



Appeal number FTC/68/2010

***INCOME TAX – late filing penalties – late payment surcharges –
reasonable excuse – continuing mental incapacity – TMA 1970 SS 93 and
59C – Appeals allowed***

**UPPER TRIBUNAL
TAX CHAMBER**

Ms AZ

Appellant

- and -

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

Respondents

**TRIBUNAL: SIR STEPHEN OLIVER QC
HOWARD NOWLAN**

Sitting in public at 45 Bedford Square, London WC1 on 17 March 2011

Peter Torino of AIMS Accountants, for the Appellant

Andrea Beveney, Solicitor for HM Revenue and Customs, for the Respondents

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DECISION

1. Ms AZ appeals against the decision of the First Tier Tribunal (the Tribunal). That decision related to appeals against:

- 5 (i) fixed penalties for late filing (section 93 Taxes Management Act 1970) for the years 2002/03 and 2007/08 and
- (ii) surcharges on unpaid tax (section 59C TMA) for the years 2002/03, 2003/04, 2005/6, 2006/07, 2007/08 and 2008/09.

10 The Tribunal dismissed the appeals, all of which raised the “reasonable excuse” defence, against the late filing penalty for 2007/08 and against the surcharges for 2006/07 and 2007/08.

15 2. Ms AZ (whose name was anonymised in this way by the Tribunal) had contended before the Tribunal (through Mr Peter Torino, her accountant) that all the penalties and all the surcharges were covered by the same continuing reasonable excuse, namely post traumatic stress suffered by her as the result of a violent robbery in early 2003. That condition continued throughout the periods covered by the penalties and the surcharges. All of them, should therefore, be discharged.

20 3. HMRC had contended that the provisions of sections 59C and 93 required that the circumstances of each default should be examined separately; this was based on the statutory requirement that reasonable excuse must exist throughout the period of default.

The Tribunal’s decision

25 4. The Tribunal upheld the approach of HMRC. The reasonable excuse had not, it concluded, covered the penalty for non-filing of the 2007/08 return and the surcharges for unpaid taxes for 2007/08 and 2008/09. The decision appealed against can be summarised as follows:

- 30 (i) For purposes of section 59C and 93 the reasonable excuse relied upon must exist throughout the period of default. Consequently the circumstances of each penalty and of each surcharge must be examined separately.
- 35 (ii) Ms AZ had established a reasonable excuse for the late filing of the 2002/03 return because that default occurred within 18 months of the robbery and when she was still needing time to bring her affairs up to date. Regarding the late filing of the 2007/08 return (due in January 2009) the Tribunal noted that earlier filings had been made on time and that Ms AZ had had professional representation since August 2004; the Tribunal concluded that Ms AZ had not discharge the burden of proof on her to demonstrate a reasonable excuse for that late filing.

(iii) Ms AZ had established reasonable excuse for the later payments of tax for 2002/03, to 2003/04 and 2005/06. While section 93C(10) rules out a tax payer's inability to pay from ranking as a reasonable excuse, the Tribunal was entitled to take account the reasons for the inability which included her loss of funds as a result of the robbery. The Tribunal was not satisfied that Ms AZ's explanation for the late payments for 2006/07 and 2007/08, namely her general state of bad health at the time, amount to a reasonable excuse.

