TC01777

Appeal number TC/2011/06078

INCOME TAX – Surcharge on unpaid income tax (Taxes Management Act 1970 s.59C) – Whether a reasonable excuse for late payment – Appeal dismissed

FIRST-TIER TRIBUNAL

TAX

MR H W TURCAN **Appellant**

- and -

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

TRIBUNAL: DR CHRISTOPHER STAKER (Tribunal Judge)
MS ELIZABETH BRIDGE (Tribunal Member)

Sitting in public in London on 14 December 2011

The Appellant in person

Mr M Ratcliff for the Respondents

DECISION

Introduction

1. This is an appeal against a default surcharge imposed pursuant to s.59C of the Taxes Management Act 1970 (the "TMA") in respect of the late payment by the Appellant of tax in respect of the 2009/10 tax year.

The relevant legislation

2. Section 59C of the TMA states in relevant part as follows:

> (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.
>
> (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.
>
> ...
>
> (5) An officer of the Board may impose a surcharge under subsection (2) or (3) above; and notice of the imposition of such a surcharge—
>
> (a) shall be served on the taxpayer, and
>
> (b) shall state the day on which it is issued and the time within which an appeal against the imposition of the surcharge may be brought.
>
> ...
>
> (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.
>
> ...
>
> (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—
>
> (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.

(10) Inability to pay the tax shall not be regarded as a reasonable excuse for the purposes of subsection (9) above.

(11) The Board may in their discretion—

(a) mitigate any surcharge under subsection (2) or (3) above, or

(b) stay or compound any proceedings for the recovery of any such surcharge,

and may also, after judgment, further mitigate or entirely remit the surcharge.

(12) In this section—

"the due date", in relation to any tax, means the date on which the tax becomes due and payable;

"the period of default", in relation to any tax which remained unpaid after the due date, means the period beginning with that date and ending with the day before that on which the tax was paid.

3. Section 118(2) of the TMA provides as follows:

(2) For the purposes of this Act, 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 concerned may have allowed; and where a person had a reasonable excuse for not doing anything required to be done he shall be deemed not to have failed to do it unless the excuse ceased and, after the excuse ceased, he shall be deemed not to have failed to do it if he did it without unreasonable delay after the excuse had ceased.

The hearing, evidence and arguments

4. It is common ground that the Appellant's tax return for the year 2009/10 was submitted on time, showing a tax liability for the year of £52,213.73. This amount was due to be paid by the due date of 31 January 2011. On the due date, an amount of £46,266.62 remained outstanding. A cheque in the sum of £46,000 was received by HMRC on 3 February 2011, but was returned as it was not paid by the bank. Subsequently, the balance was paid by the Appellant on 5 March 2011. On or about 1 April 2011, HMRC imposed a surcharge of £2,313.33 pursuant to TMA s.59C, against which the Appellant now appeals.

5. The Appellant's case is that on 31 January 2011 he sent a cheque to HMRC for the outstanding amount. He left the same day for a month's holiday in South Africa.

When he returned on 2 March 2011, he found a letter from HMRC dated 22 February 2011 stating that the outstanding amount had not been paid by the deadline, and his discovered that the bank had dishonoured the cheque. Although he had insufficient funds in his cheque account, he had sufficient funds in a deposit account, and the bank failed to make the necessary transfer. He immediately contracted HMRC and explained that he had been abroad throughout February. On 3 March 2011 he sent a cheque to HMRC which was paid by his bank on 9 March 2011.

6. The Appellant argues that he therefore missed the 28 day deadline by only 4 days due to his absence abroad, and that in the circumstances a surcharge of £2,313.33 is wholly disproportionate. Furthermore, the 22 February 2011 letter from HMRC stated that he had an earlier tax debt, which was incorrect. The decision to impose a surcharge was thus based on a false premise, namely that he had an earlier unpaid tax liability.

7. The Appellant notes that s.59C(5) TMA provides that, 28 days after expiry of the 28 day deadline, HMRC "An officer of the Board *may* impose a surcharge ... " The word "may" indicates that HMRC has a discretion whether or not to impose a surcharge. He argues that he exceeded the 28 day deadline by only 4 days, due to an absence abroad, and that if ever there was a case where the discretion should have been exercised in favour of a taxpayer, this was it. He argues that had he returned from South Africa just a few days earlier, the payment would have been made on time.

8. The Appellant also argues that he has a reasonable excuse under s.59C TMA. He said that until the bank sent him the notice of dishonour, he had no reason to think that the cheque would be dishonoured. He argues that he therefore had a reasonable excuse at least until 7 February 2011 when the bank sent the notice of dishonour, and that after he received that notice, he made payment "without unreasonable delay" within the meaning of s.118(2) TMA. The delay after 7 February 2011 was not unreasonable, given that he was abroad at the time and paid immediately on his return. The Appellant argues that it was unreasonable of HMRC not to exercise the discretion under s.59C(11) TMA to mitigate the penalty.

