



TC03637

Appeal number: TC/2013/06771

Income tax – Penalties under s 59C Taxes Management Act 1970 and Schedule 56 Finance Act 2009 for late payment of income tax – underpayment of income tax caused by employer collecting and accounting for tax at basic rate – tax payable at the higher rate – whether reasonable excuse – no – appeal disallowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

KEITH RIVERS

Appellant

- and -

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

**TRIBUNAL: JUDGE MICHAEL S CONNELL
MR LESLIE HOWARD**

Sitting in public at 45 Bedford Square, London WC1B 3DN on 21 February 2014

Mr Keith Rivers, the Appellant in person

Ms Karen Weare, Officer of HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal by Keith Rivers ('the Appellant') against late payment surcharges imposed under Section 59C of the Taxes Management Act 1970 ('TMA') for his failure to pay tax on time in respect of his personal self-assessment liability for the year ending 5 April 2010 and penalties imposed under Paragraph 3(2) of Schedule 56 Finance Act 2000 ('FA') for his failure to pay tax on time in respect of his personal self-assessment liability for the year ending 5 April 2011.
2. The appeal is out of time and the Appellant therefore applies to the Tribunal for permission to make the late appeal. The surcharges and penalties, which the Appellant appeals, were imposed on 1 April 2011, 17 August 2011, 10 April 2012 and 4 September 2012. The Appellant lodged his appeal on 25 March 2013, which was outside the 30-day limit as set down in s31A TMA. HMRC oppose his application.
3. Under section 59B TMA, the Appellant was required to pay his income tax liability for the year ended 5 April 2010 by 31 January 2012. The tax paid late was £17,980.70 and was not paid in full until 16 January 2012
4. On 1 April 2011 HMRC imposed a first late payment surcharge of 5% of the tax paid late in the sum of £899.03
5. On 17 August 2011 HMRC imposed a second late payment surcharge of 5% of the tax paid late in the sum of £899.03
6. Under Paragraph 1 of Schedule 56 FA the Appellant was required to pay his income tax liability for the year ended 5 April 2011 by 31 January 2012. The Appellant's self-assessed liability was £22,482.75. Payment was not made by 1 March 2012, being the date on which a penalty was triggered.
7. On 10 April 2012 HMRC imposed a first late payment penalty of 5% of the tax paid late in the sum of £974.00
8. On 4 September 2012 HMRC imposed a second late payment penalty of 5% of the tax paid late in the sum of £974.00.
9. The Appellant made a payment of £9,999.00 on 25 March 2013.
10. The point at issue is whether the Appellant had a reasonable excuse for the late payment of tax, and if so, whether that excuse continued up to the date of payment. The Appellant says that the late payments for the years ended 5 April 2011 and 2012 were the fault of his employers and HMRC.

Background facts

11. The Appellant submitted his 2010 return on 28 January 2011. He declared three separate employments; Coovers Ltd, Datamedics Ltd and CSC Computers Ltd ('CSC'). The Appellant started employment with CSC on 18 January 2010.

12. The Appellant's self-assessed declared income (gross dividend) for the year 2010 was £88,263.00.

13. No tax code was issued to CSC and therefore the employer correctly deducted basic rate tax at 20%. The Appellant was liable to tax at 40% on some of his income.
5 The Appellant did not receive any pay from Coovers and so no tax was deducted by that employer. Datamedics deducted no tax.

14. The Appellant made a claim to reduce the payments on account, which was accepted by HMRC. The self-assessed declared income for the year 2011 was £22,423.60.

10 15. The Appellant says that he does not dispute the self-assessments (which are not appealable decisions in any event), but that he should not have received the surcharges and penalties because he was unaware that his employer was only deducting basic rate tax when he submitted his tax returns.

15 16. HMRC say that the Appellant may not have known that he would be liable to tax in excess of that deducted under PAYE, but that is not a reasonable excuse for not paying the liability when it was known. HMRC say that the Appellant needs a reasonable excuse for the period 1 December 2011 to 15 January 2012 in respect of the surcharges imposed, and a reasonable excuse for the period 1 February 2012 to 27 May 2013 in respect of the penalties imposed, to succeed in the appeals.

