



TC02325

Appeal number: TC/2012/3611

INCOME TAX –late payment surcharges – time to pay arrangement for underpayment of PAYE – whether superseded on transfer of taxpayer to self-assessment – no – appeal allowed - section 108 Finance Act 2009

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

DAVID WILMOT

Appellant

- and -

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

TRIBUNAL: JUDGE NICHOLAS ALEKSANDER

The Tribunal determined the appeal on 11 October 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 23 February 2012 (with enclosures), HMRC's Statement of Case submitted on 16 April 2012 (with enclosures) and the Appellant's Reply dated 29 May 2012.

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DECISION

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1. This is an appeal by Mr Wilmot against the “first” late payment surcharges for the late payment of income tax for the tax years 2008/09 and 2009/10.

2. On the basis of the evidence before me, I find the background facts to be as follows:

10 3. Mr Wilmot used to be employed, and paid income tax by deduction from his salary under PAYE. On 20 January 2011, Mr Wilmot was advised of an underpayment of PAYE for the tax years 2008/09 and 2009/10 and invited to pay the amount due.

15 4. On 14 March 2011, Mr Wilmot telephoned HMRC, and agreed to pay the amount owing by monthly instalments over 36 months. He was advised that HMRC would write to him in the new tax year to establish the payment arrangements. In the event, HMRC never wrote to Mr Wilmot to establish the payment arrangements.

20 5. On 31 March 2011, Mr Wilmot’s tax agent submitted a claim for expenses on behalf of Mr Wilmot for the tax years 2008/09 and 2009/10. As a consequence of the claim, HMRC transferred Mr Wilmot to the self-assessment process, and tax returns for both years were issued to Mr Wilmot on 31 March 2011, with a due date of 7 July 2011. The returns were filed online on 29 November 2011.

25 6. HMRC submit that no time-to-pay arrangement was ever formally concluded with Mr Wilmot, and in any event it would have been overridden as a result of Mr Wilmot’s transfer to self-assessment. HMRC submit that the provisions of s59B(3) and (5A) Taxes Management Act 1970 govern this case, and that ignorance of the law can be no excuse. Section 59B(5A) provides that where a PAYE determination has been issued, but which has been superseded by an income tax self-assessment, then the tax is due for payment under self-assessment in accordance with sub-section (3) or
30 (4). Sub-section (3) provides that where a tax return is issued after 31 October following the end of the tax year in question (as was the case here), the due date for payment of tax self-assessed on the return is three months after the date on which the return is issued. Sub-section (4) is not relevant to this appeal. In any event HMRC submit that Mr Wilmot would not have been ignorant of the payment date, as the due
35 payment date would have appeared on his computer screen as part of the online filing process.

7. I find that a time-to-pay arrangement was agreed by Mr Wilmot with HMRC on the telephone on 14 March 2011. This was acknowledged by HMRC in the conclusions of their statutory review notified to Mr Wilmot by letter on 4 February
40 2012, where they state:

5 “... I do note that an arrangement was agreed on 14 March 2011 for the PAYE underpayment to be collected over 36 instalments. On the 31 March 2011 a letter was submitted by your agent claiming a large amount of expenses which automatically brought you within the self-assessment system. This in turn cancelled any payment arrangement you had under the PAYE system. I apologise if you were not directly made aware of this.”

10 8. I disagree that the time-to-pay arrangement would have been automatically cancelled by the transfer of Mr Wilmot to self-assessment. If there had been no time-to-pay arrangement, then s 59B(5A) would be in point. However, the time-to-pay arrangement is a contractual arrangement for payment of tax concluded with HMRC under their broad powers of collection and management. Unless there was an express term included in the time-to-pay arrangement which provided for its termination on the transfer of Mr Wilmot to self-assessment, the arrangement would remain valid and
15 continue, notwithstanding the transfer. There is no evidence before me to suggest that such a term was included in the arrangement (indeed I would be surprised if the terms agreed on the telephone went into such detail), and I find that there was no such term.

20 9. Accordingly, the provisions of s108 Finance Act 2009 apply. These provide that for the tax years in question no surcharge for late payment of taxes will arise in the event that a taxpayer had concluded a time-to-pay arrangement with HMRC before the due date for payment, and the taxpayer has kept to the arrangement.

25 10. I would mention that if my analysis of the application of s108 should turn out for some reason to be wrong, I would find that Mr Wilmot would have a reasonable excuse for his late payment, as it would be reasonable for him to assume that the time-to-pay arrangement would continue to apply. The fact that payment dates were displayed to Mr Wilmot when filing his tax return online is irrelevant, as Mr Wilmot would have justifiably assumed that the time-to-pay arrangement that he had concluded with HMRC overrode the normal payment dates.

11. I therefore allow the appeal.

30 12. I note that “second” surcharges for late payment of tax were imposed on or shortly after 17 February 2012, against which no appeal has been lodged. In view of my finding that the first surcharges cannot stand, HMRC should cancel the second surcharges, without the need for Mr Wilmot to lodge a formal appeal against them. In the unlikely event that HMRC do not cancel the second surcharges, I give leave to Mr
35 Wilmot to apply to me for leave to make an appeal against those surcharges notwithstanding that that time limit for appeals may have expired.

40 13. 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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**NICHOLAS ALEKSANDER
TRIBUNAL JUDGE**

RELEASE DATE: 22 October 2012