



TC01959

Appeal number: TC/2011/05832

*S 59 C Taxes Management Act 1970 – surcharge – reasonable excuse – no;
S 108 Finance Act 2009 – deferred payment plan.*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

TOBY FOSTER

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY'S Respondents
REVENUE & CUSTOMS**

**TRIBUNAL: JUDGE ALISON MCKENNA
ANTHONY HUGHES**

Sitting in public at Bedford Square on 27 February 2012

**Mike Beattie of M G Beattie & Co Ltd, Chartered Accountants, for the
Appellant**

Paul Reeve of HM Revenue and Customs, for the Respondents

DECISION

- 5 1. This appeal concerns two surcharges for late payment of income tax, imposed on Mr Foster in February 2011 in respect of the year ending 5 April 2009. The surcharges were for £6,690.59 and £3,485.59 respectively, making a total of £10,176.18.00. The surcharges became payable upon the breach (which is not disputed) of an agreement for deferred payment of tax.
- 10 2. The material facts leading to the breach of the deferred payment plan and consequent imposition of the surcharges are essentially undisputed and appear at paragraphs 4 to 7 below.
- 15 3. The Tribunal's jurisdiction in this matter derives from s 59 C (9)(a) and (b) of the Taxes Management Act 1970, whereby the Tribunal may confirm the surcharge or set it aside if the Tribunal is satisfied that the Appellant had a reasonable excuse for not paying the tax throughout the period of default. The Tribunal has no statutory power to reduce the value of the surcharges imposed.

The Facts

- 20 4. Mr Foster filed his self assessment tax return on line on 28 January 2010 and tax was calculated to be payable in the sum of £233811.93. This was due to be paid on or before 31 January 2010. Mr Foster's accountants asked HMRC to agree to a deferred payment plan consisting of an immediate payment of £100,000 followed by monthly payments of £12,820.00 from 28 February 2010 to 30 November 2010, followed by the payment of the balance on 31 December 2010.
- 25 5. HMRC referred to the deferred payment plan at the hearing of this matter as a "Time to Pay" agreement ("TTP"). Mr Beattie, on behalf of Mr Foster, argued that it was not a TTP but another type of agreement. We return to this area of dispute at paragraph 16 below. It is not disputed that an agreement was reached in the terms described at paragraph 4 above, however it was characterised.
- 30 6. Mr Foster paid the initial sum of £100,000 on 21 January 2010 and thereafter paid the monthly instalments every month for nine months until the penultimate payment due on 30 November 2010 was missed. This was because there were insufficient funds in the relevant bank account to make the direct debit payment. HMRC concluded that the TTP was cancelled on 14 December 2010. Its evidence was that it wrote to Mr Foster to inform him of this on that date,
35 although Mr Foster told us he did not receive such a letter. In cancelling the arrangement with Mr Foster, HMRC imposed surcharges - as though no TTP had ever been in place - by reference to the tax which had been due on 31 January 2010. The outstanding amount was paid in full by Mr Foster on 8 April 2011.

7. HMRC conducted a review of the decision to impose the surcharges and, on 1 July 2011, concluded that the original decision to impose the surcharges should be upheld. Mr Foster appealed to the Tribunal on 28 July 2011.

The Law

- 5 8. The surcharges were imposed under the provisions of s 59 C (2) and (3) of the Taxes Management Act 1970, which permit a surcharge equal to 5% of the unpaid tax to be levied after 28 days from when it is due and a further surcharge of 5% to be levied after six months from the due date. As noted above, these may be set aside in circumstances of “reasonable excuse” but s. 59 C (10) of the
10 1970 Act provides that inability to pay the tax shall not be regarded as a reasonable excuse for not paying it.
9. Section 108 of the Finance Act 2009 permits HMRC to enter into a deferred payment plan with a taxpayer. If such an agreement is entered into, the tax payer avoids the imposition of late payment surcharges under s 59 C of the 1970 Act because the surcharges are, under the authority of s 108, suspended. Section 108 (3) of the 2009 Act provides that if the agreement is broken, the tax payer becomes liable to the surcharge and sub section (4) states that the agreement is broken if the tax payer fails to comply with a condition to which the deferral is subject, which includes a condition for the payment of money
15 during the deferral period. Section 108 (6) provides for the variation of the agreement between HMRC and the tax payer.
- 20 10. We were referred to HMRC guidance in relation to s 108 of the 2009 Act, including DMBM804100: “Time to Pay: Monitoring the arrangement: Customer Defaults on Time to Pay”. This advises officers to
- 25 *“...look at the case and decide whether you should contact the customer to try and bring the arrangement up to date or whether it is now appropriate to cancel the arrangement.*
- In deciding whether it is appropriate to cancel the arrangement you should consider whether*
- 30 *- previous reminders have been issued*
- the customer is up to date with returns and other payments*
- how long the instalment has been outstanding*
- how many instalments are outstanding*
- How much is owed”.*
- 35 11. We were also referred to HMRC “Business Payment Support Service” website guidance to tax agents and advisers which states that