9. In response to a question, the Appellant said that he had no formal arrangement that his bank would transfer funds from his deposit account to his cheque account in order to honour a cheque when funds in his cheque account were insufficient, and that it was a "pious hope" on his part that his bank would do so.

10. The position of HMRC is as follows. The Appellant's first cheque was written on 31 January 2011, but received by HMRC only on 3 February 2011. That was not late enough to trigger a surcharge, but the cheque was nonetheless received late. Lack of funds is not in itself a reasonable excuse. Having funds in a different account is not a reasonable excuse if there is no arrangement with the bank that the bank will transfer those funds to the cheque account where necessary. Where a taxpayer relies on a third party, the responsibility is on the taxpayer to ensure that the third party does what is required. In this case, the Appellant had no more than a "pious hope" that the bank would do so, and there is no evidence that he actually took steps to ensure that

the bank would do what was required. Even from South Africa, the Appellant could have made payment online, and if he did not want to access his account online from South Africa, he should have ensured that adequate arrangements were in place before he left. The fact that a person is overseas is not of itself a reasonable excuse. Payment was received 33 days after the due date of 31 January 2011. The surcharge was not imposed on the basis that the Appellant had another tax debt. The surcharge is raised when the income tax payment is late. The 22 February 2011 letter was sent by the HMRC debt management team and had nothing to do with the imposition of the surcharge. The surcharge is fixed by legislation, at 5 percent, once payment is 28 days late, regardless of the length of time by which it is late. It is not within the jurisdiction of the Tribunal to exercise the discretion under s.59(11) TMA.

The Tribunal's findings

11. The Appellant takes exception to a letter from HMRC dated 22 February 2011, stating that he also had an earlier unpaid tax debt and that his possessions would be seized and sold at public auction. It is now acknowledged by HMRC that the Appellant did not have an earlier unpaid tax debt as incorrectly claimed in the 22 February 2011 letter. In a subsequent letter to the Appellant dated 18 August 2011, HMRC apologised to the Appellant for this error, and also expressed regret if the Appellant was upset by the tone of the 22 February 2011 letter.

12. However, it is evident that the 22 February 2011 letter dealt substantively with the alleged earlier tax debt, rather than the non-payment of tax due on 31 January 2011. The letter only referred to the latter, in that it stated that because the Appellant had not made his income tax payment by the 31 January 2011 deadline, HMRC were now going to make it a priority to collect the alleged earlier tax debt. The letter was issued before the expiry of 28 days from the 31 January 2011 deadline for the income tax payment. At that stage, the Appellant had not yet become liable to a default surcharge, and would not become liable for a further 6 days. Had the Appellant not been abroad at the time that that letter was delivered, he would in the normal course have still had sufficient time to make the income tax payment without incurring a surcharge. That letter has no material bearing on the default surcharge, other than that it served as a reminder to the Appellant that he should pay it very quickly if he wanted to avoid a surcharge. The Tribunal finds that there is nothing in the evidence to suggest that the HMRC belief that the Appellant had another unpaid tax debt had any bearing at all on the decision to impose a tax surcharge under s.59C TMA.

13. There is no doubt in this case that the payment of the tax due on 31 January 2011 was made late, and more than 28 days after the 31 January 2011 deadline. The issues in this appeal therefore concern primarily the applicability of s.59C(9) and s.118(2) TMA.

14. For a surcharge to be set aside under s.59C(2), the Appellant must have had a reasonable excuse throughout the period of default. The Tribunal finds that the Appellant did not. First, the due date was 31 January 2011, yet the first cheque was received by HMRC only on 3 February 2011. The Appellant has advanced no reasonable excuse for these first three days of the default period commencing on 31

January 2011. For that reason alone, s.59C(2) cannot apply. In any event, the Tribunal does not consider that the Appellant had a reasonable excuse for the remainder of the period of default. If he was going to delay making the payment to the last day on 31 January 2011, and then leave on a one month trip abroad on the day that payment is made, a reasonable taxpayer would take the necessary steps to ensure that the payment transaction would be duly processed. However, he did not. He had not ensured that the funds in his cheque account were sufficient, or instructed his bank to take funds from his deposit account if necessary. Furthermore, from South Africa he could have used telephone communication to check that payment had gone through, so that he could have rectified the problem from South Africa before he became liable to the default surcharge.

