



TC02572

Appeal number: TC/2012/02474

*INCOME TAX – Default surcharge for late payment of tax (TMA s.59C –
Reasonable excuse – Appeal dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

G O OSUNDIYA

Appellant

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER STAKER

The Tribunal determined the appeal on 21 September 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 27 January 2012 (with enclosures), HMRC’s Statement of Case dated 22 March 2012 (with enclosures), the Appellant’s reply dated 10 April 2012, and other papers in the case.

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DECISION

Introduction

1. In this default paper case, a summary of the findings of fact and reasons for the decision were released on 27 November 2012. The Appellant subsequently filed a request for full written reasons, as well as a notice of appeal, which was accompanied by additional documents. The Appellant states that he is uncertain about the time limit for applying for permission to appeal.

2. The Tribunal notes that paragraphs (4) and (5) of rule 35 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the “Rules”) provide as follows:

(4) If the Tribunal provides no findings and reasons, or summary findings and reasons only, in or with the decision notice, a party to the proceedings may apply for full written findings and reasons, and must do so before making an application for permission to appeal under rule 39 (application for permission to appeal).

(5) An application under paragraph (4) must be made in writing and be sent or delivered to the Tribunal so that it is received within 28 days after the date that the Tribunal sent or otherwise provided the decision notice under paragraph (2) to the party making the application.

3. According to the Rules, therefore, the Appellant cannot apply for permission to appeal until he has first applied for full written reasons. The filing submitted by the Appellant is therefore treated as a request for full written reasons only. The full written reasons are now provided. These full written reasons are reasons for the decision that was released on 27 November 2012, based on the material that was before the Tribunal at that time. Consideration is not given in the present full written reasons to the additional material contained in the documents filed by the Appellant on 14 December 2012. Should the Appellant upon receipt of these full written reasons decide that he wishes to appeal against the Tribunal’s decision, he can then file an application for permission to appeal within the applicable time limit.

Background

4. This is an appeal against a default surcharge of £26.15 imposed pursuant to s.59C of the Taxes Management Act 1970 (the “TMA”) in respect of the late payment of tax for the 2009/10 tax year.

5. The Appellant submitted a paper tax return for the tax year in question on 6 May 2011. This was outside the time limit for filing the tax return, which was 31 October 2010 for a paper return or 31 January 2011 for an electronic return. It appears that originally a penalty was imposed for the late filing of the tax return, but that HMRC subsequently allowed an appeal on the basis that the Appellant had a reasonable excuse for the late filing, namely the sickness of his partner and a period in hospital.

6. It appears that HMRC originally calculated his tax liability as £1,111.05. However, on 19 August 2011, HMRC have calculated the tax due to be £523.05. HMRC's position is that this tax was due to be paid on 31 January 2011, pursuant to section 59B(4) TMA.

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Applicable legislation

7. Section 59C of the TMA states in relevant part as follows:

- 10 (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.
- 15 (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.
- ...
- 20 (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.
- 25 ...
- (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.
- ...
- 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
- 35 (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;

“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.

8. Section 118(2) of the TMA provides as follows:

- (2) For 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.

Arguments of the parties

9. The Appellant argues as follows. Periods of illness of the Appellant and his wife have prevented him from filing the tax return and paying the tax on time. The Appellant disputes HMRC’s calculation of the amount of tax due. The Appellant therefore does not accept HMRC’s calculation of the surcharge. The Appellant does not understand how the tax liability is said to have arisen, and HMRC have not provided him with a proper explanation.

10. HMRC argue as follows. HMRC records show that the underpayment of £523.05 was created as neither the Appellant nor his partner qualified for Married Mans Allowance. This was explained to the Appellant in detail in letters dated 22 August 2011 and 23 November 2011. HMRC have accepted that periods spent in hospital by the Appellant and his partner provided the Appellant with a reasonable excuse for not filing his tax return until 6 May 2011. HMRC have accordingly accepted that he had a reasonable excuse for not paying the tax until that date, and the first surcharge for late payment of the tax has accordingly been cancelled. However, as the Appellant was able to file his tax return on 6 May 2011, it is reasonable to assume that he was also able to pay his outstanding tax liabilities on that date. Despite detailed explanations regarding his tax and numerous reminders, he has not paid the tax. HMRC must be consistent in its approach to all customers, particularly those who comply with their tax obligations, and in this case the surcharge has been

properly charged. The Appellant has not shown that payment was prevented by anything unexpected or out of his control.

The Tribunal's findings

5 11. The trigger dates for the two default surcharges were 28 February 2011 and 31 July 2011 respectively.

12. The HMRC statement of case says that consistently with the HMRC view that the Appellant had a reasonable excuse until 9 May 2011 for the late filing of the tax return, the Appellant had a reasonable excuse until 9 May 2011 for the late payment
10 of the tax. HMRC state that the first of the surcharges with the trigger date of 28 February 2011 has accordingly been cancelled.

13. However, HMRC maintain that if the Appellant was in a position to file his tax return on 6 May 2011, he should have been in a position to pay his tax liability on that date. HMRC therefore consider that the Appellant did not have a reasonable excuse
15 for the late payment of the tax on 31 July 2011, the trigger date for the second surcharge liability.

14. The Tribunal notes however that the Appellant submitted a paper tax return, such that he was relying on HMRC to calculate the amount of tax due. HMRC state that it was only on 19 August 2011 that the Appellant was advised of the revised
20 amount of tax due.

15. Assuming this statement in the HMRC statement of case to be correct, the Tribunal considers that, depending on the precise circumstances of the original erroneous assessment and the circumstances requiring the correction, it might be that the Appellant has a reasonable excuse for not paying the tax until a reasonable period
25 after receipt of the correct calculation on 19 August 2011.

16. However, in order to avoid a surcharge, it is necessary that the reasonable excuse continue throughout the period of default. Section 59C(12) TMA defines "period of default" as "the period ... ending with the day before that on which the tax was paid". The HMRC statement of case states that the tax remained unpaid on the
30 date that the statement of case was prepared (22 March 2012). The Appellant has not disputed this. To avoid liability for the second surcharge, the Appellant would therefore have to establish a reasonable excuse that continued until 22 March 2012 at the least. The burden of proof rests with the Appellant to establish circumstances amounting to a reasonable excuse. The Tribunal is not satisfied on the evidence
35 before it that the Appellant has done so. Sections 7 and 8 of the Appellant's notice of appeal refer to illness, a period of hospitalisation and disability, and unforeseen circumstances. However, the Tribunal finds that insufficient evidence has been provided to show that these matters establish a reasonable excuse lasting until 22 March 2012. The Appellant also contends that HMRC have failed to reply to his queries as to the amount of his tax liability, and the Appellant appears to argue that
40 the amount of his tax liability is unclear. However, since 19 August 2011 at least,

HMRC have consistently stated that the amount of the balancing payment due for the tax year in question is £523.05, in letters from HMRC dated 22 August 2011, 20 September 2011, 23 November 2011, and 2 December 2011. On the material before the Tribunal, the Appellant has not established that the HMRC calculation is wrong.
5 Furthermore, the Tribunal does not consider that an appeal against a default surcharge can be used as a collateral challenge to the underlying assessment of tax.

17. HMRC state that they have cancelled the first default surcharge. To the extent that it may still be necessary, the Tribunal sets it aside. However, for the reasons given, the appeal against the second default surcharge is dismissed.

10 18. 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
15 “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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**CHRISTOPHER STAKER
TRIBUNAL JUDGE**

RELEASE DATE: 27 February 2013

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