*“...a surcharge can be avoided on late payment of income tax where a Time to Pay agreement is entered into the relevant surcharge date **and** the terms of the agreement are adhered to”.*

- 5 12. In approaching our decision, we remind ourselves that article 6 of the European Convention on Human Rights has been held to apply to the imposition of tax penalties and that HMRC bears the burden of proof in satisfying us on the balance of probabilities that the surcharges were lawfully imposed. The Appellant bears the burden of proof in satisfying us on the balance of probabilities that he had a reasonable excuse, within the meaning of the legislation, for the late payment so that the surcharges should be set aside.
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Evidence and Argument

- 15 13. The Tribunal heard oral evidence from Mr Foster, who explained that the non-payment of the direct debit to HMRC arose in circumstances where his personal relationship manager at HSBC had recently left his post and the replacement manager was on sick leave. He explained that he had always had a good relationship with his bank in the past and that any problems of this nature would have been brought to his attention. In this case, he was not aware of the non-payment of funds to HMRC until February 2011 when he received the penalty notice because, as he told us, he had not received the letter from HMRC in
- 20 December 2010.
14. Mr Foster told the Tribunal that at the end of 2010 he was involved in a start-up business which could not always afford to pay him his salary. He had been aware that a number of direct debits had not been paid due to insufficiency of funds in his current account, and had taken steps to transfer funds from
- 25 elsewhere and to meet his liabilities. He was therefore surprised that neither the bank nor HMRC had informed him of the missed payment to HMRC in November 2010. He told us that if he had been made aware of the missed payment he would have made arrangements to pay it.
- 30 15. Mr Beattie had, prior to the hearing of this matter, made Freedom of Information Act requests to HMRC and placed documentary evidence before the Tribunal to show that, as he put it, there were certain “anomalies” in HMRC’s records relating to Mr Foster’s case. There is an entry stating that the base address was changed in 2007 (although Mr Foster had not changed address in that year); the computer entry on 14 December 2010 stated “second letter sent” when there had been no first letter recorded; there is no entry to show who sent a letter on that date; there is no record of a review having taken place prior
- 35 to the cancellation of the deferred payment plan; the debt management records show this case as “not a direct debit case” when there was payment by direct debit; there is an entry on 11 March 2010 saying that the agreement was amended, but it was not.
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16. Mr Beattie advanced a number of separate arguments for asking the Tribunal to set aside the surcharges imposed on Mr Foster. We summarise these as follows:

- 5 (i) The deferred payment arrangement which HMRC entered into with Mr Foster was not a TTP arrangement in reliance upon s 108 of the 2009 Act, but some other form of contract falling under the “Business Payment Support Service”. He was unable to specify what statutory basis such a contract might have but pointed to the terms of the agreement described in the correspondence between Mr Foster’s then advisers Mazars and HMRC in which the words “Time to Pay Agreement” were not used and no reference to s 108 of the Finance Act 2009 was made;
- 10 (ii) Because this was not properly to be regarded as a TTP agreement, it fell outside of the regime imposed by s 108 of the 2009 Act, so that the imposition of penalties in reliance upon that legislative authority was unlawful;
- 15 (iii) HMRC did not follow its own procedures for a TTP in any event in that it did not review the case in accordance with the procedures described at paragraph 10 above;
- 20 (iv) That the procedural anomalies disclosed by the documents he had obtained under the Freedom of Information Act were relevant to the lawfulness of the action taken by HMRC. In all the circumstances HMRC’s approach was unfair to Mr Foster. The letter confirming the deferred payment agreement (sent to Mazars on 28 January 2010) had not warned Mr Foster as to the effect of missing a payment. It had merely stated “*I will consider cancelling the plan if you make a payment late or fail to make a payment*”. Furthermore, Mr Foster had not received the letter of 14 December telling him that the payment had been missed so he had had no opportunity to remedy the situation before the penalties were imposed.
- 25 (iv) That the imposition of surcharges in relation to tax already paid represents an unjust enrichment of HMRC and that the penalty was in all the circumstances disproportionate.

