



TC03145

Appeal number: TC/2013/06653

INCOME TAX – whether late payment of income tax, Yes. Whether reasonable excuse for late payment - Yes.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

DERREN URWIN

Appellant

- and -

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

**TRIBUNAL: PRESIDING MEMBER
PETER R. SHEPPARD FCIS FCIB CTA
AII**

The Tribunal determined the appeal on 2 December 2013 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 25 September 2013 with enclosures, and HMRC's Statement of Case submitted on 1 November 2013 with enclosures. The Tribunal wrote to the Appellant on 5 November 2013 indicating that if they wished to reply to HMRC's Statement of Case they should do so within 30 days. A reply dated 13 November 2013 was received and has been considered by the Tribunal.

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DECISION

1. Introduction

5 This considers an appeal against a penalty of £429.78 levied by HMRC for the late payment of income tax of £8,595.79 for the year ending 5 April 2010.

2. Legislation

Finance Act 2009 Schedule 56
Taxes Management Act 1970, in particular Sections 7,8,9,59B, 59C and 118.

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3. Case law

Rowland v HMRC [2006] STC (SCD) 536
Anthony Wood trading as Propaye v HMRC [2011] UKFTT 136 TC 001010

4. Facts

15 The appellant normally paid tax by PAYE and did not usually receive a tax return for completion. If at the end of the tax year the appellant's payments under PAYE were either too little or too much his tax code was adjusted so that his PAYE deductions the following year adjusted for the difference. For the year 2009/10 HMRC say they will use this system providing the shortfall does not exceed £2,000. In respect of the tax
20 year 2009/10 the shortfall for the appellant was £8,595.79. On 22 August 2012 HMRC sent the appellant a tax return for the year ending 5 April 2010. The return was required to be filed by 29 November 2012. The date payment was required is a matter of dispute and is discussed below.

25 HMRC say self assessment of tax is based on voluntary compliance. Taxpayers who are within the self assessment system must file their returns by the due date and pay the tax they owe by the date specified in law.

It is therefore important to establish the due date as specified in law

Law concerning the payment of tax.

The Taxes Management Act 1970 (TMA) Section 59B (3) states :-

30 (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

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

The Tribunal observes firstly that the year of assessment was the year ending 5 April 2010 and secondly that the appellant did not give any notice as required by section 7, however he was not given notice under Section 8 or 8A until after 31st October next following that year.

5 Section 7 (3) states

A person shall not be required to give notice under subsection (1) above in respect of a year of assessment if for that year his total income consists of income from sources falling within subsections (4) to (7) below and he has no chargeable gains.

Subsections (4) to (7) set out at length the various sources of income.

10 It is not necessary to set these out in detail because if the appellant's income falls within these categories he is not required to give a notice under Section 7(1). If all the appellant's income does not fall within the categories he is required to give a notice under section 7(1) which he did not do. The Tribunal observes that in both cases a notice under section 7 has not been given within 6 months from the end of the year of
15 assessment therefore the provisions of Section 59 B (3) are not applicable to the facts relating to the appellant. It is also relevant when considering subsections (4) to (7) to have in mind that the appellant's income for the year was over £100,000 which prompted the sending of the return. It was therefore likely that he was a higher rate taxpayer. The legislation continues at Section 59B (4) :-

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

Therefore in accordance with Section 59B (4) Taxes Management Act 1970 in the case of the appellant the due date for payment was 31 January 2011.

25 On 13 February 2013 HMRC issued a Self Assessment – Tax calculation (Form SA302) to the appellant. This document included the following statement

"I enclose my tax calculation based on the amounts shown in your tax return.

My calculation shows the amounts due under Self Assessment for 2009-2010 is £8595.79 which was due by 31 January 2011.

30 The above figures show the amounts due from your Tax Return and do not take into account any payments you may have made towards amounts due on these dates, or any other amounts which may be outstanding. Please note interest and surcharges will be charged on payments made after a due date.

35 A due date has already passed. The above information will help you to decide how much you should pay now. Do not wait for the next Statement of Account.....You can view your SA account over the internet using the Self Assessment Online service. This will show you the up to date position of payments made and tax owing."

