



TC06055

Appeal number: TC/2016/04821

INCOME TAX – Accelerated payment notice – Surcharge – Whether reasonable excuse on facts – No – Appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

IRENA MORGAN

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE JOHN BROOKS

**Sitting in public at Taylor House, Rosebery Avenue, London EC1 on 3 August
2017**

The Appellant in person

Sophie Rhind, of HM Revenue and Customs, for the Respondents

DECISION

1. Mrs Morgan appeals against two surcharges imposed, under s 59C of the Taxes Management Act 1970 (“TMA”), as the result of her failure to comply with an accelerated payment notice (“APN”) given by HM Revenue and Customs (“HMRC”) under s 219(2)(b) of the Finance Act 2014. The APN required payment of £8,835.80 for the 2008-09 tax year by 11 February 2016. However, following the provision of further information to HMRC by Mrs Morgan, the sum required to be paid under the APN was reduced (under s 227(2)(c) Finance Act 2014) to £1,483.20 and each of the surcharges reduced from £441.79 to £74.16 (under s 59C(11) TMA).

2. Before setting out the background to the appeal, which will inevitably require reference to statutory provisions, it is convenient to first refer to the relevant legislation.

Relevant Legislation

3. The circumstances in which an APN may be issued are set out in s 219 Finance Act 2014 which, so far as relevant to this appeal, provides:

(1) HMRC may give a notice (an “accelerated payment notice”) to a person (“P”) if Conditions A to C are met.

(2) Condition A is that—

(a) a tax enquiry is in progress into a return or claim made by P in relation to a relevant tax....

(3) Condition B is that the return or claim or, as the case may be, appeal is made on the basis that a particular tax advantage (“the asserted advantage”) results from particular arrangements (“the chosen arrangements”).

(4) Condition C is that one or more of the following requirements are met—

...

(b) the chosen arrangements are DOTAS arrangements;

...

(5) “DOTAS arrangements” means—

(a) notifiable arrangements to which HMRC has allocated a reference number under section 311 of FA 2004,

(b) notifiable arrangements implementing a notifiable proposal where HMRC has allocated a reference number under that section to the proposed notifiable arrangements, or

4. In the present case, the APN was issued to Mrs Morgan, who has an outstanding appeal (see below), under s 219(2)(b) Finance Act 2014. The content of such an APN is prescribed by s 221 Finance Act 2014. This provides:

- (1) This section applies where an accelerated payment notice is given by virtue of section 219(2)(b) (notice given pending an appeal).
- (2) The notice must—
 - (a) specify the paragraph or paragraphs of section 219(4) by virtue of which the notice is given,
 - (b) specify the disputed tax [(if any)], ...
 - (c) explain the effect of section 222 and of the amendments made by sections 224 and 225 so far as relating to the relevant tax in relation to which the accelerated payment notice is given, and
 - (d) if the denied advantage consists of or includes an asserted surrenderable amount (within the meaning of section 220(4A)), specify that amount and any action which is required to be taken in respect of it under section 225A.
- (3) “The disputed tax” means so much of the amount of the charge to tax arising in consequence of—
 - (a) the amendment or assessment to tax appealed against, or
 - (b) where the appeal is against a conclusion stated by a closure notice, that conclusion,as a designated HMRC officer determines, to the best of the officer's information and belief, as the amount required to ensure the counteraction of what that officer so determines as the denied advantage.
- (4) “The denied advantage” has the same meaning as in section 220(5).
- (5) If a notice is given by reason of two or all of the requirements in section 219(4) being met, the denied advantage is to be determined as if the notice were given by virtue of such one of them as is stated in the notice as being used for this purpose.
- (6) In this section a reference to an assessment to tax, in relation to inheritance tax, is to a determination.

5. Section 222 Finance Act 2014 entitles a person receiving an APN to make representations to HMRC objecting to the APN on the grounds that Conditions A to C referred to in s 219 Finance Act 2014 are not satisfied, or objecting to the amount of accelerated payment that is required. Any such representations must be made within 90 days of the date the notice was given and HMRC are obliged to consider any representations that are made.

6. There is no statutory right of appeal to this Tribunal against HMRC's decision to issue an APN. However, there is a right of appeal against a surcharge (or penalty) imposed as a consequence of a taxpayer's failure (or alleged failure) to make an accelerated payment.

7. Section 224 Finance Act 2014 inserts subsections (8B) to (8D) into s 55 TMA (see below). Additionally, HMRC may, under s 227(2)(c) Finance Act 2014, reduce the amount specified in an APN under s 221(2)(b).

8. Insofar as it applies in the present case s 55 TMA provides:

- (1) This section applies to an appeal to the tribunal against—
 - (a) an amendment of a self-assessment—
 - (i) under section 9C of this Act, or
 - (ii) under paragraph 30 or 34 of Schedule 18 to the Finance Act 1998,
 - (aa) a conclusion stated or amendment made by a closure notice under section 28A or 28B of this Act,
 - (b) an assessment to tax other than a self-assessment,
 - (c) ...
 - (d) ...
- (2) Except as otherwise provided by the following provisions of this section, the tax charged—
 - (a) by the amendment or assessment, or
 - (b) where the appeal is against a conclusion stated by a closure notice, as a result of that conclusion,

shall be due and payable as if there had been no appeal.