The facts as set out in the Tribunal's Decision

5. Ms AZ is a self-employed qualified massage therapist. In February 2003 she was the victim of a vicious robbery that left her with both physical and psychological injuries. Her bank cards were stolen and the contents of her bank cards were systematically emptied – even going into substantial unauthorised overdraft. The monies Ms AZ had earmarked for her income tax payments were among the funds lost. It took the bank some two years to sort out the account. Ms AZ became homeless, relying on the kindness of acquaintances or sleeping on the floor of the clinic where she worked. She was told she was not eligible for state benefits, and that she was not a priority case for housing. There were times when she could not afford to eat properly. She gradually resumed her work, at first hampered by her own injuries. Her psychological state was poor as a result of the trauma of her attack; even years after the robbery she still suffered periods of severe depression. In December 2006 Ms AZ had a 2¼ hour meeting with HMRC officers which she felt was unhelpful and unsympathetic to her position. The Tribunal had sight of the consultant psychiatrist's report prepared for the Criminal Injuries Compensation Authority in March 2009, which diagnosed Post Traumatic Stress Disorder (PTSD) and a prognosis that PTSD drags on chronically and quantifying the impact accurately is very difficult. The consultant commented in the report – “Ms AZ has continued to work out of necessity, despite PTSD, since the attack. Many patients with her degree of symptoms would have discontinued working.”

6. The Tribunal noted that Ms AZ had made commendable efforts to resume her career after the attack. She had gradually increased her turnover until she was billing approximately £1,000 per week, allowing for normal vacations. She had retained a number of accounts in relation to her tax affairs before Mr Torino took over in 2009.

Conclusions on the Tribunal's application of the law

7. We are satisfied that there was no error of law in the Tribunal's construction of sections 93 and 59C. The proper approach required the Tribunal to determine whether Ms AZ had a reasonable excuse for her late filing of her tax returns and her late payment for the tax liabilities for the relevant years. The Tribunal rightly approached each penalty and each surcharge covered by each separate appeal by examining the circumstances of each separate penalty. In this respect the Tribunal correctly considered and interpreted section 93 of TMA which states:

“(1) This section applies where –

- (a) any person (the taxpayer) has been required by a notice ... to deliver any return, and
- (b) he fails to comply with the notice.
- (2) The taxpayer shall be liable to a penalty which should be £100.
- 5 ...
- (8) On the an appeal against the determination ... of a penalty under subsection (2) ... the Tribunal may –
 - (a) if it appears to them that, throughout the period of default, the taxpayer had a reasonable excuse for not delivering the return, set the determination aside;
 - 10 ...”

Further, the Tribunal correctly considered an interpreted section 59C which applies to the payment of a tax liability for “any year of assessment”.

8. To summarise, the wording of the legislation for the imposition of a surcharge or a penalty shows that the imposition of such surcharge or penalty, as the case may be, is in relation to a year of assessment. Therefore “period of default” to which a reasonable excuse may apply refers to the period of default for that year of assessment. It does not apply to an extended period of default that covers a number of years as Ms AZ appeared to have implied.

20 Decision Notice giving Permission to Appeal to the Upper Tribunal

9. The judge of the Upper Tribunal dealt with the Application on paper. In giving permission he observed that the right of appeal is limited to a point of law (section 11 of Tribunals, Courts Enforcement Act 2007) and stated –

25 “It seems to me arguable that the First Tier Tribunal made an error of law in accepting the consulting psychiatrist’s report of March 2009 but failing to take into account in considering the taxpayer’s excuse referring to her general state of bad health at the time of the due date for filing the 2007/08 return and the date for payment of the tax due for 2006/07 and 2007/08. It is also arguable that the fact that she was represented should not prevent the existence of a reasonable excuse on the ground that she was unable to instruct her representative properly.”

The Consultant Psychiatrist’s Report

10. This was prepared at the request of the Criminal Injuries Compensation Authority. It states–

35 “I am specifically asked to assess the nature and extent of any mental injury sustained as a result of the incident on the 10th February 2003 and to comment on its effect, if any, on the applicant’s earning capacity now and in the future.”

The Report contains a history of the incident and of Ms AZ's physical injury. It observes that in addition to those injuries she has sustained considerable financial and social problems. Her assailants had stolen her credit cards and there was a problem blocking the cards with her bank. As a result her bank account was cleared of all money and she had lost her temporary accommodation in Kentish Town. Over the next two years she had been unable to find accommodation and had apparently been considered as no priority for council housing. Consequently she had moved through 53 different addresses and on occasion had been obliged to sleep, on occasional nights at a railway station. She had worked on and off part time throughout those two years, despite her injuries.