In the Tribunal's view this notice quotes the date payment is due as specified by law accurately.

On 6 March 2013 HMRC issued a Self Assessment Statement to the appellant. This shows the following entry

- 5 29 NOV 12 Balancing payment due for year 2009/10. £8595.79

The statement also shows interest to 6 March 2013 of £68.46 giving a balance due of £8664.25 which the appellant paid on 15 March 2013

The statement also states "Becoming due 29 MAR 2013 1st Surcharge for 09/10 £429.78"

- 10 A later Self Assessment Statement dated 24 June 2013 shows the payments made by the appellant on 15 March 2013 and on 24 June 2013 a further interest charge of £9.

The balance outstanding is shown as £438.78 which is made up of the surcharge of £429.78 and the £9 interest.

5. Appellant's submissions

- 15 The appellant's submissions include the following:

In a letter to HMRC dated 23 July 2013 the appellant wrote to HMRC appealing their decision.

- 20 "The self assessment –tax calculation output for the tax year 2009-20 was produced by HMRC on the 13 Feb. This showed that I was due to pay £8595.79 which I have to say was a major shock to me as all my tax with the exception of some savings interest is all paid by pay as you earn. I do however understand that I was due to pay it and I did so.

- 25 The appellant says he was confused by what was happening and called the tax office. He says he was told that the £429.78 penalty was due as he had not completed his tax return by October 2010. The appellant expressed his disbelief at this and said that he felt it was totally unjust. He states "I also stated that it was physically impossible for me to complete the return by October 2010, as I had not been told that I needed to complete a tax return for that year until 2012."

- 30 HMRC responded on 8 August 2013 by refusing to reconsider their decision as they considered that the request was made out of time. However their letter did say "Please note the tax was payable on 29 November 2012 but you did not pay until 14 and 15 March 2013."

- 35 6. On 19 August 2013 the Appellant wrote again to HMRC requesting that they reconsider their decision not to review their decision on the grounds it was out of time. He argued that he had appealed in time. He also wrote:

“Your letter stated that the penalty for the late payment became due on 29 November 2012 however I was not notified of the tax due until I received the self-assessment tax calculation dated 13 February 2013. It is therefore inconceivable that I should be charged for something in November 2012 when I was not aware of it until Feb 2013.”

5 The appellant asserts that he was he first became aware of the penalty when he received a statement dated 24 June. He had noted there was an entry on the statement dated 6 March stating “becoming due on 29 March” but assumed that this was interest that he could avoid by paying the tax before that date, which is what he did.

10 He states “It is also worthy of note that your letter referred to a penalty notice however I have never received a penalty notice.”

7. Nevertheless HMRC again refused to review their decision and advised the appellant to appeal to the Tribunal.

15 8. The appellant followed this advice and lodged a Notice of Appeal dated 25 September 2013. This includes complaints about HMRC’s unhelpful responses to his appeals and refers to and attaches the above mentioned letters.

9. Following receipt of HMRC’s statement of case the appellant wrote a letter to the Tribunal dated 13 November 2013 This letter included the following:

20 “Given I was completing the form two years after the date it should have been completed I assumed my submission was already out of time and if there had been a specific date by which I needed to complete and return the form I would have been notified in writing expressly of this, be it in a covering letter or otherwise.”

It also included

25 “The HMRC statement mentions that I should have calculated my own tax liability and made payment before HMRC notified me of the tax liability. As I have previously explained, I am not a tax expert and do not complete tax returns on an annual basis nor do I employ an accountant given I pay tax through the PAYE system. I am simply used to receiving a letter from HMRC every year telling me they have reviewed my position, I have either underpaid or overpaid, and my tax code is adjusted accordingly.

10. HMRC’s Submissions

30 HMRC submit that in respect of the tax year ending 5 April 2010 they issued a tax return to the appellant on 22 August 2012. HMRC take the date of delivery as no more than 7 days after the date of issue. The filing date for the return was therefore 3 months and 7 days after the date of issue ie 29 November 2012. The appellant submitted a paper return which was received by HMRC on 28 January 2013.

