



TC01566

Appeal number: TC/2011/02356

Reasonable excuse- failure by bank to transfer funds

FIRST-TIER TRIBUNAL

TAX

DENNIS CLARK

Appellant

- and -

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

Respondents

TRIBUNAL: RACHEL SHORT (TRIBUNAL JUDGE)

The Tribunal determined the appeal on 12 July 2011 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 23 March 2011, HMRC's Statement of Case submitted on 5 May 2011 and the Appellant's Reply dated 31 May 2011.

DECISION

1. The Tribunal decided that this appeal should be DISMISSED.

2. This is an appeal against a surcharge of £4,355.64 for late payment of income tax
5 for the 2008/2009 tax period.

3. The tax was due to be paid by 31 January 2010 but was not paid until 27 March 2010. A surcharge was therefore applied under section 59C(2) Taxes Management Act 1970.

Agreed Facts

10 4. The Dennis Clark (the “Taxpayer”) was due to pay £87,112.88 in respect of his income tax for the 2008-2009 tax year on 31 January 2010 under s 59B(4) Taxes Management Act 1970 (“TMA”).

15 5. The Sum of £87,112.88 was received by HMRC on 27 March 2010. HMRC issued a penalty surcharge notice in an amount of £4,355.64 (being 5% of the tax outstanding).

6. The Taxpayer was aware of the due date for the payment of the tax and contacted his bank on 24 January 2010 to request a transfer of funds so that the tax liability could be paid.

20 7. The bank failed to make the transfer of funds as requested because they “failed to link the Taxpayer’s savings account to this current account”. (Letter of 28 June 2010 folio 4).

8. The Taxpayer was not aware that he would be liable to a penalty surcharge, as well as an interest charge, for the late payment of the tax.

25 9. The Taxpayer wrote two further letters to his bank to request the transfer of funds on 23 February and 8 March 2010, on both occasions requesting email confirmation that the funds had been transferred.

10. The funds were finally transferred in response to his letter of 8 March.

11. The tax was due to be paid by 31 January 2010 but was not paid until 27 March 2010. A surcharge was therefore applied under section 59C(2) TMA.

30 *The Law*

12. In order to successfully appeal against this penalty the Taxpayer has to demonstrate that he has a “reasonable excuse” under s 118(2) TMA, throughout the period of default, which for these purposes is from 31 January 2010 until 27 March 2010.

35 13. There is no statutory definition of a “reasonable excuse” for these purposes, but there is published HMRC guidance and a number of decisions from this Tribunal and the higher courts.

14. One of the principles which is stated in HMRC's guidance and which has generally been accepted by the courts is that, save in the most extreme cases, reliance on a third party does not constitute a reasonable excuse. Equally, a shortage of funds does not usually constitute a reasonable excuse save in some closely prescribed circumstances (as enunciated in the *Stepto* decision [1991] STC 302).

The Arguments

15. The Taxpayer argues that he has a reasonable excuse for non payment of his tax throughout the relevant period because he was totally reliant on the actions of his bank, who signally failed to act on his instructions. No detailed evidence has been submitted explaining the reasons and for the bank's failure, other than a statement by the Taxpayer in his letter of 28 June that the bank failed to link his new savings account with his current account.

16. The Taxpayer points out that this is not a straightforward instance of a taxpayer not having the funds to pay the tax due. He had the necessary funds, he was just unable to access them at his bank.

17. The Taxpayer's arguments are based on the fact that had the bank acted promptly on his instructions, the tax would have been paid on time and that it is only the failure of the bank to do so which has led to this penalty.

18. HMRC contends that the Taxpayer does not have a reasonable excuse, firstly because inability to pay is not a reasonable excuse, and secondly because the steps taken by the Taxpayer to ensure that he had funds available to meet his tax liabilities fell short of what would have been taken by "a prudent person excising reasonable foresight". HMRC expresses sympathy for the Taxpayer given the failures by this bank, but stresses that it is the Taxpayer's responsibility to ensure that tax is paid on time.

The Decision

19. The question for the Tribunal is whether it is correct that the Taxpayer has a reasonable excuse for the late payment of this tax for the period from 31 January to 27 March 2010 because of the failure of his bank to carry out his instructions correctly and provide the funds necessary to pay the tax on time.

20. While the Taxpayer is placing the blame entirely on the failure by his bank to transfer the funds in a timely fashion, the Tribunal does not consider that the issue is quite so straightforward. No evidence has been provided regarding the notice period required by the bank in order to transfer the funds and it is possible that even if the bank had acted to move the funds immediately, the tax might still not have been paid on time.

21. As well as transferring the funds to his current account the Taxpayer also had to transfer the funds to HMRC.

22. Secondly, the Tribunal considers that there is evidence that the Taxpayer did not himself act promptly to ensure that the bank did follow his instructions; it was a month after the original instruction were given before the Taxpayer chased the bank

for a payment which he knew, or should have known, was due on 31 January 2010. It took a further two weeks for the Taxpayer to chase the bank again and ensure that they eventually transferred the funds prior to payment at the end of March.

5 23. The Tribunal agrees with HMRC that this is below the standards of a reasonable person who was taking his payment obligations seriously (which is the comparison suggested by the Tribunal in *Mutch* [2009] UKFTT 288(TC)).

24. This is borne out by the comments of the Taxpayer himself in his letter of 28 June 2010 (at Folio 4) where he states:

10 *“To be perfectly honest at that time I thought this was a nuisance which would cost me a few pounds in interest payments, not a massive penalty of over £4,000.00.”*

25. The Tribunal agrees with the Taxpayer that this is not case of a Taxpayer arguing that there is insufficiency of funds, but it is a case in which the Taxpayers is seeking to rely on the failure of his agent, the bank, to act promptly on his instructions.

15 26. In this instance the actions of the bank were, to an extent a least, with the Taxpayer’s control and he could, or should, have chased them more rigorously to ensure that the funds had been transferred.

20 27. The Tribunal has considered whether the Taxpayer had “exercised due diligence and proper regard for his tax obligations” and has concluded that the Taxpayer has not satisfied this test.

28. For these reasons the Tribunal does not consider that the Taxpayer had a reasonable excuse for late payment throughout the period of default.

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

30



35

TRIBUNAL JUDGE
RELEASE DATE: 11 NOVEMBER 2011