[2018] UKFTT 436 (TC)

TC06626

Appeal number: TC/2018/01610

INCOME TAX – surcharges for failure to pay the tax set out in an accelerated payment notice – whether illness, anxiety and financial pressures caused by harassment at work, loss of employment status and/or a wedding amounted to a reasonable excuse – no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

SK BAINS **Appellant**

- and -

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

TRIBUNAL: JUDGE TONY BEARE

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 17 July 2018

The Appellant did not appear and was not represented

Mr K Birkin, Officer of HM Revenue and Customs, for the Respondents

DECISION

1. This decision relates to an appeal by the Appellant against:

(a) a surcharge of £765.62 which was issued under Section 59C(2) Taxes Management Act 1970 (the "TMA 1970") on 31 July 2017 for a failure to pay the amount of £17,545 due under an accelerated payment notice (an "APN") in respect of the tax year of assessment ending 5 April 2010 in full 28 days after the date when it was due to be paid; and

(b) a surcharge of £306.10 which was issued under Section 59C(3) TMA 1970 on 31 July 2017 for a failure to pay the amount of £17,545 due under an APN in respect of the tax year of assessment ending 5 April 2010 in full 6 months after the date when it was due to be paid.

Preliminary points

2. Before dealing with the substantive issues in this appeal, there are two preliminary points which I should make.

3. The first is that the Appellant did not appear at the hearing. However, before the hearing, I was provided with an email exchange between the parties dated 12 and 13 July 2018 which showed that the Appellant was aware of the hearing but was unable to attend because she had important overseas travel. In that exchange, the Appellant asked whether she would be able to provide the Tribunal with an additional statement for the purposes of the hearing, a request to which the Respondents agreed. However, the Appellant did not provide any such statement. Nevertheless, on the basis that the Appellant had already set out her arguments in full in the correspondence between the parties which preceded the hearing and in her notice of appeal, and on the basis that the Appellant had made a positive decision not to attend the hearing, I was satisfied that it was in the interest of justice to proceed with the hearing in her absence.

4. The second is that the Appellant's notice of appeal to the Respondents of 31 October 2017 was sent three months after the Respondents' letter of 31 July 2017 which notified the Appellant of the surcharges in question. The Appellant explained that the reason for her late notice was due to difficulties in receiving her post but, in any event, I note that she had previously indicated her intention to appeal against the surcharges by appealing, within the 30 day time limit, against earlier notices imposing the surcharges which the Respondents subsequently had had to withdraw and re-issue because of an error in the applicable dates set out in the notices. So the Respondents were already on notice over that three month period that the Appellant was intending to appeal against the surcharges. Perhaps for that reason, the Respondents have indicated that they are content to agree under Section 49(2)(a) TMA 1970 that this appeal may proceed notwithstanding the late notice but I would in any event have been minded to give permission to that effect under Section 49(2)(b) TMA 1970.

The relevant law

5. The relevant legislation in this case may be summarised as follows.

6. Section 219 Finance Act 2014 (the "FA 2014") sets out the circumstances in which an APN may be issued. It provides that:

"(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, or

(b) P has made a tax appeal (by notifying HMRC or otherwise) in relation to a relevant tax but that appeal has not yet been—

(i) determined by the tribunal or court to which it is addressed, or

(ii) abandoned or otherwise disposed of.

(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—

(a) HMRC has given (or, at the same time as giving the accelerated payment notice, gives) P a follower notice under Chapter 2—

(i) in relation to the same return or claim or, as the case may be, appeal, and

(ii) by reason of the same tax advantage and the chosen arrangements;

(b) the chosen arrangements are DOTAS arrangements;

(c) a GAAR counteraction notice has been given in relation to the asserted advantage or part of it and the chosen arrangements (or is so given at the same time as the accelerated payment notice) in a case where the stated opinion of at least two of the members of the sub-panel of the GAAR Advisory Panel which considered the matter under paragraph 10 of Schedule 43 to FA 2013 was as set out in paragraph 11(3)(b) of that Schedule (entering into tax arrangements not reasonable course of action etc).

(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

(c) arrangements in respect of which the promoter must provide prescribed information under section 312(2) of that Act by reason of the arrangements being substantially the same as notifiable arrangements within paragraph (a) or (b).

(6) But the notifiable arrangements within subsection (5) do not include arrangements in relation to which HMRC has given notice under section 312(6) of FA 2004 (notice that promoters not under duty imposed to notify client of reference number).

