



TC04148

Appeal number: TC/2014/03636

*Income tax – Whether reasonable excuse for late payment of income tax
and national insurance due on return for year ending 5 April 2010. Yes*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MR X

Appellant

- and -

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

**TRIBUNAL: PRESIDING MEMBER
PETER R SHEPPARD FCIS FCIB CTA AIT
MR WILLIAM HAARER**

Sitting in public at Vintry House, Wine Street, Bristol on 12 September 2014

Ms Y for the Appellant

Lee Morris, HMRC Officer, for the Respondents.

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DECISION

Introduction

1. Mr X is a self-employed computer analyst.

5 2. This considers an appeal by him dated 14 June 2014 purporting to be against a decision of HMRC dated 11 June 2014 confirming surcharges totalling £3,655.72 for the late payment of tax for the 2009-2010 tax year. The surcharges were imposed under Sections 59C(2) and (3) of the Taxes Management Act 1970.

Preliminary matter

10 3. The Notice of Appeal dated 14 June 2014 submitted by the appellant states that it is an appeal against a decision by HMRC dated 18 February 2014. That decision was not included in the bundle of papers. However reference to it was made by the appellant in the Notice of Appeal under HMRC reference ARU 81570/8842386994. It appears that 18 February 2014 was the date of a decision to levy a penalty for late
15 filing of the return. The amount of that penalty was not stated in the correspondence presented to the Tribunal.

4. Further in the Notice of Appeal the appellant confirms that there has been a review of a decision by HMRC and that the date of the conclusion of the review is 11 June 2014. In the bundle of papers presented to the Tribunal is a letter to the
20 appellant from HMRC dated 11 June 2014. It is headed "Appeal against surcharge for late filing of your 2009-2010 Self Assessment Tax Return". The result of that review was that HMRC concluded that the decision to charge the surcharge was correct.

5. At the hearing both parties made representations concerning surcharges totalling
25 £3,655.72 for late payment of tax for the year ended 5 April 2010 ie not for late filing of the return. The Self Assessment – Late Payment Surcharge Notice was dated 4 March 2014. The appellant evidently appealed this decision to HMRC because on 8 April 2014 HMRC wrote to the appellant. The letter was headed "Appeal against the surcharges on tax paid late for the 2009-2010 tax year". The letter did not agree
30 that the appellant had reasonable excuse for the late payment. The letter offered an independent review. On 26 April 2014 the appellant's agent wrote to HMRC asking for the review. This letter appears to have been acknowledged by HMRC on 29 April 2014 but no further correspondence in respect of it was presented to the Tribunal ie there was no conclusion of that review presented to the Tribunal.

35 6. Both Tribunal members considered that the appeal and submissions put to them by both parties at the hearing concerned the decision to levy surcharges for the late payment of the tax. The Tribunal was advised by the appellant that a decision to levy a penalty for the late filing of the return had been withdrawn as HMRC had accepted that the appellant had reasonable excuse for the late filing. This assertion was
40 unopposed by HMRC. No indication was given at the hearing by either party that there was any dispute concerning the late submission of the return.

7. In reviewing the papers the Tribunal found that they included documents concerning both the late filing and the late payment. As it was unclear to the Tribunal what was being appealed the Tribunal issued directions asking for clarification of the position.

5 8. In response to the directions both parties confirmed that the appeal was intended to be against the surcharges totalling £3,655.72 for the late payment of tax for the year 2009/10 and requested that a decision be issued on that basis. The appellant confirmed that there had been a confusion of dates in the Notice of Appeal.

10 9. In addition HMRC confirmed they have not issued penalties for the late filing of the appellant's return for any year and that the letter issued on 11 June 2014 was issued in error.

10. HMRC say that they agreed that the appellant had reasonable excuse for failing to notify HMRC of a source of chargeability at the correct time and have decided not to issue a penalty under Schedule 41 Finance Act 2008.

15 11. **Statutory Framework**

The Taxes Management Act 1970 (TMA) particularly Sections 8, 9, 50, 59B and 59C

Sections 8 and 9 cover the rules for provision of self-assessment returns

Section 59B covers the rules for payments of income tax. Section 59B(4) is applicable in this case, it states:

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

Section 59C covers surcharges on unpaid income tax. Sections 59C(2) and (3) state

25 *"59C(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.*

59C(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."

Section 59C(7) allows appeals to be made against surcharges.

30 Section 59C(9) states:

"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*

(b) *If it does not so appear, confirm the imposition of the surcharge.”*

5 Section 59C(10) provides that inability to pay the tax shall not be regarded as a reasonable excuse.

The Finance Act 2009 Schedule 55 covers penalties for late filing of returns.

