



TC02154

Appeal number:TC/2012/00296

INCOME TAX – surcharge under section 59C(2) Taxes Management Act 1970 - whether reasonable excuse – test for reasonable excuse: objective or subjective - authorities considered - appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

STUART COALES

Appellant

- and -

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

TRIBUNAL: JUDGE GUY BRANNAN

The Tribunal determined the appeal on 9 July 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 7 December 2011 (with enclosures), HMRC's Statement of Case submitted on 9 February (with enclosures) and the Appellant's Reply dated 5 March 2012 (with enclosures).

DECISION

Introduction

1. This is an appeal against a surcharge imposed under section 59C (2) Taxes
5 Management Act 1970 ("TMA") in respect of a late payment of income tax for the tax
year ended 5 April 2010.

The facts

2. The appellant was made redundant in or around April 2009. He received a
redundancy payment in the income tax year ended 5 April 2010. Basic rate tax was
10 deducted at source under the PAYE system.

3. His employer informed him: "If there is a [further] liability the HMRC will
charge you the extra tax direct to you at some stage after 2010."

4. After being made redundant the appellant started work with a new employer in
June 2009. The appellant moved employment again in September 2009 and stated that
15 he thought that the submission of Form P 45 and tax details would prompt HMRC to
get in touch with him.

5. It was not until February 2011 that the appellant contacted HMRC directly. He
received a communication from HMRC several weeks after contacting HMRC's
national helpline. HMRC issued a tax return to the appellant for the year ended 5
20 April 2010 on 9 May 2011. This tax return noted that interest and possibly a surcharge
would be charged in respect of late payments of tax. The new filing date for this
return was 16 August 2011 (section 8 TMA).

6. HMRC allege that they received an unsatisfactory paper return from the
appellant on 27 May 2011 which was returned on 7 June 2011. No evidence was
25 produced to substantiate this claim.

7. A satisfactory paper return was received by HMRC on 7 July 2011. The return
was processed on 12 July 2011 and HMRC calculated that the appellant owed
additional income tax of £11,076.80. The calculation of the income tax liability was
notified to the appellant but incorrectly showed the generic date for self-assessment
30 payments of 31 January 2011 instead of 16 August 2011. The notification indicated
that interest and surcharges would be charged on payments after a due date.

8. Under section 59B (3) TMA the additional income tax liability was due for
payment on or before 16 August 2011. The liability was eventually paid by the
appellant on 25 October 2011.

9. On 23 August 2011 HMRC issued a statement of account to the appellant
showing both the tax due on the due date for payment of 16 August 2011. He did not
dispute the amount. He says that if he had known that a surcharge would be applied
35 he would have paid £6000 immediately but thought it better to wait until he had

sufficient funds to pay the full amount. He contended that none of the correspondence he received from HMRC stated that payment had to be made by a certain date. The statement of 23 August indicated, however, that the tax was due on 16 August 2011.

5 10. On 27 September 2011, the appellant received a letter from HMRC stating that £11,247.83 was overdue for payment. The appellant argues that nowhere in this letter was he told that the payment had to be made by a particular date.

11. On 7 October 2011 HMRC issued a surcharge notice to the appellant in the amount of £553.84. The surcharge was calculated as 5% of £11,076.80.

10 12. The appellant appealed to HMRC on 17 October 2011. In his letter the appellant made the following points:

15 (1) his previous employer deducted basic rate tax from his redundancy payment in April 2009 and informed him that HMRC would contact him to arrange payment if there was any higher rate liability. There was, however, no contact from HMRC even though the appellant started a new employment after a couple of months and a new tax code was issued.

(2) He therefore contacted HMRC himself to make payment to start the process for an assessment. After discussions with his local tax office in April 2011 he contacted HMRC's central helpline which stated that they would arrange for HMRC to contact the appellant.

20 (3) The appellant then received a request to complete a self-assessment income tax return for the year ended 5 April 2010 which the appellant completed and returned to HMRC in May 2011.

25 (4) The appellant received a demand for a further payment of tax in July. He made arrangements to get the money together and paid the outstanding liability on 19 October 2011 (although, as stated above, HMRC's records indicate that this amount was received on 25 October 2011).

(5) The appellant stated that he had tried to contact HMRC on numerous occasions but was left holding on an automated message system.

