



TC01925

Appeal number: TC/2011/06734

INCOME TAX – Surcharge on late payment of income tax (Taxes Management Act 1970 s.59C) – Appeal dismissed

**FIRST-TIER TRIBUNAL
TAX**

MR MICHAEL JOHN COLLINS

Appellant

- and -

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

Respondents

TRIBUNAL: Dr Christopher Staker (Tribunal Judge)

The Tribunal determined the appeal on 26 January 2012 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 August 2011, and HMRC's Statement of Case dated 4 October 2011, and other papers in the case.

DECISION

1. This is an appeal against a default surcharge imposed pursuant to s.59C of the Taxes Management Act 1970 (the "TMA") in respect of the late payment of tax for the 2007/08 tax year.

2. The facts as set out in the HMRC statement of case are as follows. The Appellant filed his 2007/08 tax return on 30 April 2008, and the tax due according to the information provided in the return was paid on 21 May 2008. Subsequently, on 11 January 2011, HMRC made an assessment for 2007/08 under s.29 TMA, showing a tax liability of £7,138.40 for the year. Pursuant to s.59B(6) TMA, payment of that amount was due 30 days after the assessment. HMRC allowed an extra 6 days for delivery, such that the due date was 17 February 2011. In the meantime, on 18 January 2011, HMRC amended the s.29 assessment for 2007/2008, reducing it to £5,138.40. The Appellant paid this amount in three instalments between 14 February 2011 and 6 April 2011. On or about 8 April 2011, HMRC issued a surcharge liability notice pursuant to s.59C TMA in the sum of £191.92. The appellant now appeals against that surcharge liability notice.

3. The Appellant states by way of grounds of appeal that he never received any payment date or mail from HMRC but only from his accountant, that his tax liability was changed "three times in two months" by HMRC, and that he never received a payment slip or a date to pay until he received the late payment notice. The whole amount was paid within a week of him receiving the late payment notice. The Appellant made two small payments on his credit card only because of the credit card company. He never telephoned HMRC.

4. The HMRC response is as follows. The surcharge has been imposed in accordance with the legislation. The Tribunal may only set it aside if the Appellant establishes a reasonable excuse for the late payment that existed throughout the period of default. The period of default in this case is 10 February 2011 to 6 April 2011, 54 days. The Appellant has not established that he was prevented from paying on time by anything unexpected or outside his control. HMRC records show that the Appellant's agent was given authority by the Appellant to receive the Appellant's statements of account. HMRC nevertheless sent the Appellant a statement with attached payment slip on 28 February 2011. There is no record that this was returned undelivered. Had the Appellant given the correct figures in his tax return, the correct amount would have been assessed in 2008. Inability to pay is not a reasonable excuse, and in any event, the Appellant did not seek to enter into a time to pay arrangement with HMRC.

5. There is additionally information in the papers that the Appellant rang HMRC on 15 February 2011 advising that he could not pay the entire amount at that time, although it is noted that the Appellant denies this.

6. Section 29(1) of the TMA provides as follows:

5 (1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment—
(a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or
(b) that an assessment to tax is or has become insufficient, or
(c) that any relief which has been given is or has become excessive,
10 the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.

7. Section 59B(6) of the TMA provides in relevant part as follows:

15 (6) Any amount of income tax or capital gains tax which is payable by virtue of an assessment made ... be payable on the day following the end of the period of 30 days beginning with the day on which the notice of assessment is given.

8. Section 59C of the TMA provides in relevant part as follows:

20 (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.

...

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.

...

(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.

35 (10) Inability to pay the tax shall not be regarded as a reasonable excuse for the purposes of subsection (9) above.

...

...

40 (12) In this section—
“the due date”, in relation to any tax, means the date on which the tax becomes due and payable;

“the period of default”, in relation to any tax which remained unpaid after the due date, means the period beginning with that date and ending with the day before that on which the tax was paid.

5 9. In an appeal against a default surcharge under s.59C, the burden is on HMRC to establish on a balance of probabilities that the payment was made late, such that the Appellant is liable to a surcharge under that provision. The burden then shifts to the Appellant to establish on a balance of probabilities that he had, throughout the period of default, a reasonable excuse for the late payment.

10 10. The Appellant did not give a clear statement of relevant facts in the notice of appeal. The material facts of the case, as claimed by HMRC, are set out in the HMRC statement of case. The Appellant had the opportunity to file a reply to the HMRC statement of case, in which he could have contradicted the HMRC version of the facts, but did not avail himself of that opportunity.

15 11. On the basis of the evidence as a whole, the Tribunal is satisfied that the payment of the tax liability was not made in full until 6 April 2011.

12. The burden is thus on the Appellant to establish a reasonable excuse throughout the period of default. HMRC contends that a statement with attached payment slip was sent to the Appellant on 28 February 2011, and that there is no evidence that it was returned undelivered. In any event, the HMRC contention is that previously notices were sent to the Appellant’s agent, with the Appellant’s authorisation. If the Appellant authorises notices to be sent to an agent, it is in principle the responsibility of the Appellant to ensure that his agent passes the relevant information to him. If the agent fails to do so, that is in principle a matter between the Appellant and his agent, and does not of itself amount to a reasonable excuse. In any event, the Appellant’s notice of appeal states that “I did find out through my accountant”. Most critically, the Appellant made small payments to HMRC on 14 February 2011 and 17 March 2011. This suggests that, whether or not he rang HMRC, as claimed by HMRC and denied by him, he was aware of the tax liability in February 2011.

13. On its consideration of the evidence as a whole, the Tribunal is satisfied that the Appellant knew of the s.29 assessment well before 6 April 2011, yet did not pay in full until that date. The apparent reason for not paying in full earlier was lack of funds. However, s.59C(10) of the TMA expressly provides that inability to pay is not a reasonable excuse. The Appellant says that HMRC changed the amount of the assessment “three times in two months”. In fact, a s.29 assessment was made on 11 January 2011, and then changed only once, on 18 January 2011. That amendment reduced the tax liability, so did not prejudice the Appellant.

14. The Tribunal is not satisfied that the Appellant has established a reasonable excuse throughout the period of default, and it follows that this appeal must be dismissed.

Conclusion

15. Appeal dismissed.

16. 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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DR CHRISTOPHER STAKER

TRIBUNAL JUDGE

RELEASE DATE: 02 April 2012

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