35 HMRC advise that the appellant telephoned HMRC on 6 September 2012 and that he was provided with relevant assistance. HMRC contends that that having HMRC’s advice at the time the appellant would have been in no doubt as to the action he

needed to take and that he would therefore have been aware that the deadline for both filing of his tax return and the payment of his tax was 29 November 2012.

HMRC's produced two records of this telephone conversation. They are recorded in an abbreviated form which the Tribunal takes to mean

- 5 6 September 2012: Telephone call from taxpayer re 2009/10 Self Assessment Tax Return received for completion. I advised this was issued because his income for that year had exceeded £100K. Letter issued re 2009/10 PAYE Income details. Advice given.

No details are given as to what advice was given.

- 10 The appellant says in his letter dated 13 November 2013 "I would like to correct a factual inaccuracy in the HMRC statement concerning the call I made to HMRC on 6th September. HMRC states that after having the call I would have been in no doubt of the deadline for filing of the tax return and the payment of my tax was due by 29 November 2012. At no point in the call was I made aware of either the date for
15 submitting the return or the deadline for payment of tax."

HMRC further contends that the three months permitted for the filing of the return was ample and that the appellant could have obtained the necessary information in that period

- 20 In their statement of case HMRC contend that the tax was due to be paid on or before 29 November 2012 in accordance with the Section 59B (3) TMA 1970. However their self assessment tax calculation dated 13 February 2013 had advised the appellant that it was 31 January 2011.

- 25 HMRC say that the appellant was not issued with his 2009/10 tax return until 22 August 2012. However regardless of that fact, HMRC maintains that any perceived delay in the issuing of this return would not have placed the appellant at any disadvantage and that had he acted as instructed it would have been possible for him to avoid the surcharge. HMRC therefore contends that the date of issue of the tax return would have no bearing on the appellant's failure to pay his tax by the deadline of 29 November 2012.

- 30 HMRC say both the appellant's tax return and the Tax guide contained information about the relevant filing date for his 2009/10 tax return. HMRC contends that the Section headed Deadlines is clear and unambiguous and that had the appellant followed this instruction he would have realised that he was required to file his tax return within 3 months; that is by 29 November 2012. HMRC contends that it was a
35 direct consequence of the appellant's failure to comply with this filing requirement that he also failed to pay his tax on time.

HMRC contend that the appellant's lack of immediacy at this time is unreasonable and that his further delay in paying his tax liability shows that his claim to have a reasonable excuse for late payment is without foundation in fact.

The period of default is defined in TMA 1970 Section 59C(12) and means the period beginning with the due date and ending with the date before the tax due was paid. HMRC say that in this instance, the period is from 29 November 2012 to 14 March 2013; that is 106 days.

- 5 HMRC issued a first surcharge notice on or around 22 February 2013 for £429.78; that is 5% of the tax unpaid at the first surcharge trigger date. HMRC produce an internal computer generated document headed “Maintain Standovers” dated 30 October 2013 which includes a line stating “Charge creation date 22/02/2013” to support the contention that a penalty notice was issued on that date. No copy of the
10 penalty notice was included in the papers.

11. The Tribunals Observations

The Tribunal notes that the first document that the appellant received in connection with completing a tax return for the year 6 April 2009 to 5 April 2010 was a Notice headed “Tax return 2010” form SA100 2010. The second paragraph on the front page
15 (Page 1) of this document is in the form of a “box” and is headed “Deadlines” It states as follows

We must receive your tax return by these dates

- If you are using a paper return – by 31 October 2010 (or three months after the date of this notice if that’s later) , or
- 20 • If you are filing a return online - by 31 January 2011 (or three months after the date of this notice if that’s later).

The return also included the following statement:

25 If we receive your paper tax return by 31 October and you:

- owe tax up to £2,000, and
- have a PAYE code

we will if possible, collect the tax you owe through next year’s tax code, unless you prefer to pay it by 31 January 2011.

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This document was sent to the appellant on 22 August 2012 and HMRC say they required it to be returned by 29 November 2012. The Tribunal notes that the dates relate to the date for submission of the return not the due date for payment.

