



TC01126

Appeal number: TC/2010/08761

*Income Tax – surcharge – whether reasonable excuse – whether surcharge
a breach of Appellant’s Human Rights under Articles 1 First Protocol and
14 European Convention on Human Rights – appeal dismissed*

FIRST-TIER TRIBUNAL

TAX

MICHAEL FALLON

Appellant

- and -

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

Respondents

**TRIBUNAL: GUY BRANNAN (TRIBUNAL JUDGE)
SONIA GABLE (TRIBUNAL MEMBER)**

Sitting in public at Cambridge on 19 January 2011

The Appellant appeared in person

Philip Osborne, Presenting Officer, for the Respondents

DECISION

Introduction

1. This is an appeal against an income tax surcharge for the year 2008-2009. The
5 surcharge related to income tax unpaid at 28 February, 2010 in an amount of £1696.
These surcharge was levied at the rate of 5% producing a surcharge of £84.80.

Relevant statutory provisions

2. Section 59B Taxes Management Act 1970 ("TMA") provides that the amount of
10 income tax contained in a person's self-assessment return shall be paid on or before
the 31st January next following the year of assessment (section 59B (1) and (4)).

3. Section 59C TMA provides for surcharges to be levied on unpaid income tax as
follows:

"59C Surcharges on unpaid income tax and capital gains tax

- 15 (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.
- 20 (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 or
25 93(5) of this Act, Schedule 24 to the Finance Act 2007, 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—
- 30 (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.
- 35 (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
40 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.

25 **The facts**

4. In this appeal the facts were not in dispute.

5. HMRC made an error in removing the Appellant's fuel benefit (in respect of a car and fuel provided to the Appellant by reason of his employment) from his PAYE coding at the beginning of the 2008-2009 tax year. It is not clear why HMRC removed the fuel benefit from the Appellant's tax coding. No explanation was offered by HMRC at the hearing. The Appellant accepted, however, that it was his responsibility to check his notice of coding.

6. The Appellant filed in his tax return for 2008-2009 online on 30 January 2010. When the Appellant filed his return HMRC automatically calculated his tax due and showed (online) an amount of £1,696 tax due. The tax was due for payment on 31 January 2010. The Appellant assumed that the additional tax would be collected through his PAYE coding in later years. In other words, on 30 January 2010 he was not expecting to have to pay the tax on the following day.

7. The Appellant received a reminder from HMRC issued on 18 February 2010. This said “You need to pay £1696.00 now.” This was the first time he realised that he had to pay forthwith. He called HMRC’s helpline which explained the process for

arranging deferred payment of the tax. He concluded that it would be faster to borrow the money needed. He therefore borrowed to pay the tax. The tax was paid on 4 March 2010. However, under section 59C(2) TMA the Appellant became liable for the surcharge 28 days after the due date for payment of the tax ie on 28 February 5 2010, 4 days before he paid the outstanding tax.

8. The deadline, in respect of online filing, if a taxpayer wants HMRC to collect tax due through the taxpayer's PAYE code is 30 December. If, as the Appellant did, the tax return is filed after 30 December, it is not possible for the tax to be collected through the PAYE code. The 30 December deadline is not a statutory deadline but is 10 simply an administrative one. The deadline is explained on HMRC's website and also on the introductory notes to paper tax returns. We were told by Mr Osborne that it does not appear to be mentioned on the online return.

Arguments of the parties

9. At the hearing, the Appellant did not put forward the argument that he had a 15 reasonable excuse within the meaning of section 59C (9) TMA for the failure to pay the outstanding tax during the "period of default" (as defined in section 59C (12) TMA). Nonetheless, we have considered whether such a reasonable excuse existed.

10. Mr Osborne for HMRC argued that the Appellant did not have a reasonable 20 excuse within the meaning of section 59C Taxes Management Act 1970 on the basis that the reasonable excuse did not apply throughout the "period of default". Section 59C (10) provides that inability to pay the tax shall not be regarded as a reasonable excuse.

11. Mr Osborne argued that when the Appellant filed his tax return at the end of 25 January 2010, his tax liability would have been calculated for him and that it would have been clear that he owed the tax in question. Whatever the original reason for the misunderstanding, it was clear when he received the reminder of 18 February 2010 that the Appellant owed the tax in question. Therefore, any reasonable excuse ended at that time and before 28 February 2010.

12. The Appellant argued that the imposition of the surcharge (5% of £1696) of 30 £84.80 breached his human rights under Article 1 First Protocol (Protection of property) and Article 14 Part I (Prohibition of discrimination) of the European Convention on Human Rights ("the Convention"). In the event, at the hearing, he did not press his argument on Article 1 of the First Protocol but, instead, relied on Article 35 14. We understood his argument to be that because he filed his return online after 30 December 2009 he was being treated differently from other taxpayers in the same position who filed their returns on or before 30 December 2009. Consequently his right to enjoyment of possessions, guaranteed by Article 1, was being interfered with in a discriminatory manner.