(7) "GAAR counteraction notice" means a notice under paragraph 12 of Schedule 43 to FA 2013 (notice of final decision to counteract under the general anti-abuse rule)."

7. Section 221 FA 2014 sets out the requirements in relation to the contents of an APN, one of which is the requirement for the APN to specify the amount of "disputed tax" which is required by the APN to be paid by the recipient of the APN. Section 221(3) FA 2014 defines the "disputed tax" as being "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" and Section 220(5) FA 2014 defines the "denied advantage" as "…in the case of a notice given by virtue of section 219(4)(b), … so much of the asserted advantage as is not a tax advantage which results from the chosen arrangements or otherwise".

8. Section 222 FA 2014 entitles a person receiving an APN to make representations to the Respondents that object to the APN on the grounds that conditions A to C in Section 219 FA 2014 are not satisfied or object to the amount of the accelerated payment required. Any such representations must be sent to the Respondents within 90 days of the date that the APN was given and the Respondents are obliged to consider the representations.

9. Section 55(8B) TMA 1970 stipulates that Sections 55(8C) and 55(8D) TMA 1970 apply where a person has been given an APN and the APN has not been withdrawn. Those provisions specify as follows:

"(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) the understated tax to which the payment specified in the notice under section 220(2)(b) of that Act relates,

(b) the disputed tax specified in the notice under section 221(2)(b) of that Act, or

(c) the understated partner tax to which the payment specified in the notice under paragraph 4(1)(b) of Schedule 32 to that Act relates.

(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."

10. Section 59C TMA 1970 – which has now been repealed but still has effect for the tax year of assessment which is the subject of this decision - provided 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.

(4) Where the taxpayer has incurred a penalty under section 7, 93(5) or 95 of this Act, no part of the tax by reference to which that penalty 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—

(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 [1989 c. 26.] 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 section 50(6) to (8) of this Act shall not apply but the Commissioners may—

(a) if it appears to them 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 to them, 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."

The facts

11. On 4 September 2013, the Respondents sent the Appellant an assessment under the discovery provisions in the TMA 1970 for the tax year of assessment ending 5 April 2010. The assessment related to arrangements into which the Appellant had entered under a contract of employment. The Appellant appealed against the assessment on 24 September 2013 and requested a postponement of the relevant tax liability to which the Respondents agreed.

12. On 9 April 2015, the Respondents advised the Appellant of their intention to issue an APN to the Appellant in respect of the tax year of assessment ending 5 April 2010 in relation to the Appellant's participation in the arrangements referred to above. The Respondents enclosed with their letter a fact sheet providing further information

on APNs and the penalties and surcharges which might be applied if the amount specified in an APN was not paid in full by the due date.

13. On 24 April 2015, the Respondents issued an APN to the Appellant in relation to the arrangements referred to above in respect of the tax year of assessment ending 5 April 2010. The APN was issued in the amount of £17,545 and specified that the due date for paying the tax was 3 August 2015. In a covering letter sent to the Appellant at the same time as the APN, the Respondents explained to the Appellant what action needed to be taken in relation to the APN and inviting the Appellant to contact the Respondents if she wished to settle matters or had problems in paying the amount specified in the APN.

14. The APN provided various information to the Appellant, including that the Appellant could become liable to surcharges if payment in full was not made by the due date and that the Appellant could not appeal against the APN but could make representations to the Respondents objecting to the APN if she believed that one or more of the conditions set out in Section 219 FA 2014 had not been met or that the amount shown in the APN was not correct.

15. On 29 July 2015, the Appellant submitted to the Respondents representations in relation to the APN and, on 15 January 2016, the Respondents issued a decision letter in respect of those representations, upholding the APN and confirming that the amount set out in the APN was correct. The decision letter also provided for a revised payment date of 19 February 2016.

16. On 17 February 2016, the Appellant telephoned the Respondents to ask for an instalment payment arrangement to be put in place in relation to the tax liability shown in the APN (as well as the tax liability shown in an APN with which she had been issued in respect of the tax year of assessment ending 5 April 2011 and which is not the subject of this appeal).

