



TC02503

Appeal number: TC/2012/09776

CAPITAL GAINS TAX – late payment - first and second surcharges – section 59C Taxes Management Act 1970 – taxpayer allegedly misled by telephone advice from HMRC - whether reasonable excuse – no – appeal dismissed.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

VERITY BRUCCIANI

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE GUY BRANNAN
RICHARD THOMAS**

Sitting in public at Bedford Square, London on 11 January 2013

Peter Sudlow, Sapienter Wealth Management, for the Appellant

Gloria Orimoloye, Advocate, for the Respondents

DECISION

1. This is an appeal against first and second surcharges charged under section 59C
5 Taxes Management Act 1970 ("TMA") in respect of the late payment of capital gains
tax for the tax year ended 5 April 2009.

The facts

2. The appellant, prior to the tax year ended 5 April 2009, was not subject to
income tax and therefore was not within the self-assessment regime. Accordingly,
10 HMRC would not have issued a self-assessment tax return.

3. The appellant's tax liability of approximately £23,000 arose in respect of the
sale of shares in that tax year.

4. Following that disposal, the appellant should have notified HMRC of her
liability to capital gains tax within six months of the end of the tax year ended 5 April
15 2009 (section 7 TMA) i.e. by 5 October 2009. The appellant failed to notify HMRC.

5. On 4 January 2010, the appellant's husband telephoned HMRC in relation to his
wife's tax return. An HMRC officer returned the call on the same day and advised
him to download HMRC Form SA 1. This Form allows a taxpayer, who needs a tax
return, to register for self-assessment and receive a unique taxpayer reference
20 ("UTR").

6. HMRC received Form SA 1 completed by the taxpayer on 18 January 2010.

7. HMRC informed us that the hearing that it takes between 3 to 6 weeks from
receipt of Form SA1 for an activation code to be sent to a taxpayer enabling the
taxpayer to complete a self-assessment tax return online. There was no dispute about
25 this time period.

8. It is not clear when the UTR was issued by HMRC to the appellant, but
presumably it was at some time after 31 January 2010.

9. The taxpayer was liable to pay her capital gains tax liability by 31 January 2010.
It was accepted by both parties that payment was not made by that date. In fact, as we
30 shall see, the tax was paid on 6 April 2011.

10. In June 2010 the appellant first asked Mr Sudlow to advise in relation to the
return and payment of the capital gains tax liability for the year ended 5 April 2009.
Form 64-8, the form by which a taxpayer authorises HMRC to deal with his/her
agent, was submitted by Mr Sudlow on behalf the appellant in July 2010 but, for
35 reasons which were not explained, was sent back by HMRC in October 2010. It was
not until January 2011 that Mr Sudlow was informed that he had been accepted by
HMRC as authorised to act on behalf the taxpayer.

11. The first surcharge (section 59C(2)) TMA became due following the expiry of 28 days from the due date i.e. 1 March 2010. The second surcharge (section 59C(3) TMA) became due following the expiry of six months from the due date, i.e. 31 July 2010. In each case, the surcharge was an amount equal to 5% of the unpaid tax i.e. an amount of £1181.82 in respect of each surcharge.

12. It was not suggested by Mr Sudlow that the crystallisation of the second surcharge on 31 July 2010 was caused by HMRC's delay in processing his authorisation to act on behalf of the appellant.

13. Once it became clear to Mr Sudlow in January 2011 that HMRC accepted that he was authorised to act on behalf of the appellant he telephoned HMRC to discuss the appellant's outstanding capital gains tax liability and spoke to a Mr Bampton in HMRC's Portsmouth office on 8 February 2011.

14. There are different versions of exactly what was said in this telephone conversation.

15. 15. HMRC's notes of the telephone conversation were as follows:

"08/02/2011 – agent called re CG on share sale in 08/09. Record was set up specifically for this but itr09 [income tax return for the year ended 5 April 2009] was never issd. Manual iss now as LATE ISSUE with 3 mnth deadline after checking with tech."

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16. Mr Sudlow's notes of the conversation were as follows:

"Spoke to Paul Bampton (in Portsmouth) who indicated it looked like everything had been done which should have been done, apart from the Tax Return being issued. It will be treated as a Late Return because the problem is on HMRC's side. A Return will be issued to the Client which ought to be processable online. The deadline will be three months from 31 January 2011 to submit and pay."

