



TC02035

Appeal number: TC/2011/06733

*VAT - Default Surcharge levied pursuant to S.59C(2) TMA 1970 –
reasonable excuse advanced in mitigation – not established – Appeal
Dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

PAUL S. GAMBLE

Appellant

- and -

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

TRIBUNAL: JUDGE IAN WILLIAM HUDDLESTON

Sitting in public in Belfast on 9 February 2012

The appellant appeared in person

Mrs. P. O'Reilly, HMRC Officer, for the Respondents

DECISION

Appeal

5 1. This appeal is against a default surcharge in the sum of £2,143.81 (to include interest) notified to Mr. Gamble by HMRC pursuant to the provisions of Section 59C(2) Taxes Management Act 1970.

2. The surcharge penalty relates to the filing of Mr. Gamble's self assessment tax return for the year end 5 April 2010. That return was filed online by Mr. Gamble's
10 accountants on the 14 January 2011 and, according to the information provided by HMRC, there was an immediate assessment of the tax liable on foot of the return in the sum of £37,789.03. That amount was due to be paid on the 31 January 2011. In fact it was paid on the 20 April 2011 – some 78 days after the due date and, as a result, HMRC contend that a default surcharge is payable.

15 *History of the Appeal*

3. The facts of the Appeal are outlined above. When the default surcharge notice was raised, Mr. Gamble's accountants immediately wrote to HMRC on 19 April 2011 seeking that it be waived on the ground of reasonable excuse, setting out a number of grounds, including work related stress.

20 4. HMRC considered the position, but in their reply of 16 May 2011 rejected the application. That letter, as with previous correspondence, was sent to Mr. Gamble's former address of Lisreagh, Lisbellaw, Enniskillen, BT94 5BX.

5. A review was requested by Mr. Gamble's accountants on the 13 June 2011, pointing out that the earlier letter did not deal with Mr. Gamble's application for
25 reasonable excuse on the grounds of ill health. A review was subsequently carried out by HMRC, but the original decision was upheld. That letter was sent to Mr. Gamble's new address, Le Touessrok, Lislea, Maguiresbridge, Enniskillen, BT94 4PY.

6. The conclusion of the review was that the grounds for reasonable excuse had not
30 been established. It is essentially against that decision which Mr. Gamble now appeals.

Grounds of Appeal

7. The grounds of appeal were outlined by Mr. Gamble both in his Notice of Appeal and his oral evidence to the Tribunal. They can be shortly summarised:

35 (1) Mr. Gamble pointed out that he had an exemplary tax record over the immediately preceding 24 year period during which he had been self employed;

(2) Mr. Gamble indicated that he had advised HMRC of his change of address, but that correspondence from HMRC, including reminders regarding the unpaid tax, had consistently been sent to his former address.

5 8. During his evidence Mr. Gamble indicated that he had changed his address in December 2009 and that HMRC had been notified of that on the next subsequent tax return submitted after that date.

9. In relation to the grounds of ill health which had been cited previously by his accountants, these were expanded in the Notice of Appeal and through his oral evidence.

10 10. Mr. Gamble indicated that he had been suffering from diverticulitis – an inherited condition related to irritable bowel syndrome and brought on by stress.

11. In his evidence to the Tribunal Mr. Gamble pointed out that he had been off work intermittently during November / December 2010 but then, on the advice of his consultant, had been off work continuously from December 2010 to April 2011. His position was that during that period he had not been able to deal with his business affairs as he would normally. It is on that basis that he advances the defence of reasonable excuse to the default surcharge that has been levied.

12. In essence, Mr. Gamble's case is, firstly, that he had not been made aware of either the liability to tax because of HMRC's failure to correspond to his updated address and, therefore, nor was he aware of the need for it to be paid by the 31 January. On the same basis, he claims not to have received any of the reminders. Secondly, he claims his illness as a contributory factor. Both factors Mr. Gamble invites the Tribunal to conclude led to a "reasonable excuse". It was clear that that immediately upon becoming aware of the liability to tax it was paid.

25 *HMRC's Case*

13. HMRC indicated that they had not been aware of Mr. Gamble's change of address and produced to the Tribunal a copy of Mr. Gamble's tax return which did not include any notification of his alteration of address. That may well have been because if one follows Mr. Gamble's evidence, the change of address would have been included on the 2008/9 Tax Return of which the Tribunal did not have a copy. Regardless of that point, and the dispute on evidence surrounding it, it rather did seem to the Tribunal that most of the material correspondence at the relevant point in time – namely the submission of tax return and the immediately subsequent correspondence – occurred between HMRC and Mr. Gamble's appointed accountants.