20 17. With regard to the application to appeal out of time, HMRC argue that the Appellant cannot show that he has a reasonable excuse for not appealing within the statutory time limit or that that any such excuse continued for the entire period of the default.

Relevant legislation

25 18. For 2009/10 and earlier years, late payment of income tax gave rise to surcharges imposed by s 59C TMA 1970. Under the legislation current at that time a surcharge of 5% was imposed on tax paid twenty-eight days late.

19. Schedule 56 FA 2009 introduced new financial penalties for failure to pay income tax and capital gains tax on time.

30 20. Section 59B(4) TMA 1970 establishes the date of payment of Income Tax as being on or before 31 January next following the year of assessment.

21. Schedule 56(1) FA 2009 provides for a penalty to be paid by a 'person' who fails to pay an amount of tax specified in column 3 of the Table (at subparagraph (4)), on or before the date specified in column 4.

35 22. Subparagraph (4) shows a Table which includes at item 1, "income tax and capital gains tax" payable "under Section 59B(4) TMA 1970" and defines the day after which a penalty is incurred as being "the date falling 30 days after the date specified in s 59B(4) TMA 1970."

23. In this case, the combination of s 59B(4) and Schedule 56(1) deems the Due Date for payment of tax in respect of the year 2010-11 as being 31 January 2012 and the Penalty Date as being 1 March 2012 .
24. Schedule 56(3) subparagraph (2) specifies the amount of penalty as being 5% of the tax unpaid after thirty days. There are further penalties should tax remain unpaid five or eleven months after the Penalty Date.
25. Under Schedule 56(10), where a taxpayer makes a request to HMRC before the due date to defer payment of an amount of tax and HMRC agrees that payment may be deferred for a period, the taxpayer will not be liable to a late payment penalty on that amount between the date of the request and the end of the deferral period.
26. Schedule 56(11) requires HMRC to assess any late payment penalty which arises under Schedule 56 and the assessment is to be treated in the same way as an assessment to tax.
27. Schedule 56(13) provides for a person to:
- (1) appeal against a decision that a penalty is payable and/or
 - (2) appeal against a decision as to the amount of a penalty
28. Schedule 56(15) provides for a Tribunal to;
- (1) on an appeal under para 13(1), to affirm or cancel HMRC's Decision
 - (2) on an appeal under paragraph 13 (2) to
 - (a) affirm HMRC's Decision, or
 - (b) substitute for HMRC's decision another decision that HMRC had power to make
 - (3) rely on paragraph (9) if the Tribunal applies Para 15(2)(b)
29. Schedule 56(9) subparagraph (1) provides for HMRC to reduce any late payment penalty, because of "special circumstances". Subparagraph (2)(a) specifies that "special circumstances" does not include inability to pay.
30. Schedule 56(16) subparagraph (1) provides that liability to a late payment penalty does not arise where the taxpayer satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal, that there is a reasonable excuse for the failure. For the purpose of subparagraph (1), conditions at subparagraph (2) state:
- (a) an insufficiency of funds is not a reasonable excuse unless attributable to events outside the persons control
 - (b) reliance on any other person to do anything is not a reasonable excuse unless the person took reasonable care to avoid the failure

(c) where the person had a reasonable excuse for a failure but that excuse has ceased, they are treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.

5 The Appellant's case

31. The Appellant says in his Notice of Appeal:

10 "i. The whole problem started in January 2010 when I started work for CSC Computer Sciences Ltd. The crux of the problem is that despite numerous opportunities to do so, CSC Payroll set my tax coding at BL. Rate. When you start work for CSC, the way they calculate your actual "take home pay" is very complex. You have an amount of money (your Flex Fund in CSC language), and out of that you can choose how you receive the money. There are mandatory pension contributions to be deducted , but you can optionally take use some of the Flex Fund to purchase benefits, such as Life Insurance, additional pension contributions, company car etc.. What the CSC system doesn't actually show you, is the impact of these changes on your "take home pay". In short, after you have made your selections, you don't actually know what your "take home pay" will be until you receive your wage slip.