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17. HMRC argue that, according to their notes of this conversation, nothing was said about the date for payment of the tax. Mr Sudlow states that a three-month deadline for filing and payment was agreed. The return and the tax were respectively filed and paid within this time limit. Although, for reasons which we shall explain below, we believe that nothing turns on this dispute, we consider it more likely that Mr Sudlow's version of the conversation is correct. He had been charged with the responsibility of sorting out the appellant's capital gains tax liability. It seems to us improbable that he would have discussed with HMRC only the question of the date by which the late return should be submitted. Instead, we think it more probable that he would have discussed the deadline for the filing of the return and the payment of the tax. In any event, there appears to have been no explicit reference to surcharges by either party in their respective notes of the conversation.

18. We should add that we have been sent a copy of letter from Mr Sudlow to HMRC written after the hearing requesting a copy of the transcript of the

conversation under the Freedom of Information Act. We have accepted Mr Sudlow's account of that conversation and, for that reason, there seems no reason for us to delay our decision in this appeal.

5 19. Mr Sudlow criticised the subsequent conduct of HMRC, including (from the appellant's viewpoint) an unsuccessful review process, for failing to honour the agreement reached with Mr Bampton i.e. a recognition by Mr Bampton that HMRC had been at fault for not issuing a return and that, in his view, matters would be settled by a return being issued and the payment of tax being made within three months from 31 January 2011.

10 20. There was a further telephone conversation with Mr Marsden of HMRC on 9 September 2011 which Mr Sudlow says (based on his notes of the conversation) contained an assurance by HMRC that the appeals against a surcharge as had been allowed. HMRC's version of this telephone conversation (based on listening to a recording of the conversation which was not produced to us but which is recorded in a review letter dated 20 September 2012) is that the HMRC officer concerned confirmed that the surcharges on the appellant's self-assessment statement of account were shown as "suspended and were reduced to nil". However, HMRC state that in 15 the latter part of the conversation Mr Marsden made it clear to Mr Sudlow that he did not know whether the reference to the fact that the surcharges had been suspended meant that they were permanently suspended or that collection had been postponed. 20

21. HMRC point out that in a letter to Mr Sudlow dated 3 July 2011 HMRC advised him that the surcharges remained payable until an appeal was settled even if it was shown on the appellant's account as "collection suspended."

22. On balance we consider it more probable that HMRC's fuller version of this 25 conversation is correct. Nonetheless, we do not think that this conversation has a material bearing on the outcome of this appeal.

The legislation

23. We set out below the relevant statutory provisions, so far as is material.

24. Section 7 TMA provides:

30 "(1) Every person who—
 (a) is chargeable to income tax or capital gains tax for any year of assessment, and
 (b) has not received a notice under section 8 of this Act requiring a return for that year of his total income and chargeable gains,
35 shall, subject to subsection (3) below, within six months from the end of that year, give notice to an officer of the Board that he is so chargeable."

25. Section 59B TMA 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

5 (b) the aggregate of any payments on account made by him in respect of that year (whether under section 59A of this Act or otherwise) and any income tax which in respect of that year has been deducted at source,

10 shall be payable by him or (as the case may be) repayable to him as mentioned in subsection (3) or (4) below

(3) In a case where the person—

(a) gave the notice required by section 7 of this Act within six months from the end of the year of assessment, but

15 (b) was not given notice under section 8 or 8A of this Act until after the 31st October next following that year,

the difference shall be payable or repayable at the end of the period of three months beginning with the day on which the notice under section 8 or 8A was given.

20 (4) In any other case, the difference shall be payable or repayable on or before the 31st January next following the year of assessment.”

26. Section 59C TMA (since repealed) provided:

"(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.

25 (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.

30 (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.

35 (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—

(a) shall be served on the taxpayer, and

40 (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.

(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.

5 (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.

(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.

10 (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—

15 (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.

(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—

20 (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.

25 (12) In this section—

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

30 “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.”

27. It is worth noting that section 59C(9)(a) TMA requires that a reasonable excuse must be demonstrated throughout the period of default, and that term is defined in section 59C(12) and in this case means the period from the due date (31 January 2010) to the date on which the tax was paid (6 April 2011).