The Equality Act 2010 provides guidance on what should be taken into account in deciding whether a person’s ability to carry out normal day to day activities might be
10 restricted by the effect of that person’s impairment.

12. Case law

HMRC v Hok Ltd [2012] UKUT 363 (TCC)

Energys Holdings UK Ltd UKFTT 20 (TC) TC 0335

Award Framers International Limited v HMRC [2014] UKFTT 225 (TC)

15 The appellant’s submissions

13. At the hearing Ms Y made submissions on behalf of her partner, the appellant. There were also frequent helpful comments made by the appellant.

14. Ms Y said that the appellant accepted that the return was submitted late and the tax was paid late. She said that the appellant has no argument about the legislation.

20 15. She said the appellant has three arguments the main one is that he had reasonable excuse for the late payment.

16. The second argument is that in confirming the surcharges HMRC have failed to take on board the terms of Equality Act 2010.

25 17. The third argument is that HMRC have been inconsistent in that they accepted the appellant had reasonable excuse for the late submission of his self-assessment tax return for 2009-10 but have maintained the surcharges for late payment of the tax due on that return even though payment was submitted within five days of submission of the return

30 18. Ms Y explained that the appellant has been diagnosed with long term serious depression and anxiety. A letter dated 30 April 2013 from the appellant’s doctor supporting this diagnosis was included in the bundle of documents before the Tribunal.

19. The appellant said that it was difficult for people who did not know him to understand that he had a public persona whereby he appeared to be in control and

intellectually capable as a computer analyst, and he also had a private persona where his domestic life was the opposite.

20. Ms Y drew attention to the decision of the First-tier Tribunal in the case of *Award Framers International Ltd*. Paragraph 3 of that decision states:

5 *“The question of whether a particular trader has a reasonable excuse should be
assessed by the standards of reasonableness which one would expect of a
taxpayer who sought to honour their obligations as a taxpayer. In making this
assessment, the tribunal should also consider the particular attributes of the
10 taxpayer, their circumstances and any other factors which are relevant to the
situation. Therefore, while the reasonable taxpayer would give priority to
complying with their duties to make payment on time and ensure returns are
accurate and timely, the age and experience, health or difficulties experienced
by the taxpayer are also relevant considerations in taking a balanced view and
in arriving at a fair decision.”*

15 21. Ms Y submitted that this Tribunal should consider the ill health and associated difficulties experienced by the appellant.

22. She drew attention to a document entitled “Tax and mental health removing the barriers” produced by Mind. She also drew attention to a Factsheet entitled “Discrimination and mental health”.

20 23. She said that in confirming the surcharges it appeared that HMRC had not understood the difficulties experienced by the appellant. In particular by linking the ability to earn £120,000 in one year to submitting returns on time. Such a link might be appropriately applied to many people but was not appropriate for those suffering serious depression and anxiety. She said that she had not seen evidence that HMRC
25 had adapted to their policies in the light of the Equality Act 2010.

24. Ms Y pointed out that the tax for periods to the year ending 5 April 2012 has all been paid. The return for the year ended 5 April 2013 had been made on time and payment had also been made on time.

25. The appellant asks for the surcharges to be waived

30 26. At the close of the appellant’s submissions the presiding member asked why, given Mr X knew of his long term illness and the effects it had on him, he had not appointed accountants or sought help earlier. Mr X responded that he had gone through a particularly difficult period of over four years during which he had been hospitalised twice. He said it is hard to explain how hard it was for him to admit to
35 anyone that he was ill. It was even difficult for him to talk to Ms Y about his problems, though eventually he had to do so when he received threatening letters chasing outstanding money. This inability to talk to anyone or seek help was all part of his illness.

40 27. The appellant pointed out that with Ms Y he had voluntarily gone to HMRC in January 2014 to sort out the problems.

HMRC's submissions

28. HMRC state that under Section 8 of TMA 1970 the appellant was required to deliver for the year ended 5 April 2010 a non-electronic return by 31 October 2010 or an electronic return by 31 January 2011. In fact an unsolicited paper return was received on 9 January 2014 and was processed on 22 January 2014. The return showed that Income Tax and National Insurance due for the period totalled £36,557.33. HMRC say that this was paid on 3 January 2014.

29. HMRC say that in accordance with TMA 1970 Section 59C(2) as payment was made over 28 days late they levied a surcharge of 5% of the tax due. The tax due was £36,557.33 so 5% is £1,827.86.