14. It was not clear to the Tribunal as to whether there had been a subsequent breakdown of correspondence between Mr. Gamble's accountants and himself, or indeed if they had notified HMRC of Mr. Gamble's change of address.

15. Regardless of that position, HMRC took the stance that all tax payers knew or at least ought to know that the operative date for the payment of tax which is due is the 31 January in **each** year and that, in the present circumstances, with the tax return

having been completed on line, that Mr. Gamble and/or his agents were aware of the tax liability effectively from the 14 January 2011 (the date of the online submission) and that they had sufficient time within which to ensure payment before the relevant due date of the 31 January 2011.

5 16. On the question of Mr. Gamble's illness, HMRC accepted that his had been raised in the letter received from Mr. Gamble's accountant on 19 April 2011 (ie. that in which the issue of stress had been raised). The information on diverticulitis was provided in the Notice of Appeal itself.

10 17. HMRC's position on that, as led by Mrs. O'Reilly on their behalf, was that there was no evidence before HMRC that the illness was of sufficient magnitude to prevent the payment of tax throughout the entire period of 78 days starting with the due date of 31 January and ending on the date of actual payment.

Decision

15 18. The Tribunal found Mr. Gamble to be an entirely credible witness. It was clear to the Tribunal that he felt he had been unfairly penalised by the requirement to pay default surcharge in the circumstances and firmly felt that he had established "reasonable excuse" for the late payment of tax such that, when taken together with his previous record, he should be excused.

20 19. The question of what constitutes "reasonable excuse" is always difficult. Whilst one can have sympathy with Mr. Gamble and, indeed, his illness, nonetheless for reasonable excuse to be sufficient to relieve a tax payer of the fundamental obligation to ensure the prompt payment of tax (which is the responsibility which all tax payers face) the standard must, of its nature, be a high one. It must also be a vitiating circumstance which exists throughout the period of the delay – in this case a period of
25 78 days.

20. Mr. Gamble, in his evidence, indicated that whilst he had moved from his former home in December 2009, that both he and his wife still continued to own it and periodically visited it to collect correspondence and maintain it.

30 21. Equally, he had employed accountants who were retained to look after his tax returns and make sure returns were filed and, presumably, that where tax was due it was paid.

35 22. Taking both factors into account, the Tribunal finds that in those circumstances it was more likely than not that some of the reminders would have been brought to Mr. Gamble's attention, either by the collection of mail at his former home or, alternatively, by correspondence from his accountants.

23. Mr. Gamble is obviously a successful businessman running four trading outlets. His evidence to the Tribunal was that during the period of his illness he employed a part time manager to deal with the running of those businesses and the payment of

suppliers and staff etc. Again, this is no more than one would expect of a prudent businessman.

24. In that context it does seem strange, however, that he did not either on his own behalf or through his accountants make suitable provision to ensure that his tax liabilities were discharged. His own evidence to the Tribunal was that the information had been supplied to his tax advisors promptly. They, in turn, in the normal course, would have anticipated the tax liability that would fall due and advise it to their client. At the very least, the accountants would have been aware of that liability on the 14 January 2011 on the completion of the online filing and, again, presumably would have communicated that liability to their client.

25. In those circumstances, the Tribunal concludes that Mr. Gamble or, indeed, his advisors, must have been aware of the tax liability sufficiently in advance of 31 January 2011 as the due date for payment to allow them time to ensure that it was paid – in the same way as Mr. Gamble had made provision for the payment to his trade suppliers and staff.

26. As regards Mr. Gamble's illness, and given the fact that it was an illness which was prevalent within his family, the Tribunal can only express its regrets. Nonetheless no evidence was advanced, either from Mr. Gamble, his GP or his Consultant to the effect that the symptoms of the disease from which he suffers are so extreme as to prevent him from carrying out normal business or, at the very least, arranging for such matters to be dealt with. In the present case there is evidence that a manager was put in to run the business. There is, however, no real explanation as to why the same approach was not taken in relation to his tax affairs.

27. Given that the period of delay was 78 days, one would have expected that there would have been sufficient opportunity to allow the Appellant to make suitable alternative provision. Regrettably that did not occur and, whilst Mr. Gamble obviously feels aggrieved on the point, nonetheless this Tribunal concludes that reasonable excuse is not established.

28. For the reasons given, therefore, the Appeal is dismissed.

29. No order as to costs.

30. 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.

**IAN HUDDLESTONE
TRIBUNAL JUDGE**

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RELEASE DATE: 17 April 2012