



TC02199

Appeal number: TC/2011/6076

Income tax – surcharge under section 59BTMA – offset of overpaid PAYE for later year – reasonable excuse – adjustment to tax code under reg 14 and 186 PAYE Regs – whether HMRC failure to have regard to tax owing gave rise to reasonable excuse

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

DAVID KNOWLES

Appellant

- and -

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

TRIBUNAL: JUDGE CHARLES HELLIER

The Tribunal determined the appeal on 11 June 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 14 August 2011 (with enclosures), HMRC’s Statement of Case submitted on 3 August 2012 (with enclosures) and the Appellant’s Reply dated 19 September 2011 (with enclosures).

© CROWN COPYRIGHT 2012

DECISION AND DIRECTION

1. This is a final decision in this appeal. On 14 June 2012 a “decision and directions” was released which invited further submissions from HMRC (and provided a decision in default of such submissions). Those submissions were received and Mr Knowles, in emails of 19 and 12 July 2012, gave his comments on them. This decision encompasses consideration of that extra material and consolidates it with the earlier decision and direction. The parties will therefore find in what follows a repeat of some of the material from the earlier document together with new material. The whole is my decision in the appeal.

2. Mr. Knowles appeals against interest and a surcharge assessed by HMRC in relation to the late payment of his tax liability 2009/10.

3. The facts were as follows

4. Mr. Knowles filed his self-assessment return for 2009/10 on 31 October 2010. It showed a tax liability of £1842.80. A statement of account was issued by HMRC on 13 December 2010 showing that this amount was due.

5. On 29 October 2010 Mr. Knowles wrote to HMRC explaining that he was no longer working for his previous employer and that his pension from the civil service was still being taxed using a DO code. He said that he would like HMRC to make appropriate adjustments to his pension code to include his allowances.

6. On 19 January 2011, having received the statement of account showing that £1842 was due, Mr. Knowles wrote to HMRC. In the light of the liability of £1842, he asked how it was possible for his previous employer to have deducted insufficient tax. He also said that he wanted “to have the full allowance” against his civil service pension "and we need to do whatever possible -- whether I owe you money or you owe me money to get [the code] corrected.” He wanted “the position between us to be synchronised as of...Jan 31st”.

7. On 21 March 2011 Mr. Knowles wrote to HMRC saying that he was not in paid employment and that HMRC had taken no consideration of his financial position. He said that if he owed money he would like a full explanation and that "if you owe me money then please reimburse me as soon as possible."

8. On 29 March 2011 Mr. Knowles wrote to HMRC saying that he had now received a refund for overpaid tax on his civil service pension. This was for £3865. He then enclosed a cheque to cover the amount of tax due for 2009/10.

HMRC’s Case

9. HMRC say that the tax liability of £1842 arising from Mr. Knowles self-assessment should have been paid on 31 January 2011. It was not paid until 31 March

2011. It was paid 29 days late. As a result they say a surcharge liability arose under section 59C TMA 1970.

10. HMRC acknowledge that if Mr. Knowles had a reasonable excuse for failing to pay the liability on time then the surcharge would not arise. However they maintain that Mr. Knowles has no such excuse. They say that adequate warning was given to Mr. Knowles through the statements of account of his obligation to make payment on 31 January 2011 and that if Mr. Knowles did not have the means to make payment he could have approached HMRC to negotiate a deferred payment plan. In any event they say that an inability to pay cannot be a reasonable excuse.

11. HMRC say that any refund in relation to 2010/11 is not relevant to Mr. Knowles' liability in respect of the payment due on 31 January 2011 for 2009/10: they say the legislation does not permit the offset of a PAYE repayment in respect of a later year against the self assessment liability for an earlier year. HMRC say that they have no record of a request to make such an offset: it appears that HMRC did not read Mr Knowles' letter of January 2011 as a request to offset his expected repayment against liability.