17. On 22 February 2016, the Respondents issued letters to the Appellant confirming that they had agreed to the payment of the tax liabilities shown in both APNs in instalments over a 12 month period. The letter in relation to the tax year of assessment ending 5 April 2010 detailed the precise amount of each instalment and the date by which such instalment was to be paid. The letter also made it clear that the Respondents would not impose surcharges in respect of the APN liability as long as each instalment was paid on or before its due date but that, if an instalment was paid late, or not paid in full, then surcharges might be imposed and calculated on the amount of the APN liability that was still outstanding at the time when the relevant surcharge became due.

18. The Appellant duly discharged the instalment payment obligations in respect of the tax year of assessment in question for the period from and including February 2016 to and including November 2016. However, she neither discharged the instalment payment obligation which was due on 18 December 2016 nor contacted the Respondents to explain the reasons for her default.

19. Accordingly, on 5 January 2017, the Respondents telephoned the Appellant to ascertain the reason for the default. The Appellant told the Respondents that she was unable to make the payment that was due on 18 December 2016 because of a lack of funds. She went on to say that she had felt pressured to accept the 12 month duration of the original instalment payment arrangement and would be unable to meet the terms of that arrangement. However, she thought that she might be able to discharge the two outstanding instalments by the end of April 2017 and that she would contact the Respondents with a revised payment proposal.

20. On 6 January 2017, the Respondents attempted to contact the Appellant to discuss a revised payment proposal. The call went straight through to voicemail and so the Respondents left a message asking the Appellant to call them back. On the same day, the Respondents sent a letter to the Appellant cancelling the existing instalment payment arrangement.

21. Negotiations between the parties on the terms of a revised payment proposal then ensued and these negotiations ultimately resulted in the parties' reaching an agreement on 3 February 2017 as to the terms of a revised instalment payment plan with which the Appellant then complied.

22. On 10 February 2017, the Respondents wrote to the Appellant to inform her that, as she had failed to meet the terms of the initial instalment payment arrangement and the initial instalment payment arrangement had been cancelled, the aggregate amount of the outstanding instalments in respect of the tax year of assessment ending 5 April 2010 of £3,063.50 was now due in full but that the Appellant should contact the Respondents' Debt Management and Banking team if she was continuing to have difficulties in paying. The letter also informed the Appellant that she was "now liable for a penalty". This letter was somewhat confusing because, as noted above, the Appellant had by then already agreed the terms of a revised instalment payment arrangement and had formed the impression that no surcharges or penalties would arise in relation to her previous default. However, the Respondents subsequently on the telephone clarified that, whilst the terms of the revised instalment payment arrangement still stood, and the Appellant was not obliged to pay the outstanding amount of tax in full immediately,this did not relieve the Appellant from the surcharges arising as a result of her default in respect of the initial instalment payment arrangement and that the Appellant would need to appeal against those if she wanted to avoid paying them.

23. On 17 February 2017, the Respondents issued to the Appellant the two notices of surcharge that have ultimately led to this appeal. The first notice, in the amount of £765.62 ,was equal to 5% of the amount of the APN liability remaining outstanding at 18 March 2016, which the Respondents alleged to be 28 days after the APN liability became due (£15,312.50) and the second notice, in the amount of £306.10, was equal to 5% of the amount of the APN liability remaining outstanding at 18 August 2016, which the Respondents alleged to be 6 months after the APN liability became due (£6,122).

24. On 12 March 2017, the Appellant appealed against both surcharges, setting out the grounds for her appeal and enclosing some supporting documentation.

25. On 31 March 2017, the Respondents issued a letter to the Appellant setting out their view of the matter in relation to the surcharges. The letter noted that the surcharges referred to in paragraph 23 above had been incorrectly calculated because they had been based on an incorrect due date for paying the APN liability and that therefore the surcharges would be withdrawn and re-issued at a later date based on the correct due date for payment.

26. On 31 July 2017, the Respondents duly re-issued the two surcharge notices, using the date of 19 March 2016 as the date falling 28 days after the APN liability became due and the date of 20 August 2016 as the date falling 6 months after the APN liability became due. The minor changes in dates described above did not affect the amount of either surcharge.

27. On 31 October 2017, the Appellant appealed against the re-issued surcharge notices, explaining that her appeal was late as a result of issues with the post. The grounds of appeal were broadly the same as the grounds of the Appellant's appeal against the original surcharge notices.

28. On 23 November 2017, the Respondents issued a letter to the Appellant setting out their view of the matter and upholding the surcharges.

29. On 21 December 2017, the Appellant sought a review of the decision and, on 30 January 2018, the Respondents concluded their review by upholding their decision to impose the relevant surcharges.