35 12. HMRC calculated the amount of the penalties as £429.78 being 5% of the tax of £8,595.79 for the period 6 April 2009 to 5 April 2010 which remained unpaid at 29 November 2012. In the Tribunal’s view HMRC has taken the wrong date as the date payment is due when calculating the penalty. HMRC’s self assessment tax calculation dated 13 February 2013 has the correct date for payment as 31 January 2011. The calculation assumes a date for payment of 29 November 2012 which date never
40 appears to have been advised to the appellant except retrospectively. HMRC have therefore calculated the period of default incorrectly and the penalty notice should be set aside.

13. The appellant was not asked to complete a return until 22 August 2012. The deadline dates provided on the tax return had passed months before. No prospective due date for payment was given to the appellant in the documentation sent to him. It was impossible for him to pay by the 31 January 2011 specified on the form and according to the law. Following submission of his return the appellant received from HMRC a Self Assessment Tax Calculation dated 13 February 2013 which showed an amount of £8595.79 due by 31 January 2011. As it was impossible to pay by that date he paid in two tranches of £5,000 on 14 March 2013 and the balance on 15 March 2013. (The maximum daily payment he could make was restricted by his bank to £5,000).

14. The Tribunal notes that HMRC are confused by the due date for payment specified by law. Their tax calculation dated 13 February 2013 correctly states 31 January 2011 in accordance with TMA Section 59B (4) but other documents including their Self Assessment Statement dated 6 March 2013, their letter dated 8 August 2013 and their statement of case prepared 1 November 2013 all say 29 November 2012 assuming that TMA Section 59B (3) applies. As the appellant had not given the notice required by TMA Section 7 within 6 months of the tax year end Section 59 B (3) does not apply and therefore Section 59B (4) applies. The Tribunal notes that all of the documents mentioned above were not available to the appellant until after the due dates mentioned in them had passed. HMRC have not produced any evidence to demonstrate that on or after the issue of the return any prospective due date for payment was advised to the appellant. Many of HMRC's submissions are based on a due date for payment of 29 November 2012 which was only advised to the appellant retrospectively and which in the Tribunal's view is not the due date according to the law. Whilst it is clear that HMRC advised the appellant that the date for submission of the return was 29 November 2012 a prospective due date for payment of the tax was not made clear.

15. In the Tribunal's view it was understandable that the appellant did not realise that the PAYE deductions by his employer had created a shortfall that could not be collected by adjustment of his tax code. In previous years it had always been possible to collect any shortfall by adjustment of his tax code. When he was sent a return to complete the deadline dates advised on it had already passed. The law on when payment is due in such circumstances is so complex that HMRC have quoted two different dates. In fact it may be that the law is deficient in not adequately covering the situation that the appellant was in. The appellant was thus in a position that it was impossible for him to pay on time. Therefore in the Tribunal's view the appellant has established that he had reasonable excuse for the late payment of the tax due.

16. For all the above reasons the appeal is allowed.

17. Paragraph 9 of Schedule 56 of the Finance Act 2009 (Special Reduction) provides HMRC with discretion to reduce any penalty if they think it right to do so because of special circumstances. On the information held in this case HMRC did not consider there were any special circumstances which would allow them to reduce the penalty. In the Tribunal's view had their not been other reasons by which the appeal was allowed they would have overturned that decision. The Tribunal considers that there

were special circumstances that applied. A tax return was not issued to the appellant until 22 August 2012 which is well after the deadline date for payment of tax for the year ending 5 April 2010 and so the guidance in respect of deadline dates would not have assisted the appellant. In effect it was advising him that even if he was
5 extraordinarily diligent and completed the return and sent it back by return he was already late. No alternative date was provided to him. The law is complex in this area and may be deficient in not making provision for the circumstances the appellant was in. Therefore the Tribunal considers that there were special circumstances in this case.

18. This document contains full findings of fact and reasons for the decision. Any
10 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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PETER R. SHEPPARD
TRIBUNAL PRESIDING MEMBER

RELEASE DATE: 16 December 2013