20 ii. I made my selections prior to receiving my first pay from CSC, so when it did arrive, I assumed that (the net amount) was normal. I was never aware, and no indication was given that tax was being taken at an incorrect rate despite CSC knowing my full earning potential and relevant tax position (such as earning too much to be entitled to a personal allowance).

25 iii. Firstly I believe that CSC failed in its duty towards me as an employee and its actions (or lack of) were the root cause of the current problem. The ability to resolve this problem was with CSC and not me.

30 iv. To make matters worse, the situation continued to the end of 2009-10 and through 2010-11, until March 2011. It was only because I (not CSC) completed an online self-assessment that the issuance of a new tax code was triggered that brought the problem to light.

35 v. When my "take home pay" did change in April 2011, I made the assumption that the newly reduced "take home pay" was as a result of me completing the self-assessment, and HMRC were now recovering monies due in 2009-10, prior to my employment with CSC.

40 vi. During the period of October 2011 to November 2011, I was in contact with HMRC by phone to try and understand why, considering I was working on PAYE, and had been since January 2010, HMRC was claiming I still owed tax. It came as a nasty shock to find out on the phone, that HMRC hadn't been recovering money owed, but actually my current "take home pay" was now correct in terms of coding and tax payable. An even greater shock was being informed that I had therefore amassed a liability for tax in years 2009-10, and 2010-11. In
45 a (telephone) discussion with HMRC during that period, I questioned the legality of CSC's position, and stated that I would be writing to

HMRC to complain and appeal against this accrued liability. HMRC were very helpful and understanding on the phone, but at no point, made any reference that penalties and interest would be accruing whilst the matter was being investigated.

5 vii. It took until the 17th January 2012 for me to receive a response to my letter of the 15th November 2011. It was a very supportive letter in terms of looking into whether CSC had made a mistake. The letter does state that "if we do agree that your employer was at fault they will be directed to make payment in full". What the letter does not mention,
10 at any point was that that penalties and interest would be accruing whilst the matter was being investigated.

viii. I duly responded and provided a highly detailed analysis of why I considered CSC to be at fault, and that HMRC should intervene to recover the outstanding tax.

15 ix. On the 17th May 2012, I received a letter from HMRC stating that "for tax year 2010-11, an underpayment arose as you were not due a personal allowance as your income exceeded £100,000.00". However, HMRC made a decision that, although I had offered significant evidence, and the CSC had a duty and opportunity to ensure my
20 taxation was correct, the fault was mine (for not taking action that I didn't know I needed to take). Again, what the letter does not mention, at any point was that that penalties and interest would be accruing whilst the matter was being investigated.

25 x. On the 19th June 2012, I responded to the letter from HMRC stating that I disagreed with the findings, would like to launch an appeal, as if I cannot get resolution with HMRC, I would be considering legal action against CSC for breach of duty of care.

30 xi. On the 7th August 2012, I received a letter from HMRC stating that "HMRC cannot hold CSC Computer Sciences accountable for the tax underpaid". Again, what the letter does not mention, at any point was that that penalties and interest would be accruing whilst the matter was being investigated. Following HMRC's unwillingness to take action, I contacted CSC Computer Sciences Ltd and advised them that I considered they had breached their duty of care, and was considering
35 legal action. I was in discussions with CSC HR and Payroll through August 2012. I got a response from CSC Payroll in mid-September 2012, in which they stated "that I had slipped through the net on headcount" and they hadn't requested a P45, although in their opinion, they were not liable.

40 xii. In late October 2012, I contacted a solicitor who specialised in employment and taxation issues to invoke my last resort action of taking legal action against CSC for the recovery of unpaid tax through a breach of duty of care. The advice I received in early November was that although I was not treated fairly, in the eyes of the law, I would be
45 unlikely to win any legal pursuit.

xiii. Having, in my opinion exhausted all due process that I knew about, I resolved myself to having to pay the accrued liability, despite it being accrued through no fault of my own, and caused by events outside of my control.