30. On 28 February 2018, the Appellant notified this Tribunal of her appeal against the surcharges.

The grounds of appeal

31. In her notice of appeal to the Respondents and her notice of appeal to this Tribunal, the Appellant does not allege that there was any defect in the APN in question or that she has in fact complied with the terms of the initial instalment arrangement that she agreed with the Respondents. Instead, she alleges that she has a reasonable excuse for not paying the APN liability throughout the period of her default with the result that this Tribunal should set aside the surcharge pursuant to Section 59C(9)(a) TMA 1970.

32. More particularly, the Appellant alleges that:

> (a) She felt pressured by the Respondents to agree to a 12 month instalment payment period in the first place and would have preferred a longer payment period. Given her anticipated income and expenditure, it was always going to be huge challenge to meet her obligations under the arrangement;

(b) As it transpired, she had in fact discharged on time 10 of the 12 instalment payments and feels that she should get some credit for that fact;

(c) She has been gravely ill with stress, overwhelm, anxiety and low moods and has the medical evidence to support that fact;

(d) She got married on 16 July 2016. This was a huge life event. It gave rise to lots of pressures and expectations given her cultural background and it also led to financial pressures;

(e) She was suffering from harassment at work which was at its height in September 2016, three months before the instalment payment arrangement failed. The harassment led to her having to see a psychiatrist and she was dismissed from her employment on 16 September 2016; and

(f) She feels let down by the Respondents because the Respondents failed properly to articulate or illustrate how the surcharges could arise and, in particular, that the surcharges could arise on monies that had already been paid. If she had known that this was the case, the surcharges would be less likely to have arisen.

33. In support of her grounds for appeal, the Appellant has provided two referral letters from a company called Babylon Health. One of those letters, dated 13 February 2017, referred to the fact that the Appellant had been suffering pain around her ears and recommended that she consult an ENT surgeon and another, dated 15 February 2017, referred to the fact that the Appellant was feeling overwhelmed and irritable and had had a difficult period at work, concluded that she had a mild depressive illness and recommended that she consult a therapist.

Discussion

34. It is well-established that, in a case such as this one which relates to surcharges, it is for the Respondents to establish that the circumstances that have led to the imposition of the surcharges have occurred and, if they do, it is then for the Appellant to establish that she has a reasonable excuse for the default that has led to the surcharges.

Issues for the Respondents

35. The surcharges which are at issue in this appeal have been imposed under Sections 59C(2) and 59C(3) TMA 1970. Those sections apply to any income tax which has become payable in accordance with Section 55 TMA 1970 (see Section 59C(1) TMA 1970).

36. By virtue of the amendments made to Section 55 TMA 1970 by Section 224 FA 2014, Sections 55(8C) and 55(8D) TMA 1970 apply "where a person has been given an accelerated payment notice…under Chapter 3 of Part 4 of the Finance Act 2014 and that notice has not been withdrawn" (see Section 55(8B) TMA 1970).

37. Sections 55(8C) and 55(8D) TMA 1970 provide that, in these circumstances, any disputed tax may not be postponed and any disputed tax that has previously been

postponed ceases to be postponed and becomes due and payable on a date determined in accordance with Section 55(8D) TMA 1970. The latter provision states that, where the taxpayer has made representations, as in this case, the relevant date is the later of the last day of the period of 90 days beginning with the day when the APN was given and the last day of the period of 30 days beginning with the day on which the Respondents' determination in respect of those representations is notified to the taxpayer under Section 222 FA 2014.

38. Where Section 59C TMA 1970 applies, Section 59C(2) imposes a surcharge on the taxpayer equal to 5% of the unpaid tax if the tax has not been paid on the day following the expiry of 28 days from the due date and Section 59C(3) TMA 1970 imposes a surcharge on the taxpayer equal to 5% of the unpaid tax if the tax has not been paid on the day following the expiry of 6 months from the due date. Section 59C(5) requires notice of any such surcharge to be served on the taxpayer and state the day on which it is issued and the time within which an appeal against the imposition of the relevant surcharge may be brought.

39. The above provisions mean that the first question which arises in this case is whether Sections 55(8B) to 55(8D) TMA 1970 apply. In order for that to be the case, the Appellant must have received "an accelerated payment notice" (see Section 55(8B) TMA 1970). This raises the question of whether, in order to discharge the burden which is upon them, the Respondents need merely show that what they issued to the Appellant purported to be an APN or whether the Respondents must also show that they were entitled to issue an APN by virtue of the fact that each of conditions A to C in Section 219 FA 2014 was satisfied in relation to the purported APN (because, if not, the relevant notice was not an APN).

