



**TC01652**

**Appeal number: TC/2011/05755**

*Individual with three low paid jobs – insufficient or no tax deducted by one or more employers – HMRC estimated underpayment at £2,300 - SA returns issued – penalty charged for late return - whether return was delivered late – no – surcharge levied – whether reasonable excuse – yes – appeal allowed - attention of parties drawn to the underlying issues of liability, ESC A19 and Time to Pay arrangements*

**FIRST-TIER TRIBUNAL**

**TAX**

**MARK SAVAGE**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: ANNE REDSTON (PRESIDING MEMBER)**

**The Tribunal determined the appeal on 22 November 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 26 July 2011 and HMRC's Statement of Case submitted on 13 September 2011.**

## DECISION

1. This is Mr Mark Savage's appeal against:

- (1) a £100 penalty for late submission of his 2009-10 tax return, and
- 5 (2) a surcharge of £66.85 relating to "unpaid tax."

2. The Tribunal allowed the appeal and set aside the penalty and the surcharge.

3. The attention of Mr Savage is drawn to paragraph 62 at the end of this Decision; HMRC are asked to consider the wider issues at paragraphs 55 to 61.

### Scope of the appeal

10 4. The Tribunal has considered whether Mr Savage has appealed both the surcharge and the £100 penalty.

5. The appeal against the surcharge was made to HMRC by letter dated 18 July 2011, and included in the papers provided to the Tribunal.

15 6. The Notice of Appeal to the Tribunal was made on 26 July 2011. In the Notice of Appeal, under "Result", Mr Savage says "should not have any penaltys or charges and be able to pay the money back over say 24-30 months."

7. However, the Tribunal also notes that in the box which asks for "the amount of tax or penalty or surcharge" has the figure of £100. HMRC's Statement of Case addresses only the penalty and not the surcharge.

20 8. Given the explicit reference to "any penaltys or charges" in the "Result" box of his Notice of Appeal, and taking into account the surcharge appeal letter supplied by Mr Savage in support of his appeal to the Tribunal, I have concluded that he appealed both the penalty and the surcharge to the Tribunal, as he is entitled to do under Taxes Management Act 1970 ("TMA"), s 49D(2).

### 25 The legislation and regulations

9. TMA s 8(1)(a) states that if a person is sent a Self Assessment ("SA") return, they are required to "make and deliver" this return to HMRC.

30 10. TMA s 8(1G) states that where a return is issued to a taxpayer after 31 October following the end of the tax year in question, the return must be delivered to HMRC "during the period of three months beginning with the date of the notice." HMRC say in their Statement of Case that "HMRC's computer system in practice allows three months and seven days, to allow for printing and postal delivery times." HMRC are permitted by TMA s 118(2) to extend any deadline.

35 11. TMA s 93(2) says that a person who does not comply with the filing deadline "shall be liable to a penalty which shall be £100."

12. TMA s 100 states that the taxpayer may appeal the penalty; TMA s 93(8) sets out the powers of the Tribunal.

13. The Interpretation Act s 7 is relevant to the delivery date, and it reads as follows:

5                   Where an Act authorises or requires any document to be served by post  
(whether the expression "serve" or the expression "give" or "send" or  
any other expression is used) then, unless the contrary intention  
appears, the service is deemed to be effected by properly addressing,  
pre-paying and posting a letter containing the document and, unless the  
contrary is proved, to have been effected at the time at which the letter  
10                   would be delivered in the ordinary course of post.

14. The legislation relating to the imposition of surcharges is at TMA s 59C. So far as relevant to this Appeal, it is as follows:

**Surcharges on unpaid income tax and capital gains tax**

15                   (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.

20                   (3)-(6) ...

(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.

25                   (8) Subject to subsection (9) below, the provisions of this Act relating to  
appeals shall have effect in relation to an appeal under subsection (7) above  
as they have effect in relation to an appeal against an assessment to tax.

(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—

30                   (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.

15. Under Finance Act ("FA") 2009 s 108, no surcharge is due if the taxpayer has  
agreed a Time to Pay ("TTP") agreement with HMRC.

35                   16. The Income Tax (Pay As You Earn) Regulations 2003 ("The Regulations") Reg  
72 says that if the employer did not deduct the amount which he was "liable to  
deduct" from the individual's earnings, then the shortfall can only be recovered from

the employee if he received his earnings “knowing that the employer wilfully failed to deduct the amount of tax which should have been deducted from those payments.”