(6) The appellant did not dispute the substantive tax liability.

30 (7) He considered the surcharge to be very harsh since he had initiated the contact with HMRC in order to pay any outstanding tax.

35 13. As will be noted from the above, the appellant says he paid the outstanding tax on 19 October 2011 and HMRC say they received it on 25 October 2011. Whatever the correct date may be it is clear that the tax was paid more than 28 days after the due date of 16 August 2011.

14. The appellant requested a review of the surcharge decision on 17 December 2010. In his accompanying letter, the appellant considered that the surcharge was unfair. He stated that he had no experience of the self-assessment system.

15. On 29 November 2011, HMRC concluded its review and upheld its original decision. The appellant appealed to this tribunal on 7 December 2011.

Arguments of the parties

5 16. As noted above, the appellant contended that he was not aware (and had not been informed by HMRC) of any due date for payment of the additional income tax or the fact that he might become liable to a surcharge. He had been informed by his previous employer that HMRC would contact him if there was further tax to pay. He felt aggrieved because he had initiated the process of contacting HMRC to finalise his tax liabilities. He did not take any steps to hide the fact that he had a liability and did not challenge the substantive income tax liability, only the surcharge. He considered
10 that he was being penalised for being an honest and trustworthy person.

17. HMRC argued that payment of the additional income tax was due, in accordance with section 59B (3) TMA on 16 August 2011 i.e. three months after the tax return was issued to the appellant on 9 May 2011. The appellant failed to pay the tax on time and did not make the payment until 25 October 2011.
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18. Section 59C (2) provides that where any of the tax remains unpaid on the day following the expiry of 28 days from the due date (the due date was 16 August 2011 and therefore the trigger date for the surcharge was 13 September 2011) the taxpayer becomes liable to a surcharge equal to 5% of the unpaid tax.

20 19. HMRC contended that the appellant was aware from the statement of 23 August 2011 of the due date for payment of the additional income tax. HMRC also contended that the calculation issued on 12 July 2011 advised that a surcharge would be charged on payments made after the due date, as did the tax return sent on 9 May 2011.

25 20. HMRC noted that the appellant took no steps to contact HMRC to arrange a "time to pay" arrangement.

21. HMRC argued that inability to pay was not a reasonable excuse in accordance with section 59C (10) and that ignorance of the law was not a reasonable excuse.

30 22. HMRC also argued that the appellant had experience of the self-assessment system because he submitted self-assessment returns for the years ended 5 April 2000, 2001, 2002, 2003 and 2004. HMRC did not, however, produce any evidence of these returns and the appellant said he had no recollection of them. In the absence of any evidence of these returns we do not think we can take into account HMRC's unsupported statement that the appellant had experience of submitting self-assessment returns.

35 Statutory provisions

23. Section 59C TMA 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 per cent of the unpaid tax.
- (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.
- 10 (4) Where the taxpayer has incurred a penalty under section 7 or 93(5) of this Act, Schedule 24 to the Finance Act 2007, no part of the tax by reference to which that penalty was determined shall be regarded as unpaid for the purposes of subsection (2) or (3) above.
- 15 (5) An officer of the Board may impose a surcharge under subsection (2) or (3) above; and notice of the imposition of such a surcharge—
- (a) shall be served on the taxpayer, and
 - (b) shall state the day on which it is issued and the time within which an appeal against the imposition of the surcharge may be brought.
- 20 (6) A surcharge imposed under subsection (2) or (3) above shall carry interest at the rate applicable under section 178 of the Finance Act 1989 from the end of the period of 30 days beginning with the day on which the surcharge is imposed until payment.
- (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.
- 25 (8) Subject to subsection (9) below, the provisions of this Act relating to appeals shall have effect in relation to an appeal under subsection (7) above as they have effect in relation to an appeal against an assessment to tax.
- 30 (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—
- (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
 - 35 the surcharge; or
 - (b) if it does not so appear, confirm the imposition of the surcharge.
- (10) Inability to pay the tax shall not be regarded as a reasonable excuse for the purposes of subsection (9) above.
- 40 (11) The Board may in their discretion—
- (a) mitigate any surcharge under subsection (2) or (3) above, or
 - (b) stay or compound any proceedings for the recovery of any such surcharge,
- and may also, after judgment, further mitigate or entirely remit the surcharge.

(12) In this section—

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

5 “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.

