



TC01987

Appeal number:TC/2011/8147

Income tax- penalty for late payment of tax s59C TMA- HMRC not providing return, payslip or statement to taxpayer- reasonable excuse

**FIRST-TIER TRIBUNAL
| TAX CHAMBER**

DR CHARLES GORDON

Appellant

- and -

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

**TRIBUNAL: JUDGE CHARLES HELLIER
 SUSAN HEWETT**

Sitting in public in Southampton on 25 January 2012

David Edmonds FCA, CTA for the Appellant

Mr Bates for HM Revenue and Customs, for the Respondents

DECISION

5 1. Dr. Gordon appeals against a surcharge of £488.55 imposed under section 59C(2) TMA 1970 for failure to pay tax in respect of the year 2009/10 on time.

2. We heard evidence from Mr. Edmonds and from Dr. Gordon. We find the following facts.

3. Dr. Gordon received no tax return from HMRC for either 2008/2009 or for
10 2009/2010.

4. However, realising he had income which needed to be returned, Dr Gordon contacted Mr. Edmonds. Mr. Edmonds prepared and submitted tax returns for Dr. Gordon in respect of each of the years. They were submitted before 31 January in each year. That for 2009/2010 was submitted electronically on 21 December 2010.

15 5. In January 2010 (following the first year in which he had had additional income and in which Mr Edmonds had acted for him) Dr. Gordon, realising that tax was due (as he had been advised by Mr. Edmonds following the submission of return) rang HMRC and asked how he should pay it. He was advised he could pay by debit card. He did so there and then.

20 6. After he had prepared and submitted the return for 2009/2010, Mr. Edmonds wrote to Dr. Gordon. In his letter he said:

"Payments on account (2010/11)

"However, in addition to the above liability to settle 2009/10, the Inland Revenue will also want a payment on account for the current year (2010/11) amounting to
25 50% of previous, being a further £4885.50, making a total payment due in January 2011 of £14,656.50.

"Tax liability

"This will be due on 31 January 2011. The Inland Revenue will send you a demand in January."

30 7. Dr. Gordon had the funds to pay the tax due at the relevant time.

8. Following the submission of his returns in each year HMRC sent no demand for payment, no statement of account and no payment slip. Normally they would do so.

9. After January 2010 Dr. Gordon tried to contact Mr. Edmonds about paying the tax. Eventually he contacted him in May 2010 (Mr. Edmonds been away). Dr. Gordon
35 then telephoned HMRC and made payment of the outstanding tax and interest.

The Law

10. Section 59C TMA 1970 provides:

“(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.

5 “(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% of the underpaid tax.

...

“(9) On any appeal ... the tribunal may --

10 (a) if it appears that, throughout a 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.

...

“(12) In this section --

15 “the due date”, in relation to any tax means the date on which the tax becomes due and payable ...”

11. The due date for the payment of the tax is defined by section 59B TMA. Subsection 59B(1) provides that the difference between the liability contained in a person’s self-assessment calculation and the amounts of tax already paid by him shall
20 be payable by him as mentioned in subsections (3) or (4). Those subsections provide:

“(3) In any case where the person --

(a) gave the notice required by section 7 of this Act [see below] within six months from the end of the year of assessment, but

25 (b) was not given notice under section 8 or 8A of this Act until after the 31st October next following that year,

the difference shall be payable at the end of the period of three months beginning with the day on which the notice under section 8 or 8A was given.

“(4) In any other case that difference shall be payable on or before 31 January next following the year of assessment.”

30 12. Section 7 TMA provides as follows:

“(1) Every person who –

(a) is chargeable to income tax or capital gains tax for any year of assessment, and

35 (b) has not received a notice under section 8 of this Act requiring a return for that year of his total income and chargeable gains,

shall, subject to subsection (3) below [which is not relevant in this case], within six months from the end of that year, give notice to an officer of the Board that he is chargeable.”

13. Section 8 provides that a person may be required by notice given to him by an officer to make and deliver a tax return before a specified day. The specified day is in a case of an online return 31 January next following the year of assessment or, where notice under the section 8 is given after 31 October next following the year, the last day of the period of three months beginning with the day on which the notice was given.

Discussion

14. A penalty may be assessed under section 59C only if the tax is paid more than 28 days after the due date. That raises the question of what is the "due date" in this case.

15. Normally, where a person has received a tax return the due date is determined by section 8, and normally for online returns it is 31 January after the end of the year.

16. But Dr. Gordon did not receive a tax return. The position is thus governed by section 59B(3) and (4). Subsection (3) applies where the taxpayer gives the notice that he is chargeable required by section 7 within six months from the end of assessment. There was no evidence before us that any such notice been given before 31 October 2010, which was six months after the end of the year 2010/11. In our view the completion of the online return constituted such notice, but, because that was done on 21 December it was unfortunately not done within the period of six months relevant to condition (a) of subsection (3). Thus the requirement in (a) of subsection (3) is not satisfied. As a result the due date is not determined by subsection (3).

17. Thus subsection (4) determines the due date. That provides that the amount is payable by 31 January next following the year of assessment. In this case that was 31 January 2011.

18. Thus the tax was paid more than 28 days after the due date because it was paid in May 2011. Therefore the condition set out in section 59C(2) is satisfied. Accordingly, unless Dr. Gordon can rely upon subsection (9) - that is to say unless he has a reasonable excuse for not paying the tax on time- the appeal must be dismissed.

19. Unhappily it seems to us that Dr. Gordon did not have a reasonable excuse. We say "unhappily" because Dr. Gordon took considerable and commendable care to ensure that he made a return on time. He was not helped in this endeavour by HMRC's failure to provide him with a return or the usual payslips and statements. One might consider it unreasonable to assess a surcharge in these circumstances. But Dr. Gordon knew of his obligation to pay the tax, knew the date by which it should be paid, and knew he could pay it by telephone with a credit or debit card. He may well have placed some reliance upon Mr. Edmonds' assurance that he would be sent a pay slip, but overall it seems reasonable to expect him to have done something about payment before the 31 January deadline arrived. We do not think in these circumstances that he is absolved from that expectation by Mr. Edmonds' advice. thus in relation to the narrow issue of whether he had a reasonable excuse for the delay we find he did not.

20. Mr Edmonds says that the public's cooperation with the tax system relies upon its being, and being administered, fairly. He recalls HMRC's failure to send out payslips in July 2011 and HMRC's resulting agreement to waive interest and penalties where payment was received before September of that year. He argues that Dr Gordon
5 was not treated fairly by HMRC and that as a result he had a reasonable excuse throughout the period of non payment.

21. But we are a creature of statute. In approaching section 59C our task is not to ensure fairness of the tax system but to consider whether the Appellant had a reasonable excuse. HMRC's actions may have a bearing on whether the that is the
10 case but only if they impinge sufficiently on the taxpayer's action. The circumstances of the taxpayer are relevant: what it may be unreasonable to expect from a person who is 80 and has always used a payslip may be different from what it may be reasonable to expect from a person familiar with modern technology. Dr Gordon is a modern man and knew that he did not need a payslip. It was reasonable in our view to expect
15 him to arrange to pay as he had in the previous year.

22. As a result we conclude that the surcharge is due and dismiss the appeal.

23. 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
20 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.

25

CHARLES HELLIER

TRIBUNAL JUDGE

30

RELEASE DATE: 01 May 2012