



**TC02653**

**Appeal number: TC/2012/06875**

**INCOME TAX – PENALTY AND SURCHARGE – *HMRC conceded the Appeals on surcharges and second late filing penalty for 2001/02 and late filing penalties for 2003/04 – first late filing penalty for 2001/02 cancelled – surcharges for 2003/04 confirmed – Appeal allowed in part***

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**MR TONY C DRAPER**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE MICHAEL TILDESLEY OBE**

**The Tribunal determined the appeal on 28 February 2013 on the papers. The Appeal was originally listed for hearing as a basic case. The Appellant, however, requested that his Appeal be dealt with in his absence. On 25 September 2012 HMRC consented to the Appeal being determined on the papers. The Tribunal has considered the Notice of Appeal dated 3 July 2012, HMRC's Statement of Case and bundle of documents submitted on 25 September 2012, the Appellant's Reply dated 15 October 2006 and HMRC's response dated 7 February 2013.**

## DECISION

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1. The Appellant appealed against HMRC's decision to impose late filing penalties and surcharges for unpaid tax in respect of the tax years 2001/02 and 2003/04.
2. The position regarding the Appellant's tax returns, late filing penalties and surcharges for the years 2000/01 to 2006/07 are set out below.

<b>Year</b>	<b>Return issued</b>	<b>Return received</b>	<b>Tax due (£) (Overpayment)</b>	<b>Late filing penalty</b>	<b>Surcharge</b>
2000/01	6.4.01	29.1.02	(975.73)	None	None
2001/02	6.4.02	5.12.07	242.48	£100 (7.3.03) £100 (6.8.03)	£12.12(24.8.07) £12.12 (24.8.07)
2002/03	6.4.03	5.12.07	(54.00)	Penalty capped at nil tax liability	None
2003/04	6.4.04	5.12.07	1,684.50	£100 (2.2.07) £100 (2.2.07)	£84.22(9.1.08) £84.22 (9.1.08)
2004/05	31.1.08	3.3.08	(254.00)	Penalty capped at nil tax liability	None
2005/06	31.1.08	3.3.08	(784.52)	Penalty capped at nil tax liability	None
2006/07	6.4.07	5.12.07	(376.41)	None	None

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3. As can be seen from the above table the dispute related to the late filing penalties and surcharges for the years 2001/02 and 2003/04. Following directions

issued by the Tribunal on 7 February 2013 HMRC clarified its position in relation to the dispute which was as follows:

5 (1) **2001/02:** the late filing penalty notices of £100 each of 7 March and 6 August 2003 were sent to the Appellant's address in Mandeville Road, which at the time was recorded on his self assessment record. The notice issued on 6 August 2003 was returned undelivered. The notice of 7 March 2003 was not so returned. HMRC conceded that the notice on 6 August 2003 was not validly served, in which case the second filing penalty should be quashed. Likewise the two surcharge notices of £12.12 each issued on 24 August 2007 were not  
10 validly served, in which case both surcharges should be cancelled.

(2) **2003/04:** From January 2005 to July 2007 HMRC did not have a permanent address for the Appellant. In those circumstances HMRC accepted that the late filing penalty notices for £100 each of 2 February 2007 were not validly served and that the penalties should be cancelled. HMRC, on the other  
15 hand, believed that the surcharge notices issued on 9 January 2008 were validly served.

4. The outstanding matters that, therefore, remain were the late filing penalty of £100 issued on 7 March 2003, and the two surcharges of £84.22 each issued on 9 January 2008.

20 5. Under section 93 of the TMA 1970, a tax payer is liable to a fixed penalty of £100 if he fails to make his return by the due date as required by a notice served under section 8 of the 1970 Act. Section 59C of the 1970 Act makes a taxpayer liable to a surcharge equal to five per cent of the unpaid tax if he fails to pay by the required date. If the tax remains unpaid on the day following the expiry of six months from the  
25 due date, the taxpayer is liable to a further surcharge equal to five per cent of the unpaid tax.

6. In the Appellant's case, the 2001/02 notice to file return was sent to his address at Mandeville Court. The notice to file was not returned undelivered and required the Appellant to file his return by 31 January 2003. The Appellant sent his return on 5  
30 December 2007, which was almost four years late. In respect of the 2003/04 tax year, the Appellant was obliged to pay the outstanding tax of £1,684.50 by the 28 February 2005. The Appellant has not paid the outstanding tax of £1,684.50, in which case he was liable to the surcharge and the further surcharge equal to five per cent of £1,684.50, equating to £84.22 for each surcharge.

35 7. Sections 93(8) and 59C(9) of the 1970 Act provide the Appellant with a defence of reasonable excuse against the imposition of late filing penalties and surcharges. Reasonable excuse, however, is strictly construed, and must exist throughout the period of default. Section 118(2) states that for the purposes of the 1970 Act:

40 "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 may have allowed, and where a person had a reasonable excuse for not doing anything

required to be done he shall be deemed ..... not have failed to do it if he did it without unreasonable delay after the excuse had ceased”.