40. I find this to be a difficult question.

41. When one looks at the structure of Chapter 3 Part 4 FA 2014, the definition of an "accelerated payment notice" is set out at the start of Section 219 FA 2014 and a number of the subsequent provisions in the chapter – Sections 220, 221, 222 and 223 FA 2014 - all simply refer to an APN's having been given. The language used in those subsequent provisions is therefore on all fours with the language used in Section 55(8B) TMA 1970. This strongly suggests that the phrase "accelerated payment notice" when it is used in Section 55(8B) TMA 1970 must bear the same meaning as it does when it is used in those subsequent provisions.

42. The definition in question appears immediately after the word "notice" in Section 219 FA 2014. It therefore seems to me that it could be interpreted as meaning simply a notice which purports to be an APN or alternatively a notice which both purports to be an APN and is given in circumstances where each of conditions A to C has been satisfied. If the latter interpretation were to be correct, a notice which purported to be an APN but was given in circumstances where one or more of conditions A to C was not satisfied would not be an "accelerated payment notice" as defined.

43. In considering these alternatives, I have considered the views expressed by Judge Richards at paragraphs [27] to [29] of his decision in *Joginder Nijjar v The Commissioners for Her Majesty's Revenue and Customs* [2017] UKFTT 175 (TC) ("*Nijjar*") to the effect that, in penalty proceedings under Section 226 FA 2014, it is not necessary for the Respondents to establish that each of conditions A to C in Section 219 FA 2014 was satisfied in relation to the purported APN.

44. Judge Richards in *Nijjar* was dealing with a situation where a penalty had been imposed under Section 226 FA 2014 for a failure to pay the amount set out in an APN given while a tax enquiry was in progress, whilst this case concerns surcharges imposed under Section 59C TMA 1970 for a failure to pay the amount set out in an APN given while an appeal has not been determined or disposed of. So his comments were made in a slightly different context from the context of this appeal.

45. However, I believe that similar reasoning to that set out by Judge Richards applies in this appeal. In particular, like Judge Richards, I find it compelling that Parliament has not provided for a taxpayer who receives a notice which purports to be an APN to have a right of appeal to this Tribunal on the grounds that that notice was not issued in circumstances where each of conditions A to C was satisfied. Any such challenge by a taxpayer would need to be made by way of judicial review to the High Court. That being the case, it would be odd if a taxpayer could succeed in his or her appeal in the surcharge proceedings on the basis that the notice which has given rise to the surcharges in question and purports to be an APN was not in fact an APN because it was issued in circumstances where one or more of conditions A to C in Section 219 FA 2014 was not satisfied.

46. Further support for this interpretation may be found in the fact that, as noted above, each of Sections 220, 221, 222 and 223 FA 2014 contains the same language as Section 55(8B) TMA 1970 and Section 222 FA 2014, in particular, would make little sense if the reference at the start of that provision to "an accelerated payment notice" meant a notice that not only purported to be an APN but was also necessarily issued in circumstances where each of conditions A to C in Section 219 FA 2014 was satisfied.

47. For the above reasons, I consider that the Appellant has received an APN simply by virtue of the fact that she has received a notice purporting to be an APN and that therefore Sections 55(8B) to 55(8D) TMA 1970 do apply in this case.

48. That means that the due date for the Appellant to have paid the disputed tax set out in the APN is the later of the last day of the period of 90 days beginning with the day when the APN was given and the last day of the period of 30 days beginning with the day on which the Respondents' determination in respect of the Appellant's representations were notified to the Appellant. The second of those two dates is clearly the one which applies in this case because the APN was dated 24 July 2015 and the Respondents' determination in respect of the Appellant's representations was dated 15 January 2016.

49. It is then necessary to consider whether the due date of 19 February 2016 which was specified by the Respondents in their letter of 15 January 2015 is correct because that date then informed both each date on which a surcharge under Section 59C TMA 1970 became due and the amount of tax which was unpaid on the relevant date and was used to calculate the relevant surcharge.