### **The evidence**

17. In addition to Mr Savage’s Notice of Appeal and HMRC’s Statement of Case, the  
5 Tribunal was also provided with the correspondence between the parties, and two pages headed “Return Summary”, which were supplied by HMRC.

18. From this evidence, I find the following facts.

### **The facts**

19. For the whole of the 25 year period before January 2011, Mr Savage had been  
10 paid under PAYE.

20. In 2008-09 and 2009-10 he was working at three jobs in parallel. One of these was as an employee of a business called Allied Cleaning. He was paid £5.61 per hour in 2008-09 and £5.73 per hour in 2009-10. He worked for Allied Cleaning for ten hours a week. He had some time off sick for which he was not paid.

15 21. His employer “always paid in cash less the tax he said.” Although Mr Savage asked his employer for payslips, these were never provided.

22. Details of his earnings for the other two jobs were not provided to the Tribunal.

23. Some time before January 2011, HMRC concluded that Mr Savage had underpaid  
20 tax for the two years 2008-09 and 2009-10. They estimated the underpayment at £2,300. They did not collect the underpayment via his tax code because it was more than £2,000.

24. HMRC contacted Mr Savage, who said he could not pay this amount of money, and asked for a Time to Pay (“TTP”) arrangement. He was told that he had first to complete SA returns for both years.

25 25. On 5 January 2011 HMRC issued Mr Savage with SA returns for 2008-09 and 2009-10. The SA returns were to be sent back to HMRC on or before 12 April 2011.

26. On 14 March 2011 Mr Savage posted both returns, together with a covering letter giving details of his employment with Allied Cleaning, including contact details for the business and its proprietor.

30 27. HMRC say that they did not receive the forms until 14 April 2011. One of the forms was missing a signature. It was sent back to Mr Savage who first clarified on the telephone with HMRC what he needed to do. He says:

35 “I explained to the gentleman on the phone about missing signature that the form returned was very confusing as at the time I had three separate jobs but he only wanted two signatures which I did and returned the same day to that address.”

28. On or around 10 May 2011, HMRC issued a £100 penalty Notice for not filing the return on time.

29. Mr Savage appealed the penalty, saying that “the form originally was on time, sending it back after made it late.”

5 30. The Review Officer responded as follows:

“Your tax return...was due to be received by 12 April 2011. Your unsigned tax return was not received until 14 April 2011.”

31. The HMRC Statement of Case also makes the same point: it says “the filing deadline was 12 April 2011 and the return was not received until 14 April 2011.”

10 32. At the end of June 2011, Mr Savage was sent a surcharge notice for £66.85.

33. On 18 July 2011, Mr Savage appealed the surcharge.

### **Submissions of Mr Savage**

34. Mr Savage says that he sent back the returns on 14 March 2011 and thus they were in time for the deadline. He also says:

15 “I have always been in PAYE even when I had 3 jobs at the same time. I was asked to fill in a PAYE self-assessment form as they believed I had underpaid tax and that after receiving the demand, I said I could in no way pay in one go and they said I had to fill in these forms which I did.

20 I was never aware for the previous year to do a tax return as this had only happened just now. I am always PAYE.

The reason for the forms was to get figures right they told me so I cannot believe I now have a surcharge for a bill I never had from 2 years ago when I didn’t even have to do a tax return.”

### **25 Submissions of HMRC**

35. HMRC say that Mr Savage’s return was received two days after the due date, ie on 14 April 2011.

36. Mr Savage has no reasonable excuse for late submission of the return and so the statutory penalty should be confirmed.

### **30 Discussion and decision on the delivery date**

37. HMRC have accepted that Mr Savage’s return was delivered when they “received” it on 14 April 2011, even though it had to be sent back to him for signature.

38. The delay for which the penalty was charged is thus the two days from 12 April to 14 April 2011.

39. I have found as a fact that Mr Savage posted the return on 14 March 2011. This is the date on the covering letter which he sent with the returns.

5 40. Where a document is posted, the Interpretation Act s 7 deems it to have been delivered on the date it would be received in the ordinary course of post.

41. I take judicial notice of Royal Mail's delivery times: the "ordinary course of post" is that letters sent second class are delivered on the third working day after posting; those sent first class are delivered on the next working day.

10 42. This means that Mr Savage's returns are deemed to have been delivered to HMRC by Thursday 17 March 2011, if sent second class, and by Tuesday 15 March 2011 if sent first class.

15 43. This deeming provision is not rebutted "unless the contrary is proved". HMRC have said that they did not receive the returns until 14 April 2011. They have provided no evidence, such as a date-stamped receipt, or a log of incoming post; they have also not explained their procedures for logging and recording post. In my judgment, they have not rebutted the deeming provision in the Interpretation Act.

