



TC02207

Appeal number: TC/2012/01135

*INCOME TAX –first and second surcharge under section 59 C (2) and (3)
Taxes Management Act 1970 – whether reasonable excuse*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MAGDALENE YOUNG

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE GUY BRANNAN

The Tribunal determined the appeal on 14 August 2012 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 29 December 2011 with enclosures), HMRC's Statement of Case submitted on 9 March 2012 (with enclosures).

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DECISION

Introduction

- 5 1. This is an appeal against two surcharges imposed under section 59C Taxes Management Act 1970 ("TMA") in respect of the late payment of tax for the year ended 5 April 2010.
2. The first surcharge of £3,539.57 was imposed under section 59C (2) TMA in respect of the late payment of tax. The second surcharge of £3,064.57 was imposed
10 under section 59C (3) TMA on tax remaining unpaid six months after the due date.

The legislation

3. Section 59C TMA provides:

- 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) 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.
- (4) Where the taxpayer has incurred a penalty under section 93(5) of this Act, Schedule 24 to the Finance Act 2007 or Schedule 41 to the Finance Act 2008, no part of the tax by reference to which that penalty
25 was determined shall be regarded as unpaid for the purposes of subsection (2) or (3) above.
- (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—
- 30 (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.
- 35 (6) A surcharge imposed under subsection (2) or (3) above shall carry interest at the rate applicable under section 178 of the Finance Act 1989 from the end of the period of 30 days beginning with the day on which the surcharge is imposed until payment.
- (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.
- 40 (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—

(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.

4. Section 108 Finance Act 2009 provides:

Suspension of penalties during currency of agreement for deferred payment

(1) This section applies if—

(a) a person (“P”) fails to pay an amount of tax falling within the Table in subsection (5) when it becomes due and payable,

(b) P makes a request to an officer of Revenue and Customs that payment of the amount of tax be deferred, and

(c) an officer of Revenue and Customs agrees that payment of that amount may be deferred for a period (“the deferral period”).

(2) P is not liable to a penalty for failing to pay the amount mentioned in subsection (1) if—

(a) the penalty falls within the Table, and

(b) P would (apart from this subsection) become liable to it between the date on which P makes the request and the end of the deferral period.

(3) But if—

(a) P breaks the agreement (see subsection (4)), and

(b) an officer of Revenue and Customs serves on P a notice specifying any penalty to which P would become liable apart from subsection (2), P becomes liable, at the date of the notice, to that penalty.

(4) P breaks an agreement if—

- 5 (a) P fails to pay the amount of tax in question when the deferral period ends, or
- (b) the deferral is subject to P complying with a condition (including a condition that part of the amount be paid during the deferral period) and P fails to comply with it.

10 (5) The taxes and penalties referred to in subsections (1) and (2) are—

<i>Tax</i>	<i>Penalty</i>
Income tax or capital gains tax	Surcharge under section 59C (2) or (3) of TMA 1970
Value added tax	Surcharge under section 59(4) or 59A(4) of VATA 1994
Aggregates levy	Penalty interest under paragraph 5 of Schedule 5 to FA 2001
Climate change levy	Penalty interest under paragraph 82 of Schedule 6 to FA 2000
Landfill tax	Penalty interest under paragraph 27(2) of Schedule 5 to FA 1996
Insurance premium tax	Penalty under paragraph 15(2) or (3) of Schedule 7 to FA 1994 which is payable by virtue of paragraph 15(1)(a) of that Schedule.
Any duty of excise	Penalty under section 9(2) or (3) of FA 1994 which is imposed for a failure to pay an amount of any duty of excise or an amount payable on account of any such duty.

(6) If the agreement mentioned in subsection (1)(c) is varied at any time by a further agreement between P and an officer of Revenue and Customs, this section applies from that time to the agreement as varied.

15 (7) The Treasury may by order amend the Table by adding or removing a tax or a penalty.

(8) An order under subsection (7) is to be made by statutory instrument.

5 (9) A statutory instrument containing an order under subsection (7) is subject to annulment in pursuance of a resolution of the House of Commons.

(10) In this section, except in the entries in the Table, "penalty" includes surcharge and penalty interest.

(11) This section has effect where the agreement mentioned in subsection (1)(c) is made on or after 24 November 2008.