50. In that regard, my initial inclination was to consider that the due date should have been slightly earlier than 19 February 2016 because the last day of the period of 30 days beginning with 15 January 2016 (the date of the Respondents' letter) was 13 February 2016. However, on further reflection, I believe that the Respondents have correctly allowed for the fact that the Appellant was not "notified" of their determination in respect of the Appellant's representations until she received that letter.

51. It is not entirely clear whether, in calculating the due date with that in mind, the Respondents simply allowed for a reasonable period of time to elapse within which the letter would reach the Appellant or whether the Respondents adopted a more exact approach based on the terms of Section 7 Interpretation Act 1978 (the "IA 1978") and the terms of the Practice Direction of 8 March 1985 by the Queen's Bench Division (the "PD") but, I believe that, in any event, the due date of 19 February 2016 does in fact reflect the terms of the IA 1978 and the PD. This is because, pursuant to those terms, the Respondents' letter would have been received 4 working days after the date of the letter assuming that it was sent by second class mail. On that basis, the letter would be treated as having been received by the Appellant on 21 January 2016 and the 30 day period beginning with that date would have ended on 19 February 2016. (I would add that, in this case, the fact that the Respondents' have proceeded on the basis that the 30 day period started from the date when the Appellant would have received their letter and not from the date of the letter itself is helpful to the Appellant because, if the due date and, hence, the days on which the surcharges arose, were each to have been 6 days earlier than the respective days that have been identified as such by the Respondents, the relevant surcharges would have been slightly higher than they actually are. This is because the Appellant's instalment payment dates were on the 18th of each month and therefore, in each case, an additional instalment was paid by the Appellant between the earlier date and the later date so that the surcharges were, in each case, calculated by reference to a lower amount of unpaid tax.)

52. The second question is whether the surcharges under Section 59C TMA 1970 have been correctly determined in accordance with that section and that each surcharge notice complies with the requirements of Section 59C(5) TMA 1970. Based on the material provided to me, I have concluded that the surcharges have been correctly determined in accordance with Section 59C TMA 1970 (although I note, in passing, that:

> (a) the amount which the Appellant was due to pay on 18 February 2016 under the terms of the instalment payment arrangement letter of 22 February 2016 (£1,727.50) was £5 lower than the amount which the Appellant appears actually to have paid on that date (£1,732.50); and

(b) The amount shown in the table on page C79 of the document bundle as the outstanding balance immediately after the instalment payment of 17 August 2016 was made should read £6,122 and not £6,112)

and that each surcharge notice complies with the requirements of Section 59C(5) TMA 1970 in that it states the day on which it was issued and specifies that any appeal must be made in writing within 30 days of the relevant notice.

53. The third question is whether the Appellant both failed to discharge the tax set out in the APN in full on or before the due date and on or before each later date which was relevant for the purposes of Sections 59C(2) and 59C(3) TMA 1970 and defaulted in her obligations under the instalment payment arrangement pursuant to which the operation of the surcharge regime had been suspended. It is accepted by the Appellant that this is the case. The effect of the Appellant's entering into the instalment payment arrangement with the Respondents was to suspend the operation of the surcharge regime in Section 59C TMA 1970 but it was made clear to the Appellant at that time that, if she were to default on any of her instalments, then the arrangement would be cancelled and the surcharge regime would then apply in the usual way on the basis of the amount of the disputed tax which was outstanding on the relevant surcharge date. The Appellant did default in respect of her obligations under the instalment payment arrangement and therefore it is clear that she became liable for the surcharges in the absence of a reasonable excuse for the purposes of Section 59C(9) TMA 1970.

54. Finally, it is not clear to me that, in order to establish that the surcharges in this case have been correctly imposed, the Respondents need to show that the APN fulfilled the requirements set out in Section 221 FA 2014. For the reasons set out in paragraphs 41 to 46 above, I believe that a notice which purports to be an APN does not cease to be an APN simply because it fails to fulfil the requirements set out in Section 221 FA 2014 and therefore that, as is the case in relation to a notice purporting to be an APN which the recipient taxpayer believes to have been issued in circumstances where one or more of conditions A to C in Section 219 FA 2014 was not satisfied, a taxpayer's only redress in circumstances where a notice which purports to be an APN does not fulfil the requirements in Section 221 FA 2014 is an application for judicial review to the High Court. There is no right of appeal to this Tribunal in Chapter 3 Part 4 FA 2014 for any such failure and there is nothing in the terms of Sections 59C(7) et seq. TMA 1970 to suggest that a taxpayer who is appealing against surcharge under that provision may do so on the basis that the relevant APN did not fulfil the requirements in Section 221 FA 2014.