11. Under the heading of an "Current Psychological Symptoms" it records severe insomnia, sensual illusions and "avoidance symptoms", stating as one such current symptom that – "She is avoidant of all correspondence to do with the Inland Revenue and the CICA", and a resentment of the fact that the Inland Revenue had pursued her for payment when her assailant cleared her bank accounts. The report states in the passage headed "Opinion":

"I am of the opinion that Ms AZ is current suffering post traumatic stress disorder six years after the crime was committed. Her symptoms include sleep disturbance, intrusive visual flash backs, disturbance of mood and numerous avoidance symptoms. She is on the waiting list for specialist NHS psychological treatment to address this problem."

The Report concludes with this passage:

"It is my professional opinion that she is likely to remain disabled by PTSD over the coming years and this will have an impact on her earning capacity. Quantifying the impact accurately is very difficult."

12. We note that the interview with the consultant psychiatrist took place on 11 February 2009 which was less than two weeks after the due date for payment of the tax for the 2007/08 period. The Report concentrates on the then current state of Ms AZ's mental (and physical) health. It must therefore be relevant, not just to reasonable excuse defence for the surcharge for non-payment by 31 January 2009, but also to all earlier late payments and defaults.

13. The Tribunal has recorded the existence of the consultant's psychiatrist's report as a fact. The Tribunal, we think, failed to take its content and impact into account in determining the existence of reasonable excuses in relation to the compliance defaults in the years 2008 and 2009. In this connection we mentioned that the CICA made a high level financial award to Ms AZ at the end of the compensation proceedings. This was not provided by Ms AZ either to the Tribunal or to us; but we infer that the award was placed at that high level because of the long term and continuing disablement suffered by Ms AZ as a result of the robbery.

Professional Advisers

14. Ms AZ submits in her written argument that the Tribunal cited “the fact that the taxpayer had professional representation as evidence of the lack of reasonable excuse regarding the 2007/08 return.” Ms AZ further states that it is incorrect to imply that all is well with the taxpayer just because they have appointed a tax adviser. We accept that the Tribunal did not make this implication and that the Tribunal did not rely solely on the appointment of a tax adviser as evidence that Ms AZ did not have a reasonable excuse. We were told by HMRC in the course of the present hearing, however, that since the robbery Ms AZ has used the services of five different advisers (or representatives). We see that as a symptom of Ms AZ’s mental condition and her aversion to tax compliance matters. The rapid turnover of advisers’ evidences her inability to comply and, we think reinforces her reasonable excuse.

Conclusion

15. It is clear from the evidence that Ms AZ’s mental health has been severely impaired as a result of the robbery and the assault. We accept the consultant psychiatrist’s evidence that her mental state has caused and will continue to cause “avoidance symptoms” and these cover areas such as her dealings with the Inland Revenue. We know from our own experience that mental health problems cause widespread compliance difficulties for both taxpayers and HMRC. In our view the Tribunal failed to take account of the information contained in the consultant psychiatrist’s report. The consultant psychiatrist’s assessment of the level of Ms AZ’s mental difficulties was of sufficient significance to warrant the high monetary award made by the CICA. Those factors demonstrate to our satisfaction that Ms Börjesson’s mental state at the time of each compliance default and each non-payment of tax was such as to provide her with a reasonable excuse for purposes of sections 59(8)(a) and 50C(9)(a).

16. In the light of those circumstances, which we find as facts, we remake the decision of the Tribunal as follows:

- (i) The appeal against the fixed penalty for late filing for the year 2007/08 is allowed:
- (ii) The appeals against the surcharges for unpaid tax for the years 2007/08 and 2008/09 are allowed.

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Costs

17. We award Ms AZ an amount in respect of her costs of the appeal. Such amount is to be agreed and, if not agreed, the matter is to be referred to the Upper Tribunal for further Directions.

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SIR STEPHEN OLIVER QC

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HOWARD NOWLAN

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RELEASE DATE: 15 April 2011

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