10 **The facts and arguments**

5. A notice to serve a return for the tax year ended 5 April 2010 was issued by HMRC to the appellant on 6 April 2010.

6. The appellant's tax return was filed online on 1 September 2010.

15 7. The total taxable income (after allowances) of the appellant chargeable to tax for the year ended 5 April 2010 was £352,095, which was largely made up of dividends from UK companies (with a small amount of employment income, viz £5,720).

8. The tax liability for that year was £70,791.57 and was due and payable by 31 January 2011 (section 59B (4) TMA).

20 9. The appellant's accountant contacted HMRC on 6 January 2011 requesting a "time to pay arrangement" pursuant to section 108 Finance Act 2009, under which the appellant would be allowed extra time to pay her tax liabilities without incurring surcharges. HMRC agreed to the "time to pay arrangement" on 6 January 2011. The agreement required that the appellant's outstanding tax liability should be settled by
25 payments on 30 April and 31 May 2011.

10. The required payments were not made and the "time to pay" arrangement was cancelled on 17 August 2011.

30 11. The first surcharge notice was issued on or after 17 August 2011. The amount of the surcharge was £3,539.57 calculated as 5% of the balance of tax outstanding at 28 February 2011.

12. The second surcharge notice was issued on or after 17 August 2011. The amount of the surcharge was £3,064.57 calculated as 5% of the balance of tax outstanding at 31 July 2011.

35 13. As at the date of the preparation of HMRC's Statement of Case £63,432.08 of the appellant's tax liability for the year ended 5 April 2010 remained outstanding.

14. In her notice of appeal the appellant stated:

5 "I think it is unfair that my personal circumstances are not being considered. I do want to, and will pay my taxes and interest owed, but circumstances changed unexpectedly and I find myself in the position of not having the available funds in cash. I am doing my best to sell the property I have which will more than cover the outstanding amounts owed. The credit crunch has caused difficulty for many people and is causing the sale of property to take much longer than anticipated initially."

10 15. On 13 September 2011, the appellant's accountants wrote to HMRC in the following terms:

15 "Subsequent to the sale of a former rest home business it was Mrs (and Mr) Young's intention to acquire new business premises which were to be developed as a care home for people with disabilities. A residential property was subsequently purchased in Blackpool with a view to it being altered so as to be suitable for use. The property was purchased in 2008 and Mr and Mrs Young realised that the conversion process was more complicated and would take longer than originally envisaged. Their plan is of necessity changed. Unfortunately Mr Young suffers from Parkinson's disease which manifests itself in progressive debility and he was no longer able to be actively involved in the day-to-day running. The property alterations had been started and needed to be finished before the property could be placed on the market again.

25 Mindful of the forthcoming tax payments a local estate agent was appointed with a view to finding a suitable purchaser of the property which would otherwise have been producing cash inflows. The agent was instructed to obtain a realistic price but this coincided with the dramatic downturn in the economy. Mrs Young therefore placed the joint property on the market on 10 September 2010 with Oystons Estate Agents with a view to using the proceeds to settle personal tax liabilities.

35 The property had not sold by 6 January 2011 and it was clear that a sale would not complete by 31 January 2011 enabling tax payment to be made. On behalf of Mr and Mrs Young we contacted HM Revenue & Customs on 6 January 2011 to agree a time to pay arrangement based on deferring the payment until 31st May 2011 which would hopefully allow time to the property to be sold.

40 The property was not sold by May 2011 even after their making every effort to sell the property. Mrs Young therefore decided to change estate agents to Farrell & Hayworth in early June 2011 with a significantly reduced asking price with a view to a quick sale.

45 Mrs Young has made every reasonable effort to raise the funds to settle her personal tax liabilities and has sold personal possessions raising £9,500 which was sent to HM Revenue & Customs as a payment on account.

Our client has a separate private residence and the decision has been taken to also place this property on the market. Mr and Mrs Young have equity in the property is in excess of the liability but

5 unfortunately do not have cash available. Mr Young's Parkinson's disease has progressed in the period and aggravated by the worry of not being able to meet his tax commitment. Mr and Mrs Young do not dispute the payment at all but having no immediate income stream they are unable to make meaningful payments on account.

10 It is their determined wish to settle the liability but can only see this being possible from the proceeds of sale of one or other of the properties involved. With the best will in the world Mr Young is unable because of his illness to obtain paid employment and because of their age mortgage lenders are not forthcoming.

