



**TC02209**

**Appeal number: TC/2012/01317**

*INCOME TAX – first surcharge – section 59C (2) Taxes Management Act 1970 – whether reasonable excuse*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**ADRIAN LATHAM**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE GUY BRANNAN**

**The Tribunal determined the appeal on 17 August 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 9 January 2012 (with enclosures), HMRC's Statement of Case submitted on 24 February 2012 (with enclosures).**

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## DECISION

1. This is an appeal against a first surcharge imposed under section 59C (2) Taxes Management Act 1970 ("TMA") in respect of the late payment of tax for the tax year ended 5 April 2009.

### **The facts**

2. On 6 April 2009, HMRC issued a notice to file a tax return to the appellant in respect of the income tax year ended 5 April 2009.
3. The appellant filed his tax return online on 31 January 2010 and the return was processed by HMRC on 3 February 2010.
4. The appellant's tax liability for the year ended 5 April 2009 was £18,848.14.
5. There is no dispute the tax was due for payment on or before 31 January 2010 (section 59B TMA).
6. The appellant made to payments by BACs transfers. The first payment was, according to HMRC's records, received by HMRC on 1 March 2010 in the amount of £8, 848.24. The second payment, again according to HMRC's records, was received by HMRC on 2 March 2010 in the amount of £10,000.
7. The appellant instructed his bank, Lloyds TSB, to make a BACs transfer to HMRC in the sum of £18,848.24 on Friday, 26 February 2010. The trigger date for the first surcharge payment was Sunday, 28 February 2010. As noted above, the due date for payment of the tax was 31 January 2010.
8. On receiving the payment, HMRC allocated the receipt to earlier tax liabilities and liabilities in respect of late payment interest.
9. HMRC, for reasons which are not explained, did not participate in the "Faster Payment Service" in respect of BACS transfers until 17 December 2011 i.e. after the date of the above transactions.
10. The appellant gave instructions to Lloyds TSB in the amount of £18,848.24. For its own internal purposes, Lloyds TSB split this amount into the two separate amounts referred to in paragraph 6 above.
11. In a letter to HMRC from Lloyds TSB dated 1 March 2011, the appellant's Lloyds TSB relationship manager stated:

"On the 26th February 2010 we received instructions to make a BACs transfer to HMRC in the sum of £18,848.24.

For operational/security reasons on our part this was divided into two tranches and the payment made on that date.

We understand that whilst the sum of £8,848.24 was received by you on or before 28th February the remaining £10,000 is logged at 2nd March.

5 The payment was one transaction and we understand this anomaly has caused the financial penalty to be imposed.

On behalf of our customer we ask for a review on the grounds that these circumstances have arisen through our Banking system procedures and that the charge may therefore be properly removed."

10 12. The appellant has failed to pay his tax liability by the due date on a number of past occasions and has received late payment surcharges for the tax years 2001/2002, 2003/2004, 2004/2005, 2005/2006 and 2006/2007.

### **Arguments of the parties**

15 13. HMRC argue that the payment of tax for the year ended 5 April 2009 was due on 31 January 2010 and that the trigger date for the first surcharge under section 59C (2) TMA was 28 days from the due date of 31 January 2010 i.e. 28 February 2010.

14. HMRC submitted that the appellant had been registered for self-assessment since 13 October 1996 and was experienced within the self-assessment regime. He should have known that his liability was due to be paid by 31 January 2010.

20 15. It was not sufficient that the appellant instructed his bank to transfer the payment to HMRC on 26 February 2010: to avoid a surcharge the appellant was required to ensure that his payment would be received by HMRC by 28 February 2010. The appellant should have considered how many days it would take his bank to make the payment. As 26 February 2010 was a Friday, the appellant should have known that his payment would not have reached HMRC before the surcharge trigger date of 28 February 2010.

16. HMRC further submitted that extracts from the "Money Saving Expert" website in support of his appeal explained how BACs transfers required three working days for payments to be cleared.

30 17. In the Notice of Appeal, the appellant argued that HMRC had ignored the submission from Lloyds TSB. The appellant submitted that this was an exceptional event beyond his control. Moreover, the penalty was totally disproportionate to the alleged late payment period.

### **Legislation**

18. Section 59C TMA provides:

35 (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.

- (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.
- 5 (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 93(5) of this Act, Schedule 24 to the Finance Act 2007 or Schedule 41 to the Finance Act 2008, 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.
- (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—
- 15 (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 the surcharge; or
- (b) if it does not so appear ..., confirm the imposition of the surcharge.
- 35 (10) Inability to pay the tax shall not be regarded as a reasonable excuse for the purposes of subsection (9) above.
- (11) The Board may in their discretion—
- (a) mitigate any surcharge under subsection (2) or (3) above, or
- 40 (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;

“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.

19. Section 118 (2) TMA 1970 provides:

" For all the purposes of this Act, a person shall be deemed not to have failed to do anything required to be done within a limited time if he did it within such further time, if any, as the Board or the [tribunal] or officer concerned may have allowed; and where a person had a reasonable excuse for not doing anything required to be done he shall be deemed not to have failed to do it unless the excuse ceased and, after the excuse ceased, he shall be deemed not to have failed to do it if he did it without unreasonable delay after the excuse had ceased."

### 15 **Decision**

20. In my view, the appellant does not have a reasonable excuse for his failure to pay his tax liability for the year ended 5 April 2000 by 28 February 2010 to avoid a surcharge under section 59C (2) TMA.

21. 26 February 2010 was a Friday. BACs payments usually take three working days to reach their destination unless the Faster Payments Service is used. The Faster Payments Service was not available in February 2010. It was, therefore, not reasonable for the appellant to expect his payment to reach HMRC by Monday, 28 February 2010.

22. I regard HMRC's records as giving an accurate date of receipt of the two payments (i.e. 1 March and 2 March 2010 respectively). The letter from Lloyds TSB dated 1 March 2011 did not state that the sum of £8,848.24 was received by HMRC on or before 28 February but rather that "We understand that" it was received on or before that date. I do not, therefore, regard this as evidence that the payment was received on or before 28 February 2010.

23. Bearing in mind that the appellant has a history of late payment of his tax liabilities, he should have taken extra care to ensure that the payment in respect of the year ended 5 April 2009 was made on time. He did not.

24. As regards the appellant's arguments that the first surcharge is disproportionate, I disagree. The surcharge arises 28 days after the due date for payment of the tax. The appellant should have paid his tax liability on 31 January 2010, not 28 February 2010. Parliament has allowed a 28 day grace period before the trigger date for the first surcharge under section 59C (2) TMA. In addition, there is no liability to a surcharge where a reasonable excuse for non-payment exists. The purpose of the surcharge is plainly to encourage taxpayers to pay their tax liabilities on time and to deter late payment. This seems to me a perfectly legitimate objective. All these factors suggest to me that the first surcharge is proportionate. To be disproportionate it would have to be, in the words of Simon Brown LJ in *International Transport Roth GmbH & Ors v*

*Secretary of State For the Home Department* [2002] EWCA Civ 158 at [26], "not merely harsh but plainly unfair". In my view the first surcharge is not unfair.

25. This appeal must, therefore, be dismissed and the surcharge is confirmed.

26. 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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**GUY BRANNAN  
TRIBUNAL JUDGE**

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**RELEASE DATE: 22 August 2012**