Decision

24. The 5% surcharge became payable if the tax was not paid within 28 days of the due date (16 August 2011): section 59C(2) TMA. It was not in dispute that the tax
10 was due on 16 August 2011 and was not paid within 28 days.

Meaning of "reasonable excuse"

25. Under section 59C (9)(a) I can, however, set aside the surcharge determination if it appears that, throughout the period of default, the taxpayer had a reasonable excuse for not paying the tax. The onus is on the appellant to satisfy me that there was
15 a reasonable excuse. The statute provides (section 59C(10)) that inability to pay the tax shall not be regarded as a reasonable excuse.

26. In this context, I consider the reasonable excuse exception to be an objective test applied the individual facts and circumstances of the appellant in question.

27. In *Bancroft and another v Crutchfield (HMIT)* [2002] STC (SCD) 347 in
20 relation to section 59C (9)(a) the learned Special Commissioner (Dr John Avery Jones CBE) stated:

"A reasonable excuse implies that a reasonable taxpayer would have behaved in the same way. A reasonable taxpayer would at least have read the literature issued by the Revenue..."

25 28. The concept of "reasonable excuse" appears throughout VAT and direct tax legislation in respect of the imposition of surcharges on penalties. There is a considerable amount of case law in this tribunal as well as its predecessors (the VAT and Duties Tribunal and the Special and General Commissioners). It is not possible to do justice to all these decisions but I think that helpful guidance can be obtained from
30 the decision of the VAT Tribunal in *The Clean Car Company Limited v C & E Commissioners* [1991] VATTR 239 and I can do no better than quote from the passage where the Tribunal (HH Judge Medd OBE QC) said:

35 "So I may allow the appeal if I am satisfied that there is a reasonable excuse for the Company's conduct. Now the ordinary meaning of the word 'excuse' is, in my view, "that which a person puts forward as a reason why he should be excused".

A reasonable excuse would seem, therefore, to be a reason put forward as to why a person should be excused which is itself reasonable. So I have to decide whether the facts which I have set out, and which Mr

Pellew-Harvey [for the Appellant] said were such that he should be excused, do in fact provide the Company with a reasonable excuse.

5 In reaching a conclusion the first question that arises is, can the fact that the taxpayer honestly and genuinely believed that what he did was
10 provide him with a reasonable excuse. In my view it cannot. It has been said before in cases arising from default surcharges that the test of whether or not there is a reasonable excuse is an objective one. In my
15 judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader
20 conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do? Put in another way which
25 does not I think alter the sense of the question: was what the taxpayer did not an unreasonable thing for a trader of the sort I have envisaged, in the position the taxpayer found himself, to do? ... It seems to me that Parliament in passing this legislation must have intended that the
30 question of whether a particular trader had a reasonable excuse should be judged by the standards of reasonableness which one would expect to be exhibited by a taxpayer who had a responsible attitude to his duties as a taxpayer, but who in other respects shared such attributes of the particular appellant as the tribunal considered relevant to the situation being considered. Thus though such a taxpayer would give a
35 reasonable priority to complying with his duties in regard to tax and would conscientiously seek to ensure that his returns were accurate and made timeously, his age and experience, his health or the incidence of some particular difficulty or misfortune and, doubtless, many other facts, may all have a bearing on whether, in acting as he did, he acted reasonably and so had a reasonable excuse. Such a way of interpreting a statute which requires a court to decide an issue by judging the standards of the reasonable man is not without precedent of the highest authority, though in a very different field of the law. (See *DPP v Camplin* ([1978] 2 All ER 168)."

29. I agree with the Tribunal's views. In my view, this decision clearly explains that the test is an objective one: it involves considering the actual circumstances of the taxpayer in question but applying an objective analysis of those circumstances.

30. Recently, this tribunal (Judge Geraint Jones QC and Mr Derek Speller) in
40 *Chichester v HMRC Commissioners* [2012] UKFTT 397 (TC) held that an honest and genuine belief, even if unreasonable, could be a reasonable excuse. The tribunal said:

45 "14. In its decision in *Intelligent Management UK Ltd v HMRC* [2011] UKFTT 704 (TC) this Tribunal recognised that an honest belief in a given state of affairs could amount to a reasonable excuse for not thereafter doing a particular act, but at paragraph 22 of its decision went on to say 'If honest and genuine belief that the filing had taken place within the deadline can be a reasonable excuse, the Tribunal considers that there must be some reasonable basis for the honest and

genuine belief. The Tribunal does not consider that an irrational or unreasonable belief, even if honest and genuine, would suffice.'