30. HMRC say that in accordance with TMA 1970 Section 59C(3) as payment was made over six months late they levied a further surcharge of 5% of the tax due. The tax due was £36,557.33 so 5% is a further £1,827.86.

31. HMRC say that they view mental illness seriously. They accept that the appellant's work was sporadic as he coped with his mental health problems.

32. HMRC say that in his letter the doctor does not say that during the period he was working the appellant could not deal with his tax affairs. They also point out that the doctor does not mention whether the appellant received medical treatment or counselling.

33. HMRC say that a prudent self-employed person knowing he had a history of illness would ask for assistance from HMRC or appoint an agent to act on his behalf. HMRC have no record of contact from the appellant.

34. In their letter of 11 June 2014 (which HMRC have subsequently said was issued in error) HMRC gave the conclusion of their review. They say:

“The tax returns that have been submitted indicate that you were able to run your business and during 2009-2010 you earned in the region of £120,000. It would therefore not be unreasonable to expect you to make arrangements for completing and sending the tax return in on time.”

35. HMRC pointed out that the appellant had appointed an accountant to set up a company to deal with a house letting business and therefore any reasonable excuse he might have had ended then and therefore did not last for the whole period as the legislation requires.

36. Ms Y answered this by saying that letting the house was part of the solution to the appellant's problems. The accountants had suggested setting up a separate company for this business. All the appellant had had to do was agree to the proposal and sign forms put in front of him. Ms Y stated that she had contacted a letting agent and she had decorated the property. She said that this had removed a remaining millstone round the appellant's neck.

37. The Tribunal asked HMRC why, if they considered that the appellant had reasonable excuse for the late submission of the return on 9 January 2014, they now considered the appellant did not have reasonable excuse for the late payment re the same return which payment was made at around the same time in January 2014.
5 Mr Morris said that he had not been provided with details of the reason but presumed that it was because some officers would have more empathy with the appellant's health problems than others.

38. HMRC said they considered that the appellant had not discharged the onus of proof that he had reasonable excuse for the late payment of tax for the year ended
10 5 April 2010 and requested the appeal be dismissed.

The Tribunal's observations

39. The level of the penalties and whether or not they are disproportionate is discussed at length in the Upper Tribunal's decision in *HMRC v Hok Ltd*. The decision also discusses the fact that there is no power of mitigation available to the
15 Tribunal. The only power in this respect is that if the Tribunal considers the amount of the penalty is wholly disproportionate to the gravity of the offence, if it is not merely harsh, but plainly unfair, then the penalty can be discharged. For example in *Energys Holdings Ltd* the Tribunal discharged a potential default surcharge of over £130,000 for the submission and payment of a VAT return submitted one day late.

20 40. The level of the surcharges has been laid down by parliament and unless the surcharges have not been issued in accordance with legislation or have been calculated inaccurately the Tribunal has no power to discharge or adjust it other than for the reason outlined below.

41. The only other consideration that falls within the jurisdiction of the First-tier
25 Tribunal is whether or not the appellant has reasonable excuse for his failure as contemplated by Section 59C(9) and (10) TMA 1970.

42. It is clear that the appellant's tax affairs had become in arrears as a result of the appellant's mental health problems. Through the diligence and attention of Ms Y these arrears were notified to HMRC and brought up to date in January 2014.
30 Accountants have been appointed on an ongoing basis and Ms Y is also available to assist the appellant. Providing this remains the situation the appellant's tax affairs should remain up to date and the appellant's long term health problems should not in future constitute a reasonable excuse for late returns or payments.

43. The Tribunal found it difficult to understand why when (a) HMRC in their letter
35 dated 13 May 2014 had accepted that the appellant had reasonable excuse for failing to notify HMRC of a source of chargeability at the correct time and had decided not to issue a penalty under Schedule 41 Finance Act 2008, and (b) had not levied a penalty for the late submission of the self-assessment tax return for the year ending 5 April 2010 on 9 January 2014, they did not also consider that the reasonable excuse
40 also covered the surcharges for the late payment. That payment was stated by HMRC as being made on 3 January 2014 and by the appellant on 14 January 2014. The

Tribunal considers that it is clear that the reasonable excuse accepted for the late notification of the source of chargeability and late filing should also extend to the surcharges for late payment of the tax due and therefore allows the appeal and sets aside the imposition of the surcharge.

5 44. 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
10 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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PETER R SHEPPARD
TRIBUNAL PRESIDING MEMBER

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RELEASE DATE: 25 November 2014