55. However, on the basis that the Respondents in this case clearly assumed that they needed to satisfy me that the APN in this case fulfilled the requirements in Section 221 FA 2014 in order to substantiate the surcharges, I have considered whether the APN in this case did fulfil those requirements. In my view, it did do so because it specified the paragraph of Section 219(4) FA 2014 by virtue of which it was given (so that Section 221(2)(a) was satisfied), specified the disputed tax (so that Section 221(2)(b) was satisfied) and explained the effects of Section 222 FA 2014 and of the amendments made by Sections 224 and 225 FA 2014 so far as relating to the

relevant tax in relation to which the APN had been given (so that Section 221(2)(c) was satisfied) and Section 221(2)(d) is not in point in these circumstances.

56. For the above reasons, I consider that the Respondents have discharged the burden of proving that the surcharges in this case have been correctly imposed unless the Appellant can show that she had a reasonable excuse for her failure.

Reasonable excuse

57. Turning then to the question of whether or not the Appellant did have a reasonable excuse for her failure, the Appellant has alleged that she has a reasonable excuse for the following reasons:

(a) She felt pressured by the Respondents to enter into a 12 month instalment payment period instead of a longer instalment payment period;

(b) The Respondents did not clearly explain to her the nature of her obligations following her receipt of the APN and how the surcharges would be calculated in the event of a failure to discharge her obligations under the instalment payment arrangement;

(c) Health problems which led to her being recommended to consult a therapist and an ENT surgeon;

(d) The stress and anxiety caused by harassment at work and her wedding; and

(e) The financial cost of her wedding and the financial impact on her of her loss of employment;

58. Before considering whether any one or more of the above reasons amounts to a reasonable excuse for the Appellant's failure to pay the tax set out in the APN on its due date or to meet her obligations under the instalment payment arrangement, it is worth noting three preliminary points as follows:

(a) First, in accordance with Section 59C(10) TMA 1970, an inability to pay the tax in question is not regarded as a reasonable excuse. However, the circumstances which led to that inability to pay the tax might constitute a reasonable excuse if, for example, the circumstances in question were unavoidable or unforeseen. In addition, the taxpayer might also have a reasonable excuse for failing to pay the tax in circumstances where the failure is not attributable to an inability to pay the tax;

(b) Secondly, in order for the Appellant to succeed in her appeal, it is not enough for her to make a vague allegation that a particular hardship or particular circumstances led to her defaulting in the relevant instalment payment obligations. Instead, in order to discharge the burden of establishing that she has a reasonable excuse, she needs to show that the relevant hardship or circumstances prevented her from meeting those obligations and to provide evidence to that effect; and

(c) Finally, there is a by now well-established definition of what amounts to a reasonable excuse, as laid down by Judge Medd in *The Clean Car Company Limited v The Commissioners of Customs and Excise* [1991] VATTR 234 ("*Clean Car*"). In *Clean Car*, Judge Medd stated as follows:

"It has been said before in cases arising from default surcharges that the test of whether or not there is a reasonable excuse is an objective one. In my judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do? Put in another way which does not I think alter the sense of the question: was what the taxpayer did not an unreasonable thing for a trader of the sort I have envisaged, in the position the taxpayer found himself, to do?"

59. Applying the above principles in the present case, whilst I sympathise with the Appellant for the difficulties which she has undergone, I do not think that any of the reasons which are set out in paragraph 57 above can properly be said to amount to a reasonable excuse for her failure to meet her instalment payment obligations.

60. As regards the reason set out at paragraph 57(a) above, the alternative to entering into the instalment payment arrangement was for the Appellant to pay the tax set out in the APN in full within 30 days of receiving the Respondents' letter of 15 January 2016. Since an inability to pay the tax at that point would not have been a reasonable excuse, the fact that the Appellant was unable to persuade the Respondents at that point to agree to a period of longer than 12 months within which to discharge the tax cannot be a reasonable excuse. The Respondents were not obliged to accede to any instalment payment proposal. Instead, they were exercising a discretion in agreeing to the terms of a 12 month instalment payment regime and therefore their refusal to agree to a longer instalment payment period cannot amount to a reasonable excuse.