20 44. I have come to this conclusion without taking judicial notice of the extensive publicity given to the widespread and lengthy delays in opening post at HMRC offices.

45. I thus find that Mr Savage's return was delivered well before the due date of 14 April 2011 and therefore that it was not late.

46. His appeal against the £100 filing penalty is allowed and the penalty set aside.

#### **Discussion and decision on the surcharge**

25 47. The surcharge of £66.85 is set, by statute, at 5% of the tax unpaid. It therefore relates to a tax debt of £1,337. Where a TTP agreement is in place, no surcharge is due, by virtue of FA 2009, s 109.

30 48. Mr Savage had made it clear to HMRC that he could not pay the tax, and had asked for a TTP agreement when he was told that he owed £2,300. It had been explained to Mr Savage that the completion of the SA returns was a necessary prelude to such a TTP agreement.

49. I find that he had a genuine and reasonable belief that having completed the SA returns, he would then be given a longer timescale for payment.

35 50. The meaning of "reasonable excuse" has been held to be "a matter to be considered in the light of all the circumstances of the particular case", see *Rowland v HMRC* [2006] STC (SCD) 536 at [18].

51. That a genuine, honest and reasonable belief provides a defence in common law has long been accepted, see *Reg v Tolson* (1889) 23 QBD 168, 181; this principle was more recently expanded to include genuine but mistaken belief by the House of Lords in *R (ex p B) v Director of Public Prosecutions* [2000] UKHL 13. In the recent case of  
5 *R v Unah* [2011] EWCA Crim 1837, while noting the caveat in that case that “it is only with caution that one should seek to draw analogies with other statutory contexts where the concept of reasonable excuse is employed”, the Court of Appeal found that a genuine and reasonable belief was sufficient to amount to a reasonable excuse.

52. On the facts of this case, I find that Mr Savage’s genuine and reasonable belief  
10 was that, once he had completed the SA returns, HMRC would revert to him with a TTP agreement, and that this belief provides him with a reasonable excuse for the late payment of the tax assessed under SA.

53. I allow his appeal and discharge the surcharge.

### **Wider issues for the attention of the parties**

15 54. There are wider issues raised by this appeal, to which I draw the attention of the parties.

55. All the tax uncollected arises from Mr Savage’s employment income. At least part of the sum which HMRC are seeking to collect appears to relate to the earnings Mr Savage received from Allied Cleaning. The owner of that business said he had  
20 withheld tax from the wages paid to Mr Savage, but failed to provide payslips despite Mr Savage’s requests.

56. To the extent that the tax shortfall arises from this employment, Mr Savage appears to be protected from assessment by Reg 72: he clearly did not receive his wages “knowing that the employer wilfully failed to deduct the amount of tax which  
25 should have been deducted from those payments.”

57. The papers before the Tribunal do not explain why his other two employers failed to deduct the proper amount of tax, and thus it is unclear whether or not Mr Savage is also protected by virtue of Reg 72 in relation to these earnings.

30 58. As a separate matter, I note that no reference has made by HMRC to Extra-statutory Concession A19 (“ESC A19”).

59. This ESC states that tax is “given up” by HMRC if the taxpayer “could reasonably have believed that his or her tax affairs were in order” and “was notified of the arrears more than 12 months after the end of the tax year in which the Revenue received the information indicating that more tax was due.”

35 60. Mr Savage reasonably believed his affairs were in order, and was only notified shortly before January 2011 of the shortfall relating to 2008-09. ESC A19 would thus apply in relation to that year.

5 61. Finally, if after the above points have been addressed, tax remains due from Mr Savage, I note that he requested a TTP agreement before the issuance of the self-assessment returns in January. He has asked for it again, repeatedly, in correspondence and he also raised this issue in his appeal to the Tribunal. No reply appears to have been received from HMRC, despite Mr Savage's many requests.

10 62. Mr Savage is unrepresented and had no assistance with his appeals to HMRC or to the Tribunal. He concluded his Notice of Appeal with the words "please help". The Tribunal can only decide questions of law. If Mr Savage needs assistance with the underlying issues in dispute, he may find help from Taxaid at <http://www.taxaid.org.uk>, or by calling 0345 120 3779 between 10am and 12 midday, Monday to Friday.

15 63. 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.

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**Anne Redston**

**TRIBUNAL PRESIDING MEMBER  
RELEASE DATE: 12 DECEMBER 2011**

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