family decided to move house so that their listed building could be restored. Mr Metelerkamp was clear that this was move was wholly discretionary: he called it "optional". He moved out and let the builders in because it was a financially sensible thing to do in a depressed market, where builders were relatively cheap and available. In our judgment, this voluntary disruption to the family's normal pattern of life is difficult to reconcile with the picture of a man whose daughter's illness was preventing him from carrying out his statutory responsibilities.

20 (3) Mr Metelerkamp said that the day-to-day care of his daughter was in his wife's hands. This weakens his reasonable excuse claim, in that it is clear that the primary burden rested on Mrs Metelerkampf. However, he sought to argue that this extra burden made his wife less able to cope with the household administration, including his payments on account.

25 (4) Mr Metelerkamp did not go so far as to say that responsibility for paying his tax rested with his wife. Even had this been the case, we would not have found reliance on Mrs Metelerkamp to be a reasonable excuse. As this Tribunal said in *B&J Shopfitting Services v R&C Commrs* [2010] UKFTT 78 (TC) at [12], "reliance on a third party as a matter of policy will not normally be a reasonable excuse because a taxpayer should not be able to avoid his liabilities by passing them on to someone else".

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Lack of knowledge of the quantum of the surcharge

35 50. Finally, Mr Metelerkamp says that he was not told that failure to pay the tax within 58 days would trigger the surcharge. The reasonable excuse defence is meant for taxpayers who cannot pay by the trigger date for a good reason. It does not shelter those who do not pay because they are unaware of the severity of the penalty.

Decision

51. For the reasons set out above, we find that Mr Metelerkamp had no reasonable excuse and his appeal fails. We confirm the surcharge in the amount of £2,711.83.

40 52. 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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Anne Redston

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TRIBUNAL PRESIDING MEMBER
RELEASE DATE: 6 March 2012

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THE LEGISLATION

Taxes Management Act 1970, Sch 3ZA Schedule 3ZA

5 **Date By Which Payment to be Made After Amendment or Correction Of Self-Assessment**

(1) This paragraph applies where an amount of tax is payable or repayable as a result of the amendment of a self-assessment under section 9ZA of this Act (amendment of personal or trustee return by taxpayer).

10 (2) ...the amount is payable (or repayable) on or before the day following the end of the period of 30 days beginning with the day on which the notice of amendment was given.

Taxes Management Act 1970, s 59C

Surcharges on unpaid income tax and capital gains tax

15 (1) This section applies in relation to any income tax or capital gains tax which has become payable by a person (the taxpayer) in accordance with section 55 or 59B of this Act.

(2) 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.

20 (3) Where any of the tax remains unpaid on the day following the expiry of 6 months from the due date, the taxpayer shall be liable to a further surcharge equal to 5 per cent of the unpaid tax.

(4)-(6) ...

25 (7) An appeal may be brought against the imposition of a surcharge under subsection (2) or (3) above within the period of 30 days beginning with the date on which the surcharge is imposed.

(8) ...

(9) On an appeal under subsection (7) above that is notified to the tribunal section 50(6) to (8) of this Act shall not apply but the tribunal may—

30 (a) if it appears 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, confirm the imposition of the surcharge...