61. As regards the reason set out at paragraph 57(b) above, the Appellant has not explained how the absence of suitable information from the Respondents has led her to default in the payment of the tax under the instalment payment arrangement. Given that her allegation is that she was unable to make the instalment payments in December 2016 and January 2017, it isn't clear to me how her receiving clearer information from the Respondents as to how the surcharges would be calculated in the event of her default would have enabled her not to default.

62. Having said that, I agree with the Appellant that the Respondents' letter of 22 February 2016 could have been clearer in explaining that a default under the instalment payment arrangement could give rise to surcharges calculated retrospectively on an amount of tax which had already been paid under the instalment payment arrangement before the default. The second and third sentences in the section of that letter dealing with surcharges said as follows:

"However, if you pay any of the instalments late, or don't pay in full, then we may charge surcharges.

If we do charge surcharges, we will calculate them based on the amount that was still unpaid at each date that a surcharge is chargeable."

I think that the above might reasonably be construed as saying that, if there were to be a default under the instalment payment arrangement, then a surcharge would at that point arise and be calculated by reference to the outstanding amount of tax at that point. Although the next sentence of the relevant section then does direct the reader to the section on surcharges in the APN itself, and one can see from that section that the surcharges in question would arise on the dates set out in that section and not on the date when the instalment payment arrangement is cancelled because of the taxpayer's default, I believe that a reader of the letter might still be forgiven for thinking that the latter would be the case. Be that as it may, as mentioned above, I do not think that the Appellant's misunderstanding of the rules in relation to how the surcharges would be calculated in the event of her default under the instalment payment arrangement can be said to be a reason for her failure to pay the relevant instalments.

63. As regards the reason set out at paragraph 57(c) above, the Respondents have pointed out that the Appellant's default under the instalment payment arrangement occurred in December 2016, some two months before the medical recommendations mentioned in that paragraph. Moreover, the documents submitted by the Appellant do not explain how long the symptoms referred to in the ENT-related recommendation had continued and neither of the documents sheds any light on how the symptoms referred to in them impacted on the Appellant's day-to-day life or the Appellant's ability to handle her affairs during the period in question. For that reason, I do not think that the Appellant has discharged the burden of establishing that the reason set out at paragraph 57(c) above was the cause of her defaults in December 2016 and January 2017.

64. As regards the reason set out at paragraph 57(d) above, again, the Appellant has provided no evidence as to how the wedding which took place in July 2016 and the harassment which the Appellant suffered at work prior to the termination of her employment in September 2016 prevented her from discharging the instalments that were due in December 2016 and January 2017. Indeed, the Appellant continued to make her instalment payments up to and including the instalment payment in November 2016 notwithstanding those stresses.

65. Finally, as regards the reason set out at paragraph 57(e) above:

> (a) I do not see how the financial costs which were associated with the Appellant's wedding can amount to a reasonable excuse, given the terms of Section 59C(10) TMA 1970. At the time when she decided to get married, the Appellant would have been aware of her obligation to discharge the tax by instalments and the extent of the remaining instalments. So, if she chose to enter into additional financial commitments associated with the wedding at that point, that cannot

amount to a reasonable excuse. An inability to pay the tax caused by the voluntary acceptance of another financial commitment at a time when the extent of the tax obligation was known does not meet the objective standard described in *Clean Car*; and

(b) As for the Appellant's loss of employment, whilst that could amount to a reasonable excuse in the appropriate circumstances, it would need to be clear from the evidence provided that the loss of employment was the cause of the default. In this case, the Appellant left her employment in September 2016 but still made three instalment payments after that date. Moreover, the Appellant obtained new employment shortly after September 2016. Precisely when she did so is not clear but, by the time of her call with the Respondents on 20 January 2017, the Appellant was already re-employed and she managed to discharge the outstanding amount of tax under the new instalment payment arrangement. The Appellant has produced no evidence to support her contention that her employment status after September 2016 was the cause of her default. She could have produced evidence in the form of bank statements or other material and she could have provided written or oral evidence to establish that nexus but she did not do so. In the circumstances, I do not believe that the Appellant has discharged the burden of establishing a sufficient connection between her loss of employment in September 2016 and her failure to meet the December 2016 and January 2017 instalment payments.

66. For the above reasons, I dismiss the Appellant's appeal and confirm the imposition of the two surcharges that are the subject of this appeal.

67. 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.

TONY BEARE
TRIBUNAL JUDGE

RELEASE DATE: 6 AUGUST 2018