35 **Discussion**

28. In our view the appellant has failed to establish a reasonable excuse within the meaning of section 59C(9) TMA.

29. As noted above, the reasonable excuse must exist throughout the period of default i.e. from 31 January 2010 to 6 April 2011.

30. It is not disputed that the appellant should have notified her liability to capital gains tax for the year ended 5 April 2009 by 5 October 2009 and should have paid the outstanding tax liability by 31 January 2010. It is also accepted by both parties that she failed either to notify the liability or pay the tax by those respective dates.

5 31. There is no evidence, in our view, that HMRC misled or in any way prevented the appellant from paying her tax liability by 31 January 2010, or by the trigger dates for the two surcharges. If the appellant had complied with her obligation under section 7 TMA to notify HMRC of her tax liability by 5 October 2009, it would have been perfectly possible for HMRC to have issued a UTR and a self-assessment tax
10 return in time for the appellant to file a return and pay the tax by 31 January 2010.

32. By filing Form SA 1 on 18 January 2010, the appellant left HMRC insufficient time to issue a UTR and an activation code for her self-assessment tax return for the relevant year. In any event, as HMRC pointed out at the hearing, there was nothing to prevent the taxpayer making a payment of the capital gains tax due before 31 January
15 2010 even without a UTR. Moreover, the appellant could have requested and filed a paper return prior to 31 October 2009 – there is no obligation in the case of an individual self-assessment return for the return to be filed on-line (at least prior to 31 October following the end of the relevant tax year).

33. There was, therefore, no reasonable excuse for the late payment of tax from 31
20 January 2010 to, at least arguably, 8 February 2011 i.e. the date of the telephone conversation between Mr Sudlow and Mr Bampton. That telephone call cannot in our view establish a reasonable excuse for the failure of the appellant to discharge her liability to capital gains tax prior to the date of that conversation. It may well be that HMRC, in that conversation, admitted a failure to send out a self-assessment tax
25 return but HMRC are not pursuing the appellant for penalties in respect of a failure to submit a return by 31 January 2010.

34. We have found that it is more likely than not that HMRC, in that conversation, also required that tax should be paid within three months from 31 January 2011. That does not mean, however, that they accepted that tax should not be paid by the due
30 date 31 January 2010. In any event, the liability to the first and second surcharges had already crystallised many months before.

35. Mr Sudlow argued that there was a contract created by Mr Bampton in the telephone conversation. He says that HMRC offered a waiver of the surcharges on the basis of the officer's assessment of the case from the information to hand, in return
35 for the filing of the tax return within three months of 31 January 2011 and payment of the tax by that date. He says that he accepted this offer on behalf of the appellant who duly submitted the return on 21 March 2011 and made the payment of tax on 6 April 2011.

36. In our view, this cannot be the correct analysis. There was no indication from
40 the records of the conversation maintained by HMRC or Mr Sudlow that HMRC had agreed to waive the surcharges. Moreover, the agreement of the appellant to make a payment of tax by a date which was already over 12 months overdue in circumstances

where the appellant was under a statutory obligation to pay that tax on 31 January 2010 cannot possibly constitute good consideration as a matter of contract law.

5 37. In short, the conversation of 8 February 2011 came too late to constitute a reasonable excuse for the failure of the appellant to pay the tax on the due date and came after the first and second surcharges had already crystallised. The same is true as regards the conversation with Mr Marsden.

10 38. It is clear from the decision of the Upper Tribunal in *HMRC v HOK Limited* [2012] UKUTT 363 (TCC) that this tribunal has no inherent judicial review function in relation to tax appeals – its jurisdiction is purely statutory (although we might add that that jurisdiction must be interpreted, so far as it is possible to do so, in a manner consistent with a taxpayer’s Convention rights). If Mr Sudlow's complaint is that HMRC's insistence on charging surcharges has been maintained after the telephone conversation with Mr Bampton on 8 February 2011 is *Wednesbury* unreasonable, then that is an issue over which, in the ordinary case, this tribunal has no jurisdiction. The
15 appellant's recourse, if any, would be to either to make an application for judicial review or to make a complaint to the Adjudicator’s Office.

Decision

39. For the reason given above, we dismiss this appeal.

20 40. 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)”
25 which accompanies and forms part of this decision notice.

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**GUY BRANNAN
TRIBUNAL JUDGE**

RELEASE DATE: 30 January 2013

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