8. Thus the Tribunal has limited jurisdiction in penalty appeals which reflects the purpose of the legislation of ensuring that tax payers file their returns and pay their tax on time. The Tribunal has no power to mitigate the penalty. The Tribunal can either confirm the penalty or quash it if satisfied that the Appellant has a reasonable excuse for his failure. The onus is upon the Appellant to prove on a balance of probabilities the matters upon which it asserts to discharge the penalty.

9. The Appellant asserted that he sent his tax returns on time. The Appellant stated that he had changed addresses many times during 2002 to 2006 due to work commitments. When the Appellant moved to Spain in 2006 he sent everyone a correspondence address in the UK to enable the onward forwarding of mail to him. In September 2007 he received a demand for unpaid tax in the sum of £9,578.64. The Appellant contacted HMRC which asked him to re-send the returns for 2001/02, 2002/03 and 2003/04 by 10 October 2007 because it could not locate the original ones. HMRC received the re-submitted returns on the 22 October 2007 which were returned to the Appellant together with other blank forms.

10. The Appellant believed that the problems with his tax were caused when he worked for DJL Contracts which did not pass onto him the tax vouchers under the Construction and Industry Scheme (CIS). The Appellant was, of the view, that HMRC requested the new returns because his original ones did not include the tax vouchers. The Appellant had tried to obtain copies of the vouchers but DJL Contracts did not comply with his request. DJL contracts have subsequently gone bankrupt.

11. The Appellant pointed out that his tax bill had been reduced from £9,578.64 to less than £2,000 which was due to HMRC setting off tax overpayments in other years against the tax due. The Appellant, however, stated that he had not received details of the revised computation of the tax due. The Appellant requested the removal of all penalties and surcharges. The Appellant indicated that in 2011 he suffered a serious injury and was unable to work. The Appellant was relying on financial assistance from family and friends and experiencing severe financial hardship as he was unable to claim benefits because of his residence outside the UK.

12. HMRC disputed that the Appellant had always sent his tax returns on time. HMRC's records showed a different picture with no returns for 2001/02 onwards being submitted until December 2007. HMRC contended that the Appellant has provided no information or evidence to support his assertion about filing the returns on time. Further the Appellant has offered no reasonable excuse or explanation for his failure to comply with his tax obligations.

13. The Tribunal considers there was significant doubt about whether the late filing penalty notice issued on 7 March 2003 and sent to Mandeville Road was validly served. HMRC has already accepted that the notice issued on 6 August 2003 and sent to the Mandeville Road address was not validly served. The Tribunal also considers that the Appellant has a defence under section 118(2) of TMA 1970 in that he was given further time by HMRC to resubmit his 2001/02 return which he appeared to

have complied with. The Tribunal, therefore, decides to cancel the late filing penalty of £100 issued on 7 March 2003.

14. The Tribunal finds that the Appellant has not paid the outstanding tax due on the 2003/04 return. HMRC's 2003/04 tax computation revealed that the full amount of tax credited under the CIS scheme had been accounted for leaving an outstanding balance of £1,683.60 which represented the amount due under Class 4 National Insurance Contributions. The surcharge notices were validly served, having been sent after the Appellant got in contact with HMRC in September 2007. The Appellant has offered no explanation for not paying the outstanding tax on time, particularly in view of his assertion that he had sent the 2003/04 return by the due date. The Tribunal finds that the Appellant did not have a reasonable excuse for not making on time the balancing payment of £1,683.60 for 2003/04. The Tribunal upholds the default surcharges in the total amount of £168.44.

### Decision

15. The Tribunal allows the Appellant's appeals against the late filing penalties for 2001/02 and 2003/04, and the surcharges for 2001/02. The Tribunal, therefore, quashes the late filing penalties totalling £400 and the surcharges in the amount of £24.24. The Tribunal dismisses the Appellant's appeal against the surcharges imposed for non payment of the outstanding tax in 2003/04 by the due date and confirms the amount of surcharges as £168.44.

16. As a result of the Tribunal's decision, the Appellant's statement of account for the disputed period subject to interest adjustments is as follows

<b>Tax Year</b>	<b>Outstanding Tax (£)</b>	<b>Description of the Debt</b>
2001/02	242.48	Tax due
2003/04	1,684.50	Tax due
	84.22	Surcharge (1)
	84.22	Surcharge (2)
<b>Total due</b>	<b>2,095.42</b>	
Available for Set Off	(1,468.93)	Tax over-payments for 2002/03, 2004/05, 2005/06, and 2006/07
<b>Amount due</b>	<b>626.49</b>	

17. 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

5 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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**MICHAEL TILDESLEY OBE  
TRIBUNAL JUDGE**

**RELEASE DATE: 17 April 2013**

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