



**TC03865**

**Appeal number: TC/2014/01207**

*INCOME TAX–surcharges under s 59C (2) Taxes Management Act 1974  
late payment of tax- whether reasonable excuse - appellant's illness-medical  
certificates- time in prison- whether reasonable excuse for the “period of  
default” – no reasonable excuse for the final few months – surcharges  
confirmed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**JULIJA FREIBERGA**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE GUY BRANNAN  
MICHAEL SHARP FCA**

**Sitting in public at Northampton on 12 June 2014**

**The Appellant in person**

**Michael Foster, Presenting Officer, for the Respondents**

## DECISION

### Introduction

- 5 1. This is an appeal against surcharges imposed for the late payment of tax under s59C (2) Taxes Management Act 1970 ("TMA").
2. The surcharges have been imposed under s 59C (2) and (3) TMA for the tax years ended 5 April 2009 ("2009 tax year") and 5 April 2010 ("2010 tax year"). A surcharge under sub-s (2) ("the first surcharge") arises when tax remains unpaid  
10 following the expiry of 28 days from the due date and is calculated as a surcharge equal to 5% the unpaid tax. The due date in respect of the 2009 tax year was 31 January 2010 and in respect of the 2010 tax year was 31 January 2011 (s 59B (4) TMA). A surcharge arises under sub-s (3) ("the second surcharge") where the tax remains unpaid on the day following the expiry of six months from the due date and is  
15 also calculated as an amount equal to 5% of the unpaid tax.
3. Thus the "trigger dates" for the first and second surcharges were, respectively, 28 February 2010 and 31 July 2010 in respect of the 2009 tax year and 28 February 2011 and 31 July 2011 in respect of the 2010 tax year.

### The facts

- 20 4. We find the following facts.
5. The Appellant filed her unsolicited tax return for the 2009 tax year on 11 December 2012. The due date for the return was 31 October 2009 for a paper return or 31 January 2010 for an electronic return. As we shall see, the Appellant also filed her tax return for the 2010 tax year at the same time.
- 25 6. HMRC calculated the Appellant's income tax liability for the 2009 tax year as being £11,259.50. This amount was due to be paid on or before 31 January 2010 under s 59B (4) TMA.
7. This income tax liability was therefore unpaid on the two "trigger dates" in respect of the 2009 tax year referred to above.
- 30 8. HMRC issued the first surcharge notice on approximately 22 February 2013 in the amount of £562.97 i.e. 5% of the income tax unpaid at the first trigger date.
9. As already mentioned, as regards the 2010 tax year, the Appellant filed her tax return for the 2010 tax year on 11 December 2012. The due date for this return was 31 October 2010 for a paper return or 31 January 2011 for an electronic return.
- 35 10. The second surcharge notice was also issued on approximately 22 February 2013. Again, this was calculated at 5% of the unpaid tax at the second trigger date and this amounted to £562.97.