12. I deal with HMRC's additional submissions later.

Mr Knowles' argument

13. Mr. Knowles case is simple. He does not dispute that the balance of his tax liability for 2009/10 was £1842, or that it was due for payment on 31 January 2011. But he says that at the time it was due for payment HMRC had collected via the PAYE system too much tax on his 2010/11 income and owed him £3865. He says that once he had received the refund of that sum through the PAYE system he paid the £1842 liability on 29 March 2011. He says that in his correspondence he asked HMRC to set the liability off against the amount he owed. In his notice of appeal Mr. Knowles suggests that he did not have the funds to pay the £1842 until he received the £3865; he does not say this in terms but he says that "as he was on a very low pension income I asked [HMRC] to offset one against the other".

The legislation

14. Section 59B TMA 1970 provides:

"(1) Subject to subsection (2) below, the difference between --

(a) the amount of income tax and capital gains tax contained in a person's self-assessment under section 9 of this Act for any year of assessment, and

(b) the aggregate of any payments on account made by him in respect of that year ... and any income tax which in respect of that year has been deducted at source,

shall be payable by him or (as the case may be) repayable to him as mentioned in subsection (3[which is inapplicable]) or (4) below ...

"(2) The following namely --

(a) any amount which, in the year of assessment, is deducted at source under PAYE regulations in respect of the previous year, and

5 (b) any amount which, in respect of the year of assessment, is to be deducted at source under PAYE regulations in a subsequent year ...

shall be respectively deducted from and added to the aggregate mentioned in subsection (1) (b) above.

(4) ... the difference shall be payable or be payable or before 31 January next following the year of assessment."

10 15. I note here the effect of section 59B(2)(b): if an amount in respect of 2009/10 was to be deducted at source under the PAYE regulations in 2010/11 then it goes to reduce (or eliminate) the amount due under section 59B(1).

16. Section 59C provides that in relation to income tax which has become payable in accordance with section 59B:

15 "(2) Where any the tax remains unpaid on the day following the expiry 28 days from the due date, the taxpayer shall be liable to a surcharge equal to 5% of the unpaid tax....

"(9) On an appeal ... the tribunal may-

20 (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 appear ... confirm the imposition of a surcharge.

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

25 "(11) the Board may in their discretion --

(b) mitigate any surcharge under subsection (2) ... above..."

30 17. Section 86 TMA 1970 provides that any assessment to income tax payable in accordance with section 59A (2) shall carry interest at a rate set out in section 178 of the Finance Act 1989 from the date it was due until payment. The Act provides no appeal to the tribunal in relation to such interest.

18. Regulation 14 of the Income Tax (Pay as you Earn) Regulations 2003 provides:

"(1)If [HMRC] determine a code under this regulation they *must have* regard to the following matters so far as known to them:

35 (a) the reliefs from income tax to which the employee is entitled for the year for the tax year in which the code is determined, ...

(b) any PAYE income of the employee ...

(c) any tax overpaid from any previous tax year which has not been repaid;

(d) any tax remaining unpaid for any previous tax year which is not otherwise recovered; ...

5 “(3) paragraphs (1)(c) and (d) are subject to regulations 186 and 187 (recovery and repayment: adjustment of employee's code).” [my italics].

19. Regulation 186 provides:

10 “(1) This regulation applies if, on the assumption mentioned in paragraph (2) the difference mentioned in section 59B(1) of TMA (difference between tax contained in a self-assessment and aggregate of payments on account) would be payable by the taxpayer.

“(2) The assumption is that, in respect of the tax year, nothing will be deducted at source under those regulations in a subsequent year.

15 “(3) [HMRC] *must have regard* to the difference in determining a taxpayer's code for a subsequent tax year under regulation 14 (matters relevant to determination of code) if -

(a) it is less than £2000, and

(b) the return for the tax year is –

20 (ii) delivered ... before 1st November following the end of the tax year....

“(5) But [HMRC] *must not have regard* to the difference if the taxpayer objects at the time the return is delivered or subsequently.” [my italics again].

Discussion.

20. I have no jurisdiction to consider Mr Knowles' appeal to the extent it relates to
25 any interest charge rather than the surcharge under section 59C. To the extent Mr Knowles' appeal related to interest that part of the appeal must be struck out. The remainder of this decision relates to the surcharge.