(3) If the appellant has grounds for believing that the amendment or assessment overcharges the appellant to tax, or as a result of the conclusion stated in the closure notice the tax charged on the appellant is excessive, the appellant may—

- (a) first apply by notice in writing to HMRC within 30 days of the specified date for a determination by them of the amount of tax the payment of which should be postponed pending the determination of the appeal;
- (b) where such a determination is not agreed, refer the application for postponement to the tribunal within 30 days from the date of the document notifying HMRC's decision on the amount to be postponed.

An application under paragraph (a) must state the amount believed to be overcharged to tax and the grounds for that belief.

(3A) ...

(4) ...

(5) ...

(6) ...

(7) If the appellant and HMRC reach an agreement as to the amount of tax the payment of which should be postponed pending the

determination of the appeal, the agreement shall not have effect unless—

- (a) the agreement is in writing, or
- (b) the fact that the agreement has been reached, and the terms of the agreement, are confirmed by notice in writing given—
 - (i) by the appellant to HMRC, or
 - (ii) by HMRC to the appellant.]¹³

(8) ...

(8A) Where an agreement is made which has effect under subsection (7), references in subsection (6)(a) and (b) above to the date of the determination shall be construed as references to the date that the agreement is confirmed in writing.

(8B) Subsections (8C) and (8D) apply where a person has been given an accelerated payment notice or partner payment notice under Chapter 3 of Part 4 of the Finance Act 2014 and that notice has not been withdrawn.

(8C) Nothing in this section enables the postponement of the payment of (as the case may be)—

- (a) ...,
- (b) the disputed tax specified in the notice under section 221(2)(b) of that Act, ...
- (c) ...
- (d) ...

(8D) Accordingly, if the payment of an amount of tax within subsection (8C)(b) is postponed by virtue of this section immediately before the accelerated payment notice is given, it ceases to be so postponed with effect from the time that notice is given, and the tax is due and payable—

- (a) if no representations were made under section 222 of that Act in respect of the notice, on or before the last day of the period of 90 days beginning with the day the notice or partner payment notice is given, and
- (b) if representations were so made, on or before whichever is later of—
 - (i) the last day of the 90 day period mentioned in paragraph (a), and
 - (ii) the last day of the period of 30 days beginning with the day on which HMRC's determination in respect of those representations is notified under section 222 of that Act.

...

9. Section 59C TMA (Surcharges on unpaid income tax and capital gains tax) is applicable in the present case, which concerns an assessment for 2008-09 because, although “omitted” by Finance Act 2009 Schedules 55 and 56 (Income Tax Self

Assessment and Pension Schemes)(Appointed Days and Consequential and Savings Provisions) Order 2011 (SI 2011/702), s 59C TMA remains in force “in relation to the tax year 2009-10 or any previous tax year.”

10. The relevant provisions of s 59C TMA state:

(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.

(4) ...

(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.

(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.

(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.

11. Where a person “had a reasonable excuse for not doing anything required to be done” s 118(2) of the Taxes Management Act provides that:

... 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.

12. “Reasonable excuse” is not defined in the legislation but “is 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]).

Background

13. On 31 August 2013 Mrs Morgan was issued with a s 29 TMA ‘discovery’ assessment to income tax in the sum of £8,835.80 in respect of untaxed income for 2008-09. Mrs Morgan, who does not accept that she is liable to the tax appealed to HMRC against that assessment on 23 February 2013. In a letter to Mrs Morgan, dated 24 April 2013, HMRC confirmed receipt of the appeal and the postponement of the tax charged (in accordance with s 55 TMA). There does not appear to have been any further progress in that appeal to date.

14. On 24 March 2015 HMRC wrote to Mrs Morgan to explain that she would “soon need to make a payment of the amount [£8,835.80] that relates to your use of the tax avoidance scheme shown in the letter.” The scheme referred to in the letter was “The Sanzar Partnership Trust” which had been allocated a DOTAS number by HMRC. Mrs Morgan explained that the Sanzar Partnership Trust was her employer and that the letter from HMRC was the first she knew about any allegation of tax avoidance.

15. On 16 April 2015 HMRC issued Mrs Morgan with an APN, under s 219 Finance Act 2014, which required her to pay £8,835.80 on or before 22 July 2015. Although payment of the tax had previously been postponed s 55(8D) TMA provides that if payment of an amount of tax within s 55(8C)(b) TMA, is postponed under s 55 TMA, as in the present case, “it ceases to be so postponed with effect from the time that the [APN] is given, and the tax is due and payable” on the date specified.

16. The APN warned that if the tax was not paid within 28 days of the due date a liability to a surcharge equal to 5% of the unpaid tax would arise and that a further surcharge, also equal to 5% of the unpaid tax, would arise if the tax remained outstanding after six months.