11. HMRC calculated the Appellant's income tax liability for the 2010 tax year as being £2,307.80. This amount was due to be paid on or before 31 January 2011 under s 59B (4) TMA.
12. This income tax liability was unpaid on the two surcharge "trigger dates" in respect of the 2010 tax year referred to above.
13. HMRC issued the first surcharge notice on approximately 28 February 2013 in the amount of £115.39 i.e. 5% of the income tax and paid at the first trigger date.
14. The second surcharge notice was also issued on approximately 28 February 2013. Again, this was calculated at 5% of the unpaid tax at the second trigger date and this also amounted to £115.39.
15. The Appellant appealed against the surcharges by a letter dated 8 March 2013.
16. The Appellant had two main sources of income. First, she acted as an agent for buying and selling properties, mainly outside the UK, for clients who were typically located in Russia. She carried on this business from 2004 to 2009. In respect of the 2009 tax year she had monies owing to her from abroad, some of which were received in the 2010 tax year. This agency business stopped in April 2009.
17. Secondly, the Appellant ran a property rental business in respect of properties situated in the UK. She had invested in UK rental property through what she described as an "investment club". However, the properties had decreased in value. The rents had been collected by a professional agent until 2008 and, thereafter, by a member of the Appellant's family. Essentially, although rents were received between £60,000 and £70,000 in the relevant years, overall (taking account of decrease in property values) the business was loss-making.
18. There was some debate about the number of properties in which the Appellant had invested. As we shall see, the Appellant claimed that her ill-health prevented her from dealing with her tax affairs for significant periods of time. On the other hand, HMRC contended that the number of rental properties in the relevant periods had increased, indicating that the Appellant was, indeed, able to deal with business affairs.
19. We were informed by Mr Foster that the Appellant's tax returns for the 2009 and 2010 tax years indicated that eight properties were being rented out. However, the relevant tax returns were not produced in evidence and, accordingly, we make no finding as to the number of properties rented out by the Appellant in those years.
20. Nine properties were rented out in the 2011 tax year, 10 properties in the 2012 tax year and eight in the 2013 tax year. These figures were taken from the tax returns submitted by the Appellant with which we were provided.
21. The Appellant, in correspondence, indicated that she had suffered a rental loss in respect of a bad investment made in Egypt in respect of which she lost £77,500 in the period 2007 – 08.

22. The Appellant has suffered from a history of personal and financial misfortune, ill-health and imprisonment.

23. As a result of marital difficulties and other family problems, including her mother's ill-health and that of the Appellant following the birth of her second child in March 2008, as well as difficulties arising from her property business, the Appellant suffered from severe depression.

24. The Appellant produced a medical certificate from her GP dated 12 June 2013 stating that the Appellant had been suffering from:

"... severe Anxiety and Depression from April 2008 till December 2012.... As a result, [the Appellant] was unable to concentrate on managing her business affairs during the above-mentioned period."

25. During this time, the Appellant received treatment for her condition.

26. In the course of 2008 – 2009 the Appellant's rental business began to deteriorate and she estimated that the losses incurred in the business in that period were £43,000. The poor performance of this business was caused by a decline in the property market, adverse interest rates and the Appellant's inexperience in property investment.

27. In March 2010, the Appellant was arrested and charged with benefit fraud. The Appellant says that she did not have the emotional or financial resources to fight the charge. She says that she just pleaded guilty without knowing sure whether she did the right thing or not. As a result, she served a term of imprisonment from 1 February 2012 to 13 June 2012.

28. In connection with this criminal prosecution, all the Appellant's financial records were confiscated in March 2010 and returned to her, in part, only in October 2010. It took a further year to recover all the documents.

29. The Appellant states that she was legitimately awarded Income Support between 2010 and March 2013 and that she had now made full and correct disclosure to the Department of Work and Pensions in order to claim this benefit..

30. In October 2012, one of the Appellant's children was diagnosed with a serious medical disorder.

31. We were provided with a second medical certificate, also signed by the Appellant's GP dated 15 January 2014. The certificate stated:

"I am writing to confirm that the above patient is suffering from Acute Anxiety and Depression since 2008.

She has been suffering from Acute bout of Depression [sic] and suicidal thoughts from 05.08.2013 till 15.01.2014.

[The Appellant] was unable to manage her business affairs during the above period of time."

32. Although at one stage HMRC appeared to be challenging the Appellant's GP's conclusion that the Appellant was unable to manage her business affairs (e.g. when they asserted that the number of rental properties owned by the Appellant had increased in the period covered by the medical certificates), in answer to a question from the Tribunal, Mr Foster confirmed that HMRC did not challenge these certificates.

33. As of 3 April 2014, the Appellant had not paid her tax liabilities in respect of the 2009 and 2010 tax years, save for a payment of £202.69 made on 21 May 2012. As of 3 April 2014 the tax due from the appellant stood at £16,499.45. 3 April 2014 was the date on which HMRC had run off the latest tax statement for the Appellant from its computerised records. There was no evidence before us that any tax payments had been made after that date, in respect of the years under appeal, by the Appellant.