21. Mr Knowles says in his 13 July 2012 email:

30 “ I expect a reasonable judge to understand that when you have no money and no job, and someone owes you £4000, but on another matter I owe them £2000, that a normal logical man would offset one against the other...”.

22. It is plain to me that when Mr. Knowles' tax liability of £1842 was due on 31
35 January 2011 HMRC did not at that stage owe over deducted PAYE to Mr. Knowles. Thus no question of simply setting off one against the other to eliminate the 2009/10 liability can arise. The legislation contemplates that the liabilities both of a taxpayer and HMRC for a tax year are determined after the end of the year. There is therefore no sustainable argument on this basis that the £1842 was not properly due on 31 January 2011.

23. There is no doubt that the amount was paid late. As a result it is only if Mr. Knowles has a reasonable excuse that I can set the surcharge aside.

24. I have mentioned that Mr. Knowles' notice of appeal could be taken as indicating that he did not have sufficient funds to meet the liability on 31 January 2011, although he does not say that he had no other funds from which he could meet the liability. However even if this were the case, given the provisions of section 59B(10) I could not treat such an inability to pay on its own as a reasonable excuse.

25. I next ask myself whether Mr Knowles could be taken to have a reasonable excuse for the reasons he sets out in the quote in paragraph [21] above. Does he have an excuse because tax had been over deducted from his pension and he could reasonably believe that one liability should be set against the other? In my judgement there could be circumstances in which such an expectation could give rise to a reasonable excuse: for example if it were shown that before the tax was due the taxpayer knew of a real offsetting liability of HMRC and had written to HMRC asking for it to be offset.

26. But Mr Knowles' position is different. Mr Knowles says that "As I... knew HMRC owed me money I asked them to offset one against the other.". I believe his recollection is faulty. I am not able to read his letter of 19 January 2011 either as evidence that he knew that HMRC owed him money or as a request to offset one against the other. In the letter of 19 January he says:

"..I have now received another PAYE demand from you for additional tax. I am concerned about this calculation because it is a large error to have occurred within PAYE (being of the order of £1800). How is it possible for Orange to have miscalculated my tax on such a scale or is it the case that my allowances have been incorrectly applied? I would like you to look into this as I want to have the full tax allowance against my CSP pension (which is now my primary source of income)."

There is nothing so far which suggests that Mr Knowles knows that tax has been deducted in an amount which exceeds his 2009/10 liability.

"I believe the current code should be 647L and we need to do whatever possible – whether I owe you money or you owe me money to get that corrected"

Again there is nothing here to suggest that Mr Knowles knows that there has been an over deduction which equals or exceeds his 2009/10 liability. This is about getting the code for the 2010/11 year right.

"Also as I said in my last letter I am not in paid employment, I will have paid tax on my 2101/2011 earnings whilst at Orange and I want the position between us synchronised as of now (Jan31st 2011 not April 5th 2010)."

It is only the closing words of this sentence which could possibly be read as asking for one amount to be set off against another. But to me it reads as a request to get the position for 2010/2011 sorted out, not as a request to set any repayment from his employer from an over deduction which would arise once a PAYE code had been

changed against a 2009/10 liability. In these words he was not in my view to be taken as “ask[ing] them to set one against the other”

5 Nor do I think it reasonable for Mr Knowles to think that a PAYE code even if wrong meant that HMRC owed him money at that time. He knew PAYE was deducted (and repaid) by an employer. He knew from the result of his tax return for 2009/10 that accounts with HMRC were settled at the year end. Whether he owed tax for the year or was owed a repayment could be determined only at the year end. There was no debt due to him to be offset at that time, and he must have understood this. .

10 27. I find that the evidence does not support a conclusion that Mr Knowles had a reasonable excuse on these grounds.

15 28. There was no other circumstance referred to in the correspondence or in Mr. Knowles' notice of appeal which in my opinion gave rise to the possibility of there being a reasonable excuse other than the concern I expand below in relation to the way in which HMRC appeared to have determined Mr. Knowles' tax code for 2010/11 and the consequent effect that had on his liability under section 59B.