15. For similar reasons, the Tribunal decides that s.118(2) TMA also does not apply in the circumstances of this case.

16. The Appellant argues that the default surcharge is wholly disproportionate in the circumstances. The Tribunal has therefore of its own motion considered whether it has the power to strike down a penalty on the ground that it is disproportionate. This too is a not entirely settled question. In *Enersys Holdings UK Ltd v Revenue & Customs* [2010] UKFTT 20 ("***Enersys***"), a case concerning a VAT default surcharge, it was found that the Tribunal does have the power to discharge a penalty that is disproportionate. It was said in that case at [59] that:

> It goes without saying that there is a public interest, recognised by the Human Rights Convention itself, in the timely payment of taxes. As I have pointed out, the law allows a taxable person a calendar month from the end of each of his prescribed periods to prepare his return and arrange for the payment of the net amount due, a period which, as I have said, is of reasonable length. It also seems to me impossible, in principle, to criticise a penalty system which is designed to deter delay, even of as little as one day, beyond that month, and to punish delay when it occurs. It is necessary also to bear in mind that the tax due from many traders amounts to a very large sum; the imposition of a small fixed penalty, such as the £100 imposed in many of the cases to which Mr Conlon referred me, would constitute in such circumstances neither deterrent nor punishment. For that reason I see nothing offensive in principle in a tax-geared penalty nor, self-evidently, in a system which increases the rate of the penalty for repeated offences. The tax-gearing of the default surcharge is, as I have said, somewhat unsophisticated, but I am not willing to accept that the lack of sophistication, taken alone, is a reason for concluding that the method adopted is disproportionate. A link with the net amount of tax due has the considerable advantage of simplicity, and any other means of linking the penalty to the tax is, I think, equally likely to produce results which might be thought anomalous in individual cases.

17. However, the Tribunal found in that case at [69] that:

> I am quite willing to accept—indeed experience of its operation tells me—that the default surcharge regime, by and large, produces a fair

> penalty, or at least one which is not obviously disproportionate to the offence, albeit I have particular misgivings about the absence of any correlation between the period of delay and the amount of the penalty. But, as I have indicated, the penalty imposed in this case is in my view wholly disproportionate to the gravity of the offence—it is, as Simon Brown LJ put it in *Roth*, "not merely harsh but plainly unfair"—and I am not persuaded, in the absence of any justification of it, that it can be saved by the state's margin of appreciation.

18. Although *Enersys* was a VAT case, in *Dina Foods Ltd v Revenue & Customs* [2011] UKFTT 709 (TC) its reasoning was found to apply also in the direct tax context. The Tribunal said in that case at [41]-[42] that:

> 41. The issue of proportionality in this context is one of human rights, and whether, in accordance with the European Convention on Human Rights, Dina Foods Ltd could demonstrate that the imposition of the penalty is an unjustified interference with a possession. According to the settled law, in matters of taxation the State enjoys a wide margin of appreciation, and the European Court of Human Rights will respect the legislature's assessment in such matters unless it is devoid of reasonable foundation. Nevertheless, it has been recognised that not merely must the impairment of the individual's rights be no more than is necessary for the attainment of the public policy objective sought, but it must also not impose an excessive burden on the individual concerned. The test is whether the scheme is not merely harsh but plainly unfair so that, however effectively that unfairness may assist in achieving the social objective, it simply cannot be permitted.
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> 42. Applying this test, whilst any penalty may be perceived as harsh, we do not consider that the levying of the penalty in this case was plainly unfair. It is in our view clear that the scheme of the legislation as a whole, which seeks to provide both an incentive for taxpayers to comply with their payment obligations, and the consequence of penalties should they fail to do so, cannot be described as wholly devoid of reasonable foundation. ...

19. The Tribunal finds it unnecessary to reach any view in this case on the extent of any power it may have to mitigate discharge a penalty on grounds that it is disproportionate. Even if the Tribunal has the power to do so, in the circumstances of this case described above above, it considers that neither the default surcharge scheme in general, nor the particular surcharge imposed pursuant to that scheme in the present case, is "devoid of reasonable foundation" or "not merely harsh but plainly unfair". The proportionality argument is not accepted.

20. As to the Appellant's reliance on s.59C(11) TMA, the Tribunal notes that the discretion to mitigate under this provision is conferred on HMRC, and not on the Tribunal. It is perhaps a not entirely settled question whether the Tribunal has the jurisdiction to determine whether or not an exercise of that discretion by HMRC has been unreasonable or otherwise unlawful on administrative law principles. In *Tennyson v The Commissioners for Her Majesty's Revenue & Customs* [2011] UKFTT 119 (TC) at [25]-[32] and *A Divorcee v Revenue & Customs* [2010] UKFTT

612 (TC) at [9]-[12], it was held that the Tribunal did not have this jurisdiction. In the latter case it was said that "Appellant's remedy must instead be by way of judicial review in the High Court". In *Cubberley v Revenue & Customs* [2011] UKFTT 239 (TC) at [35]-[39] it was suggested that if HMRC had promised that no surcharge would be levied, the taxpayer may have a legitimate expectation that this would be the case, but added that "Whether this Tribunal has the jurisdiction to consider legitimate expectations is currently unclear".

21. The Tribunal considers it unnecessary to answer this question in the present case. Even if the Tribunal has such a jurisdiction, in light of the conclusions above, it does not consider that anything has been advanced that would provide a basis for concluding that HMRC's failure to exercise this discretion in the present case was unlawful or unreasonable.

Conclusion

22. For the reasons above, the Tribunal finds that the appeal must be dismissed.

23. 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.

Christopher Staker

TRIBUNAL JUDGE
RELEASE DATE: 25/01/2012