



TC01364

Appeal number: TC/2011/1891

Late filing penalty section 93 TMA- surcharge- difficulties with electronic submission of return- reasonable excuse? Appeal dismissed

FIRST-TIER TRIBUNAL

TAX

MRS ADEFOLAKE DARE

Appellant

- and -

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

Respondents

TRIBUNAL: CHARLES HELLIER (TRIBUNAL JUDGE)

The Tribunal determined the appeal on 30 June 2011 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 11 February 2011 and HMRC's Statement of Case submitted on 14 April 2011

DECISION

1. Mrs Dare appeals against two penalties of £100 each imposed for the late filing of her tax return for the year to 5 April 2009, and against the imposition of a surcharge of £259.50 for the late payment of tax for that year. Her notice of appeal also suggests that she appeals against the interest charged on the late payment.
2. Mrs Dare does not dispute that her return was filed late. It was filed online on 5 September 2010, just over seven months after the date it was due to be filed. She does not dispute that the tax, which was due on the same date, was paid on 27 October 2010, between seven and eight months late.
3. In her notice of appeal Mrs Dare said she made several telephone calls in January 2010 to HMRC to obtain an activation code or online password so that she could complete her return online. She says that when, by 1 February 2010, she had not received them she spoke to Mr Tony at HMRC who explained that there were technical problems and that once they were resolved she would be sent the log in details. Those details were eventually sent to her and she submitted her return and paid the tax.
4. In her request for a review to HMRC Mrs Dare makes the same point. She notes the phone calls in January and gives the precise time of her call with Mr Tony on 1 February. She says she was advised that she would be sent the necessary details to access the online system.
5. It appears that no notification was sent, and Mrs Dare did not contact HMRC again, until August 2010. Following that call she received the code notification and submitted her return and paid the tax a few days later.
6. In these circumstances Mrs Dare says that it is unfair to impose penalties, surcharges and interest.

Discussion

(a) the late filing penalties

7. The tribunal was supplied with a copy of HMRC's "SA Notes" . This copy had the majority of its entries blacked out. Only two entries were intelligible: one relating to a call on 13 August in which Mrs Dare says that she was still waiting for a PIN, and one on 19 January 2010 in which Mrs Dare seems to have sought a PIN. Between these two entries there is a blacked out entry.
8. The blacking out of the entries makes it very difficult for the tribunal to assess this record. The intervening entry could have been very relevant to the appeal. Earlier entries may have been illuminating.
9. HMRC say in their case statement that there is no record of Mrs Dare contacting HMRC on 1 February 2010. In the light of the blacking out of an entry which could have related to such a call, I am unable to accept that submission.

10. I find that Mrs Dare was told on 1 February 2010 that she would be sent the necessary details to register when the technical problems were resolved. There is no indication however in Mrs Dare's letters and submission that she was told that she did not have to file or pay until the code was received: that all she had to do was to sit back and wait.

11. Given that Mrs Dare had asked for and had not been sent the codes necessary to file her return on line on 31 January I find that she had a reasonable excuse for not filing on that date. In my view that excuse lasted for a period after that date.

12. How long was it reasonable for Mrs Dare to wait before she got in touch with HMRC to chase then up again? Mrs Dare waited seven months. In my view that exceeds a reasonable period in these circumstances. A taxpayer who knew that she had to file and pay and had not been expressly assured that she would not have to file and pay until she received the code, could reasonably be expected to have chased HMRC after four months waiting.

13. I conclude that any excuse Mrs Dare had for not filing on time because she had not been sent her PIN expired on 1 June 2010.

14. The penalty which may be imposed under section 93(2) TMA for the late filing of a return may be set aside by the tribunal if it appears that the taxpayer had a reasonable excuse for not filing from the time the filing should have taken place until the time of filing. Mrs Dare had such an excuse only for part of this period. As a result the tribunal cannot set the penalty aside.

15. I note also section 188(2) TMA which provides that if a person has "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 ceased." In Mrs Dare's case this provision has the same effect as section 93(2): her excuse ceased on 1 June 2010 and she did not file in a reasonable time thereafter. The section provides no help for her.

(b) the surcharge for late payment

16. The tribunal may set the surcharge aside only if it concludes that the taxpayer had a reasonable excuse for not paying the tax on time from the time the tax became due to the time it was paid.

17. Mrs Dare waited until she could file her return before she paid her tax. HMRC say that even if she did have problems filing online she could have paid the tax earlier.

18. It seems to me that if a taxpayer is geared up to filing online (and perhaps having the tax calculation done online for her so that she would be told by the system how much to pay) it would not be unreasonable to wait a short while in the hope that the code would arrive and filing and payment could be organised together. But if after several weeks it proved impossible to file online then it would be reasonable to expect

the taxpayer to estimate her tax and to make a payment all the same. If she got it a bit wrong there might be a reasonable excuse for any tax underpaid not being paid on time. But unfortunately Mrs Dare did not do this. She left matter in abeyance for seven months. In my view that was unreasonably long, and Mrs Dare did not have a reasonable excuse for failing to pay for a large part of that period.

19. I therefore conclude that Mrs Dare did not have a reasonable excuse for her failure to pay on time.

(c)interest

20. The Act does not give a right of appeal to this tribunal against the charge to interest. The charge is an automatic liability on late paid tax. A taxpayer may appeal to this tribunal against the amount of the tax but if the amount of the tax is fixed the interest for late payment follows from a statutory calculation.

Conclusion

21. The appeal against the penalties and the surcharge is dismissed.

22. 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.

CHARLES HELLIER
TRIBUNAL JUDGE
RELEASE DATE: 29 JULY 2011