20 29. The concern I had related to the setting of Mr Knowles' tax code during 2010/11. In their statement of case HMRC say that following the delivery of Mr. Knowles' tax return for 2009/10 in October 2010 the return was processed on 18 November 2010 and Mr. Knowles advised of the amount due to be paid. As a result it seems to me that by 18 November 2010 HMRC knew that £1842 was due on 31 January 2011 in respect of that year.

30 30. Thus for the purposes of regulation 14(1) of the PAYE Regulations it was known to HMRC that there was tax remaining unpaid for a previous year within para (d).

25 31. On the assumption that nothing would be deducted at source in respect of that liability (the assumption in reg 186(2)), the difference mentioned in section 59B would become payable by Mr Knowles: thus regulation 186(1) was satisfied. The amount so due was less than £2000: thus reg 186(3)(a) was satisfied. Mr Knowles had delivered his return before 1 November: thus reg 186(3)(b) was satisfied. Thus regulation 186(3) applied unless Mr Knowles had “object[ed] at the time [his] return [was] delivered or subsequently”..

35 32. As a result of regulation 14 and 186 HMRC therefore had to have regard to the £1842 in determining his code for 2010/11 unless Mr Knowles had objected. It seems to me that the only reasonable way they could have had regard to it was by reducing Mr Knowles' tax code for the year accordingly.

40 33. It was apparent that they did not do so. Instead they had regard only to the reliefs from income tax which Mr. Knowles was entitled in respect of that year. That is to say they had regard only to subparagraph (a) of regulation 14(1) and not subparagraph (d), and no regard to regulation 186(3). There was no indication in HMRC's statement of case that any consideration was given to the unpaid liability for the previous year in setting Mr. Knowles' tax code for 2010 /11.

34. Mr Knowles' letters did not seem to me to constitute an objection within regulation 186(5). Indeed his request to get things "synchronised as of...Jan 31st" in his letter of 19 January 2011 seems quite the reverse.
35. Had HMRC adjusted his tax code his liability under section 59B would have been eliminated. The effect would have been the same as the set off which he sought.
36. If HMRC had failed in their statutory duty to have regard to the unpaid tax for 2009/10 in setting Mr Knowles' tax code for 2010/11 and thereby had sought tax from him which would not have been due if they had performed that duty, then Mr Knowles would in my view have had a reasonable excuse for his related failure to pay.
37. This point was not made expressly in Mr Knowles' Notice of appeal or in correspondence with HMRC. Understandably therefore it was not addressed in HMRC's statement of case. I decided that I should not determine the appeal without giving HMRC an opportunity to respond to it.
38. HMRC's response was that on Page 4 at section 12.12 of his 2009/10 return Mr Knowles had put an X in the box next to the legend: "If you owe tax for 2009/10 and have a PAYE code we will try to collect the tax up to £2000 unless you put an X in the box". HMRC submit that the putting of the X in the box constituted an objection at the time of delivery of the return for the purposes of regulation 186.
39. Mr Knowles responds to this thus:
- "HMRC have no case and quoting their own regulations from 1970 is meaningless. I put an X in the box on my tax return because I was not (and am not) working and could not see any value in having adjustments made either way through my PAYE code..."
40. I cannot accept Mr Knowles' approach. The regulations are made under the authority of an Act of Parliament. Although originally made in 1970 they applied in the period relevant to the appeal. They impose obligations on HMRC and the taxpayer. It was these very regulations which could have provided Mr Knowles with a defence to the penalty HMRC sought to impose.
41. In my judgement the "X" which Mr Knowles put in the box is properly to be taken as an objection to the 2009/10 tax liability being collected through his PAYE coding for the purposes of regulation 186. As a result Mr Knowles became liable to pay £1842 on 31 January 2012, and HMRC acted in accordance with the regulations. Mr Knowles therefore has no reasonable excuse for late payment on these grounds.
42. I dismiss the appeal.
43. 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.

5

**CHARLES HELLIER
TRIBUNAL JUDGE**

RELEASE DATE: 16th August 2012

10