15 Having regard to the above Mr and Mrs Young respectfully request whether HMRC will be prepared to place a charge on the private residence property (presently free of mortgage) to cover their tax liabilities pending sale.

As you will appreciate Mr and Mrs Young are consumed with worry about their position and can see no alternative route having regard to the combined factors of age and disability."

16. In addition, in the context of a request for an independent review by HMRC, the appellant's accountants wrote to HMRC on 7 November 2011 as follows:

20 "From the outset our client is not in the category of will not pay but in the category of wanting to pay but presently unable. In the reply from HMRC to our client's appeal no reference is made to any consideration having been given to the unfortunate circumstances Mrs Young (and Mr Young) find themselves in as a result of Mr Young's illness and yet this is germane to the appeal.

25 Mr Young is diagnosed with Parkinson's disease which manifests itself in progressive deterioration. This has put an enormous demand on both of them and changed their circumstances such that the ability to earn has been eroded. Had their circumstances not altered they would have done their utmost to have met their commitments at the time but they are now in a position of using their best endeavours to not only make a living but also be mindful of Mr Young's needs. Mr and Mrs Young appreciate that it is clearly correct to charge interest on any balance outstanding but in the circumstances the surcharge liability is only serving to compound their dilemma.

35 We respectfully request that their appeal is looked upon sympathetically as they are trying to catch up on their obligations."

17. These three documents, therefore, set out the appellant's view of the factual position and grounds of appeal.

40 18. HMRC argue that pursuant to section 59C (9) TMA a reasonable excuse must exist for the whole period of default. HMRC argue that a reasonable excuse is normally an unexpected or unusual event, either unforeseeable beyond a person's control, which prevents them from complying with their tax obligations. HMRC note that section 59C (10) TMA provides that an inability to pay the tax shall not be regarded as a reasonable excuse for the purposes of subsection 9.

19. HMRC submitted that although the appellant's accountants stated that she and her husband purchased the property in 2008 and incurred renovation costs in the process, they are both directors of a company called Whittingham & Young Limited and it was this company that purchased the property. However, HMRC have produced
5 no evidence to substantiate this submission. In an appeal allocated to the "default paper" category it is essential that all relevant documents that the parties intend to rely upon to support their submissions should be included in the papers. Mere statements or assertions in a Statement of Case are not evidence, unless they are backed up by relevant documentary evidence or, where appropriate, by a witness statement. I have,
10 therefore, taken no account of this submission by HMRC.

20. HMRC did produce records which indicated that the appellant and her husband each received dividends from UK companies in the amount of £352,777 (i.e. a total of £705,554) in the tax year ended 5 April 2010. In the light of this fact, HMRC submitted that it would have been reasonable to expect that money would have been
15 set aside to ensure the payment of tax liabilities for that tax year on the due date.

Decision

21. In my view, the onus of proof lies on the appellant to establish that there was a reasonable excuse within section 59C (9) TMA throughout the period of default. Inability to pay is not a reasonable excuse (section 59C (10) TMA). However, it is
20 well-established that if that inability to pay is caused by some underlying unexpected event or some event outside the control of the taxpayer or by circumstances which could not have been reasonably anticipated then those circumstances can result in a reasonable excuse for non-payment (*Steptoe v Revenue & Customs* [1989] UKVAT V4283) .

22. In this case, HMRC have established that the appellant received £352,777 in dividend income in the tax year in question. The appellant has not explained why an amount was not set aside from this dividend payment to provide for the future
25 payment of the appellant's self-assessment tax liability.

23. Whilst I appreciate the fact that the appellant is making every effort to settle her liability and sympathise with the difficulties caused by her husband's illness, I do not
30 think that this can constitute a reasonable excuse. Plainly, her husband's illness prevents him from obtaining employment but it does not explain why, when funds were apparently available to the appellant from the receipt of dividend income, these monies were not used to satisfy the appellant's tax liabilities rather than being used to
35 defray other expenses.

24. For these reasons, I have decided that there is no reasonable excuse within the meaning of section 59C (9) TMA and dismiss this appeal.

25. 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
40 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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**GUY BRANNAN
TRIBUNAL JUDGE**

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RELEASE DATE: 22 August 2012