5 xiv. In my letter of the 25th March 2013, I did request that the debt be reduced to principle sum (tax owed) without interest and charges. Subsequent to that letter, I had a long conversation with HMRC on the 24th April 2013. The gentlemen who dealt with my query fully understood the case, could see why I felt penalised for something that was essentially not my fault, and was very helpful in getting the matter resolved. I asked him for a settlement figure that would exclude charges and interest. He informed me that £20,981.91 was owed and that I should pay that as soon as possible. I paid £500 that week, and the balance was paid by the 13th July 2013. He also said I should write to HMRC with details of "reasonable excuse" in order to get the previous charges revoked and state that during the "due process" there had been no mention, at any point, that penalties and interest would be accruing whilst the matter was being investigated.

10 xv. On the 2nd May 2013, despite the assurance and phone call of the 24th April, and despite making payments, I was informed that the deadline for appeal had passed. I therefore wrote, to HMRC with a letter of "reasonable excuse" on the 5th August 2013. Throughout this process, I have not been ignoring HRMC, but communicating fully. Due to the nature of written communications, there have delays on both sides between receiving a letter and responding to it. All I have done is exercise due and legal process in full view of HMRC. Payments were not made earlier as the matter was in dispute. I believe I have acted in good faith in a situation that was not of my making, and not fully under my control. I therefore believe there is a strong case for HMRC to remove all penalties and interest accrued for tax years 2009-10 and 2010-11. After all, the tax liability caused by CSC has been paid by me, and the penalties relate purely to the due process that was followed in conjunction with, and in the full knowledge of HMRC."

15 32. At the hearing the Appellant reiterated his grounds of appeal as set out above

HMRC's case

33. The legislation at Para 16 Schedule 56 provides for a penalty not to be charged if it can be proven there was a "reasonable excuse" for the failure.

35 34. The taxes due on 31 January 2011 and 31 January 2012 had not been paid by the respective Penalty Dates of 1 March 2011 and 1 March 2012.

35. HMRC are unable to agree that the Appellant has any 'reasonable excuse' for the failure to make payment of the tax due, as required by the relevant legislation.

40 36. In dealing with the grounds of appeal relating to unfairness, HMRC refer to the case of *Hok Ltd* in which it was accepted that the First-tier Tribunal has no jurisdiction beyond that which is stipulated in legislation.

Conclusion

37. Having heard the Appellant's grounds of appeal and having considered all the circumstances the Tribunal granted permission for the Appellant to make the late appeal.

38. With regard to the substantive issues of the appeal, when a person appeals against a penalty they are required to have a reasonable excuse. There is no definition in law of reasonable excuse, which is a matter to be considered in the light of all the circumstances of a particular case. A reasonable excuse is normally an unexpected or unusual event either unforeseeable or beyond a person's control which prevents him from complying with an obligation. The reasonable excuse must also exist throughout the entire period of default.

39. The self-assessment system places a greater degree of responsibility on taxpayers for their own tax affairs. This includes ensuring that tax is paid on time without waiting for a tax demand or prompt for payment.

40. The Appellant knew what the outstanding liability was when he submitted his tax returns. He was also reminded by his self-assessment statements.

41. It is necessary to consider the actions of the Appellant from the perspective of a prudent taxpayer exercising reasonable foresight, due diligence and having proper regard for their responsibilities provided by legislation. The Tribunal recognises that the Appellant genuinely thought that HMRC were deducting the amount of tax that had been underpaid through the PAYE scheme. He thought this to be the case right up until November 2011. However, a mistake, even one based on an honestly held belief, is not a ground of appeal.

42. The self-assessment system is based on voluntary compliance so it is important that taxpayers who pay on time feel confident the system does not reward non-compliance in any way.

43. For the above reasons we therefore find that the Appellant did not have a reasonable excuse for the late payment of his tax. In particular, the mistake made by the Appellant ceased to be a reasonable excuse as soon as he became aware that tax was still outstanding in November 2011.

44. The appeal is therefore disallowed and the penalties referred to in paragraphs 4, 5, 7 and 8 above are confirmed.

45. 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.

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**MICHAEL S CONNELL
TRIBUNAL JUDGE**

RELEASE DATE: 23 May 2014