5 15. Whether a person holds an honest and genuine belief is a question of fact. It is an enquiry into the subjective state of mind of a given individual. There is no objective element to the enquiry; it is entirely subjective. That is the effect of the decision of the Court of Appeal in *R v Unah* The Times 2/8/11 the Court of Appeal (Criminal Division) where Elias LJ, Wyn Williams J & Sir David Clarke decided, albeit in a rather different context, that a genuine or honestly held belief can amount to a reasonable excuse for not doing something that a person is required to do.

15 16. If the claimant's (honest) belief is, when viewed objectively, irrational or apparently unreasonable, that is a factor that might weigh in the forensic exercise of deciding whether the person claiming to hold the stated (honest) belief did in fact hold the claimed (honest) belief. It is not a separate test to be applied in deciding whether an honest belief amounts to a reasonable excuse. If it was, it would inject an impermissible element of objectivity into an enquiry which is solely subjective, in the sense that it turns solely upon the state of mind or subjective belief of the relevant person. Accordingly, it is wrong in law to proceed on the basis that an honestly held belief would not amount to a reasonable excuse if, from an objective standpoint, it was considered that that belief was irrational or unreasonable. The objective analysis goes solely to the issue of credibility. If a Tribunal finds that a person, as a matter of fact, held a particular honest and genuine belief, that may amount to a reasonable excuse (on appropriate facts) regardless of whether that belief would be characterised as irrational or unreasonable when viewed objectively."

30 31. With respect, I disagree. The starting point for any analysis of the concept of "reasonable excuse" must always be the statute. In this case section 59C (9)(a) TMA provides that I may set aside the surcharge if the taxpayer has a reasonable excuse for not paying the tax. Parliament has balanced the interests of the taxpayer with those of the Exchequer. A taxpayer may be spared a surcharge if the taxpayer has an excuse, but the excuse must be a reasonable one. The word "reasonable" imports the concept of objectivity, whilst the words "the taxpayer" recognise that the objective test should be applied to the circumstances of the actual (rather than some hypothetical) taxpayer.

40 32. The test contained in the statute is not whether the taxpayer has an honest and genuine belief but whether there is a reasonable excuse. It is true that the absence of a genuine and honest belief would usually indicate that the excuse could not be reasonable, but its presence does not mean that the excuse is necessarily reasonable.

33. Moreover, the concept of reasonable excuse is not confined to tax law and is to be found in many other statutory contexts, particularly in the criminal law.

45 34. In *R v G* [2009] UKHL 13 the defendant had been charged with the offence of having control of a record (which included a photographic or electronic record) which contained information that was likely to provide practical assistance to a person committing or preparing an act of terrorism, contrary to section 58 (1) of the

Terrorism Act 2000. Under section 58 (3) it was a defence to this charge if the defendant could show that he had a reasonable excuse for possessing the record in question. The Court of Appeal, in the earlier case of *R v K* [2008] 2 WLR 1026, had held that in order to establish the defence of reasonable excuse it was sufficient for the
5 defendant to show that the record was possessed for a purpose other than to assist in the commission or preparation of an act of terrorism and that it did not matter that that other purpose may infringe some other provision of the criminal or civil law. The House of Lords rejected the Court of Appeal's interpretation of reasonable excuse. Lord Rodger delivering the judgment of the Judicial Committee said [76 – 77]:

10 "A defence in terms of reasonable excuse is to be found in a whole range of provisions under the 2000 Act. And it is, of course, a familiar feature of many other offences, such as possession of an offensive weapon under section 1(1) of the Prevention of Crime Act 1953 and
15 section 47(1) of the Criminal Law (Consolidation) (Scotland) Act 1995, and failure to provide a specimen of blood or urine under section 7(6) of the Road Traffic 1988. The Court of Appeal's decision in *R v K* [2008] 2 WLR 1026, 1031, para 15, singles out this particular use of the defence in section 58(3) and imposes on it a construction which is utterly different from the construction which has been put on the
20 equivalent defence in other statutes.