30 17. On behalf of HMRC, Mr Reeve argued that:

- (i) Section 108 of the 2009 Act governs all arrangements for late payment of tax, so it is irrelevant how the agreement is described. There is no other legislative authority in reliance upon which HMRC could enter into a deferred payment agreement;
- 35 (ii) The only basis for the Tribunal to set aside the surcharges would be if it found that Mr Foster had a reasonable excuse for breaching the agreement. An insufficiency of funds in his bank account is not a reasonable excuse by virtue of s 59 C (10) of the 1970 Act. Mr Foster is expected to be aware of his tax affairs and to ensure that funds are available to meet his liabilities to HMRC;
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- 5 (iii) Whilst the letter to Mazars refers only to consideration of cancellation in the event of a missed payment, the legislation itself makes clear that the surcharge is only suspended during the agreement and that breach of the conditions would make it payable. Mr Foster was professionally advised and the e mail of 21 March 2011 exhibited at B22 of the hearing bundle shows that Mazars had understood the legislative position to be that the surcharge would not be applied so long as payment was made as per the payment plan;
- 10 (iv) The legislation gives HMRC no discretion at the point where an agreement has been breached. If Mr Foster had contacted HMRC and explained his difficulties a new arrangement could have been reached, as permitted by the legislation;
- 15 (v) The HMRC officer had reasonably concluded that there was nothing to be gained from contacting Mr Foster before cancelling the agreement. There is a discretion to do so but no requirement. In relation to the letter of 14 December, the records show that it was sent, so it was duly served. That letter was the “second letter” which is the cancellation of agreement letter, so it would not have been possible for Mr Foster to remedy the situation even if he had received it because the surcharges had already been triggered at that date by the missed payment;
- 20 (vi) The default is not contested in this case and so unless there is a reasonable excuse for non payment the Tribunal must uphold the surcharges.

The Tribunal’s Conclusions

- 25 18. The Tribunal has considered all the evidence and arguments very carefully. As we explained to Mr Beattie, the only statutory basis for setting aside the surcharges is the “reasonable excuse” ground. We note that Mr Foster had insufficient funds in his current account to meet the direct debit payment on 30 November but that he apparently had access to funds elsewhere. On that basis, it does not seem to us that this case falls squarely within s 59 C (10) of the 1970 Act, which rules out insufficiency of funds as an excuse for non payment.
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- 35 19. That said, we do not accept that a tax payer’s difficulties with cash flow and with his bank can constitute a reasonable excuse for no payment either. Mr Foster is a sophisticated business man who can be expected to pay attention to his financial affairs and the fact that a payment might be missed if he retained insufficient funds in his current account should have been obvious to him, especially in circumstances where the consequences of missing a payment would be serious.
- 40 20. Mr Beattie attacked HMRC’s processes on grounds of procedural unfairness. As we explained to him, this was not in itself a ground for setting aside the surcharge. We note that HMRC had discretion to contact Mr Foster or to cancel

the payment and that it exercised its discretion in favour of cancelling the agreement. Whilst recognising that in circumstances where article 6 of the European Convention apply, HMRC must show due process and that the penalties are properly imposed, we note that the letter of 14 December 2010 (which, we accept, Mr Foster did not receive) was one which cancelled the agreement and not one which asked him to remedy the missed payment in order to restore the agreement. In these circumstances it is irrelevant to this appeal that Mr Foster did not receive it.

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21. We have some sympathy with Mr Foster who had, after all, made the majority of the payments before the missed payment triggered the imposition of the surcharges. We note, however, that the legislative framework approved by Parliament is designed to be punitive and to deter missed payments. In those circumstances we reject Mr Beattie’s arguments as to unjust enrichment.
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22. Finally, although the point was not specifically argued before us, we have considered whether the penalty in this case might be thought to be disproportionate so as to offend European law. We have considered the decisions in *Energys Holdings UK Ltd v HMRC* [2010] UKFTT 20 (TC) and *Total Technology (Engineering) Ltd v HMRC* [2011] UKFTT 473 (TC). We note that the test applied in those cases was whether the penalty was “*not merely harsh but plainly unfair*”. In *Total Technology* it was noted that this test sets a high threshold before a court or tribunal can find that a penalty, correctly levied on the tax payer under legislative provisions conferred by Parliament, may be struck down as disproportionate. We conclude that the penalty imposed on Mr Foster in this case is indeed harsh, but is not so unfair as to enable this Tribunal to strike it down as unlawful.
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23. For the above reasons, we now dismiss this appeal.
24. 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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TRIBUNAL JUDGE

RELEASE DATE: 10 April 2012

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