### **Discussion**

34. There is no dispute that the Appellant failed to pay her tax late for both the 2009 and 2010 tax years. She did not pay the tax by the due date or six months later, with the result that the first and second surcharges for both years were, on their face, correctly charged.

35. The question in this case is whether the Appellant had a reasonable excuse for the late payment of her tax.

36. The relevant statutory provisions can be briefly stated. Section 59C (9) TMA provides that 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 is not so appear, confirm the imposition of the surcharge."

37. Section 59C (12) defines the expressions "the due date" and "the period of default" as follows:

"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."

38. Section 118 (2) TMA also provides:

" 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."

39. In this case, we accept on the basis of the medical certificates, that the Appellant  
5 had a reasonable excuse for failing to pay her tax liabilities for the 2009 and 2010 tax  
years from April 2008 until December 2012 and from 5 August 2013 until 15 January  
2014. Although HMRC made a number of submissions aimed at undermining the  
statement in those certificates that the Appellant was unable to manage her business  
affairs, eventually, Mr Foster accepted that HMRC were not challenging the  
10 certificates and we consider that it was proper for him to have done so.

40. Furthermore, we do not accept the submission, made in HMRC's statement of  
case, that a person suffering from a lengthy period of ill-health ought to have sought  
help from HMRC or engaged professional help. Much will depend on the  
circumstances, but in the context of mental health, we are inclined to accept that the  
15 consequences of suffering from severe depression may well prevent a person from  
acting in such a way as to sort out their tax affairs.

41. Whether a person's imprisonment constitutes a reasonable excuse for failing to  
deal with their tax affairs is a debatable point. But even if it was a reasonable excuse,  
the Appellant's imprisonment lasted from 1 February 2012 to 13 June 2012 i.e. a  
20 period of 4 1/2 months and, in any event, coincided with the period covered by the  
first medical certificate.

42. There was, therefore, a period from December 2012 to 5 August 2013 when  
there was no medical evidence that the Appellant was unable to attend to her tax  
affairs. Furthermore, there was a further period from 15 January 2014 until the date of  
25 the hearing (or at least until 3 April 2014 which was the latest date of the HMRC  
computer printout indicating the Appellant had not settled her tax liabilities), in which  
there was no evidence of a reasonable excuse on medical grounds.

43. Section 59C(9) TMA requires that there must be a reasonable excuse throughout  
the "period of default". This must, however, be read in the light of s118 (2) which  
30 allows a default to be corrected "without unreasonable delay after the excuse [has]  
ceased."

44. In our view, there was no reasonable excuse during the two periods referred to  
in paragraph 42 above and there was no indication that the Appellant had put right her  
default in those periods. It was plain that the Appellant was in some financial  
35 difficulty caused primarily by adverse conditions in respect of her property rental  
business. It appeared that this was the main reason why she was unable to pay her tax  
liabilities when due or, at least, after any reasonable excuse had expired. However, we  
were not convinced that these financial difficulties themselves constituted a  
reasonable excuse. The problems seem to stem from a downturn in the property  
40 market, adverse interest rates and the Appellant's inexperience in property investment.  
Taken in the round, these factors did not seem to us to constitute a reasonable excuse.  
These were the ordinary perils of property investment.

45. Finally, the Appellant drew attention to the fact that in relation to penalties in respect of the Appellant's failure to make timely tax returns, HMRC appear to have accepted her ill-health as a reasonable excuse. Be that as it may, HMRC's view in respect of other penalties is not a material factor in respect of the surcharges under appeal even though Mr Foster accepted that there may have been some inconsistency in HMRC's view.

46. For the above reasons, we dismiss this appeal.

47. Nonetheless, it is plain that the Appellant has faced a sad variety of health, personal and financial difficulties. In particular, as the medical certificates indicate, she has suffered serious ill-health. There are, in our view, material mitigating circumstances. The mitigation of surcharges is a matter for HMRC and not for this Tribunal, nonetheless we wish to express our view that this is a case where some leniency might well be justified.

48. 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.

**GUY BRANNAN  
TRIBUNAL JUDGE**

**RELEASE DATE: 01 August 2014**