*More than that, however, the Court of Appeal's construction robs the adjective "reasonable" in section 58(3) of all substance. Neither the judge nor the jury is left with any room to consider whether the excuse
25 tendered by the accused for, say, his possession of the document or record is actually reasonable. Provided only that he proves that his purpose was not connected with the commission etc of an act of terrorism, the Court of Appeal give him a defence under subsection (3). Indeed they expressly affirm that it matters not that the defendant's purpose may infringe some other provision of the criminal or civil law.
30 Suppose, for example, that the accused had a document containing information about the security system protecting the Home Secretary's residence. The interpretation adopted by the Court of Appeal means that, if the defendant proved that he had this document because he was planning to burgle the Home Secretary's house and steal her jewellery,
35 this would, by definition, be a reasonable excuse since the defendant's purpose would not be connected with the commission etc of an act of terrorism. The same would apply if the defendant's purpose was to murder the Home Secretary for purely personal motives. Even if the jury rightly considered that these "excuses" were outrageous rather
40 than reasonable, in each case the judge would have to direct them that the defendant's purpose amounted to a reasonable excuse in terms of section 58(3) and that they would have to acquit him. In our view, Parliament could not have intended section 58(3) to be interpreted or applied in that way." (Emphasis added)*

45 35. Lord Rodger added [81]:

"Similarly, the circumstances which may give rise to a section 58(1) offence are many and various. So it is impossible to envisage everything that could amount to a reasonable excuse for doing what it

prohibits. Ultimately, in this middle range of cases, whether or not an excuse is reasonable has to be determined in the light of the particular facts and circumstances of the individual case."

36. Obviously the context of this decision is very different from that of this appeal.
5 But tax law is not an island detached from the other laws of this country. In my view there is nothing which justifies the words "reasonable excuse" being given a materially different interpretation in a tax context where the imposition of penalties is concerned. It is plain that the House of Lords is interpreting reasonable excuse in substantially the same manner as Judge Medd QC in *The Clean Car Company Limited*
10 in the passage which I have cited. The excuse must be objectively reasonable and that test must be applied to the facts of the individual case.

Test of reasonable excuse applied to the facts

37. In this case the appellant took the initiative, albeit belatedly, to inform HMRC of his redundancy payment. He says his previous employer informed him that HMRC
15 would contact him if there was additional income tax to pay on the redundancy payment, although the extract he quoted from the correspondence with his former employer merely said that if there were a [further] liability "HMRC would charge you the extra tax direct to you at some stage after 2010". He says he was not informed that there would be a surcharge and was not aware that of the due date for payment.

20 38. In my view, this does not constitute a reasonable excuse. I accept that the appellant may have been misled (or, more likely, misinterpreted the comments made) by his previous employer and that he genuinely believed that HMRC would contact him. This does not, however, absolve him from the obligation to report his income and to establish its correct tax treatment. A reasonable taxpayer, in his circumstances,
25 would have taken steps at an earlier stage to establish his full tax liability, whether by contacting HMRC or by taking professional advice.

39. But none of this rendered him liable to the surcharge under appeal. He became liable to the surcharge because he did not pay the outstanding tax within 28 days of the due date. Once HMRC determined his tax liability and sent him the statement
30 dated 23 August he should have settled the outstanding tax more promptly and within the 28 day time limit provided for by section 59C(2). He did not do so.

40. The appellant should have been aware from the statement of 23 August 2011 of the due date for payment of the additional income tax and that the calculation issued on 12 July 2011 advised the appellant that a surcharge could be charged on payments
35 made after the due date, as did the tax return sent on 9 May 2011. I consider that the appellant was on notice as regards the due date for payment or the fact that paying the tax after the due date may result in a surcharge.

41. Moreover, the fact that the appellant says he could not pay the full amount of the tax due within the 28 days does not of itself constitute a reasonable excuse
40 (section 59C(10)). The appellant has given no explanation as to what may have caused his shortage of funds and had not indicated that there were any unusual circumstances which prevented him from settling his tax bill.

42. I therefore conclude that the appellant did not have a reasonable excuse for failing for not paying the tax within 28 days of the due date.

43. For these reasons, I dismiss this appeal.

5 44. 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)”
10 which accompanies and forms part of this decision notice.

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**GUY BRANNAN
TRIBUNAL JUDGE**

RELEASE DATE: 26 July 2012

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