17. Mrs Morgan objected to the APN in a letter of 17 July 2015 on the grounds that the amount stated was incorrect and “should be zero”. Her letter explained that she was an employee at Sanzar and that all tax due was collected through PAYE. A printout of her payslips for the period April to September 2008 was enclosed with the letter. HMRC responded on 17 January 2016 confirming that Mrs Morgan had indeed been taxed through the PAYE system on income received from her employment with the Sanzar Partnership Trust but that the APN was based on additional income that she had received from Sanzar. The APN was therefore confirmed and the time for payment extended to 11 February 2016.

18. In the absence of payment of the tax within 28 days of 11 February 2016 Mrs Morgan was issued with a Notice of Surcharge Assessment (under s 59C(2) TMA) in the sum of £441.79. On 27 April 2016 Mrs Morgan wrote to HMRC to appeal against the surcharge on the grounds that she had no savings and was trying to find a way to borrow the money to pay the APN. She explained that as a pensioner she was finding it difficult to find a lender and that the imposition of the surcharge would make her position worse. For some unknown reason Mrs Morgan’s letter was not delivered to HMRC but returned to her. However, she re-sent it to HMRC on 4 May 2016.

19. Although technically late HMRC considered the appeal but because the conditions of s 219 Finance Act were met and HMRC considered that Mrs Morgan did not have a reasonable excuse for the failure to comply with the APN, HMRC notified Mrs Morgan, by letter dated 26 May 2016, that the surcharge “remains chargeable”. HMRC’s letter also offered Mrs Morgan a review of that decision which she accepted. Mrs Morgan also requested consideration of her appeal against the APN.

20. On 11 August 2016, having undertaken the review, HMRC wrote to Mrs Morgan to notify her that in the absence of a reasonable excuse the surcharge would be upheld. The letter also explained (correctly) that there is no right of appeal against an APN. On 8 September 2016 Mrs Morgan appealed to the Tribunal. By agreement the hearing was postponed while further consideration was given to bank statements that Mrs Morgan had provided to HMRC. As noted above (at paragraph 1) this resulted in a reduction in the sum required under the APN (under s 227(2)(c) Finance Act 2014) to £1,483.20 and the surcharge (under s 59C(11) TMA) to £74.16.

21. As the payment due under the APN remained outstanding six months after the date it was required to be paid, on 21 September 2016 HMRC issued a Notice of Surcharge (under s 59C(3) TMA) in the sum of £441.79 subsequently reduced to £74.16. Mrs Morgan appealed to HMRC against this surcharge on 20 October 2016.

22. Although there was not an appeal to the Tribunal against the second surcharge, as it arose out of the same APN and with the agreement of the parties, both were

considered at the hearing. Insofar as it is necessary to do so, in accordance with rule 7(2)(a) of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009, I waive the procedural requirements, under rule 20, for starting appeal proceedings.

Discussion and Conclusion

23. This appeal is concerned solely with the surcharges that have been imposed because of Mrs Morgan's failure to pay the tax stated on the APN by 11 February 2016. Therefore, the issue to be determined is whether Mrs Morgan had a reasonable excuse for not making that payment on time.

24. Having heard from Mrs Morgan, who I find to be a credible and honest witness for whom I have considerable sympathy, it would appear that she does not believe the APN should have been issued. However, as I explained during the hearing and as is clear from the statutory provisions, there is no right of appeal in this Tribunal against an APN.

25. In relation to the issue of "fairness" also raised by Mrs Morgan, I would refer to the decision (which I am bound to follow and apply) of the Tax and Chancery Chamber of the Upper Tribunal in *HMRC v Hok Ltd* [2013] STC 225 in which it is stated, at [36], in relation to a penalty under s 100B TMA:

"... neither that provision nor any other gives the tribunal a discretion to adjust a penalty of the kind imposed in this case, because of a perception that it is unfair or for any similar reason. Pausing there, it is plain that the First-tier Tribunal has no *statutory* power to discharge, or adjust, a penalty because of a perception that it is unfair."

26. On the question of reasonable excuse Mrs Morgan explained that her position was simply that, as a pensioner relying on Pension Credit to meet her expenses for the past nine years she cannot afford to pay either the amount due under the APN or the surcharges even though they had been reduced.

27. Although s 59C(10) TMA provides that an inability to pay "shall not be regarded as a reasonable excuse", as a result of the decision of the Court of Appeal in *Customs and Excise Commissioners v Steptoe* [1992] STC 757, which considered a similar provision in the VAT legislation, it is necessary to consider the underlying causes of the inability to pay to determine whether there is a reasonable excuse for the default. However, other than emphasise her inability to pay and reliance on Pension Credit, Mrs Morgan did not refer me to any specific underlying cause or event that could give rise to a reasonable excuse in the circumstances of this case.

28. Therefore, for the above reasons I have no alternative but to dismiss Mrs Morgan's appeal and confirm the surcharges. However, as I indicated at the hearing I hope that Mrs Morgan and HMRC will be able to come to some agreement in respect of payment of the APN and surcharges.

Appeal Rights

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.

**JOHN BROOKS
TRIBUNAL JUDGE**

RELEASE DATE: 8 AUGUST 2017