13. On the human rights issue, Mr Osborne submitted surcharges imposed under 40 section 59C TMA did not fall within the protection of the Convention. Mr Osborne cited the decision of the Special Commissioners (Dr John Avery-Jones) who said in

5 "...[I]n *WS v Poland* (Application No. 37607/97) where a small penalty
for wrong accounting entries in relation to tax (but not the tax) was an
issue the court found that the proceedings were inadmissible on the
grounds that the penalty was not a criminal one. I consider therefore
that the proceedings about the surcharge [charged under section 59C
TMA] in this case which is closely related to the tax itself, being an
automatic surcharge on the amount of the tax imposed for late payment
10 of the tax, do not relate to the Appellants' civil rights and obligations
and so are not protected by article 6."

14. Mr Osborne also submitted that if HMRC received the return after 30 December
there was considerable time pressure to process the information and communicate the
notice of coding to the employer. This, in his submission, provided an objective
15 justification for the difference in treatment between a taxpayer who filed his return
online on or before 30 December and a taxpayer who filed his return after that date
but before 31 January.

Our decision

15. We concluded that the Appellant did not have a reasonable excuse within the
20 meaning of section 59C. Any reasonable excuse ended, for the purposes of section
59C(9) on 18 February 2010 when it became clear to the Appellant that he owed
additional income tax and that it was due for immediate payment. Inability to pay the
tax – which we take to mean by virtue of a lack of funds – is not a reasonable excuse
(section 59C(10)).

25 16. As regards the Appellant's argument in respect of the European Convention on
Human Rights, Article 14 states that—

30 'The enjoyment of the rights and freedoms set forth in this Convention
shall be secured without discrimination on any ground such as sex,
race, colour, language, religion, political or other opinion, national or
social origin, association with a national minority, property, birth or
other status.'

17. Thus, Article 14 protects the enjoyment of the rights and freedoms set out in the
Convention without discrimination on any basis. Article 14 can only be relied on in
conjunction with another Article: the Appellant must indicate the specific Convention
35 right in respect of which discrimination is alleged. The Appellant need not show that
the other Article has actually been breached, but merely that that right has been
affected by discriminatory treatment. The non-discrimination right under Article 14 is
most frequently raised in conjunction with Article 1 of the First Protocol on the basis
that tax statutes interfere with the right to enjoyment of possessions in a
40 discriminatory manner. We understood this to be the Appellant's argument in this
case. The test is whether the particular facts of a case "fall within the ambit" of
another Article of the Convention *Rasmussen v Denmark* (1985) 7 EHRR 371.

18. In *Kjeldsen, Madsen and Pedersen v Denmark* (1976) 1 EHRR 711 the European Court of Human Rights stated: 'Article 14 prohibits, within the ambit of the rights and freedoms guaranteed, discriminatory treatment having as its basis or reason a personal characteristic ("status") by which persons or groups of persons are distinguishable from each other.'

19. Article 14 requires three criteria to be satisfied:

- (a) taxpayer 1 is in the same or relevantly similar position to taxpayer 2 (e.g. *Nelson v UK* (1986) 49 DR 170);
- (b) taxpayer 1 has (within the ambit of another Convention right) been treated differently by reference to a prohibited ground from taxpayer 2; and
- (c) there is no reasonable or objective justification for the distinction between taxpayer 1 and taxpayer 2 and the differential treatment must be proportionate to that legitimate aim (see *Belgian Linguistics case* (1979-80) 1 EHRR 241 at 252).

20. Without expressing a concluded view on paragraphs (a) and (b) above (although we doubt whether the Appellant has been treated differently because of a personal characteristic), we were satisfied that there was an objective justification for the difference in treatment between taxpayers who filed online up to and after 30 December 2009. As already noted, Mr Osborne submitted that if HMRC received the online return after 30 December there was considerable time pressure to process the information and communicate the notice of coding to the employer. This was the reason why taxpayers who submitted their returns after 30 December could not have any additional tax collected through their notice of coding. We accept this explanation and consider this a reasonable justification for the different treatment in this case. We do not consider that the 30 December deadline or a 5% surcharge were disproportionate.

21. As regards Mr Osborne's reliance on the *Bancroft* decision, we have some doubts whether the passage quoted in that decision can stand following the decision of the European Court of Human Rights in *Jussila v Finland* [2009] STC 29. It is not, however, necessary to decide that point in the light of our conclusion that there was an objective justification for the differential treatment of taxpayers.

22. Finally, we note that section 59C (9) provides that, in the absence of a finding that there is a reasonable excuse, the Tribunal "may" confirm the imposition of the surcharge. As the learned Special Commissioner said in *Bancroft*, in considering whether to give effect to section 59C(9) in a way which was compatible with Convention rights in accordance with section 3 of the Human Rights Act 1998:

"It seems to me that if Parliament says [section 59C (9)] that I may set aside the surcharge if I find that there is a reasonable excuse but that if I do not so find I may confirm the imposition of the surcharge, even the widest possible reading consistent with the Human Rights Act cannot result in my doing the opposite. Perhaps "may" is used because there are two alternatives but having found that there is no reasonable

excuse it can only mean "must". Even assuming in favour of the Appellants that the law does not give effect to their Human Rights, I cannot read and give effect to the legislation in a way that is compatible with their Convention rights."

5 23. With respect, we agree with these comments.

24. Finally, for completeness, we note that section 59C(11) gives HMRC a discretion whether to mitigate or entirely remit a surcharge. This Tribunal has no jurisdiction over the exercise by HMRC of this discretion. It is a matter entirely for HMRC whether this discretion should be exercised in this case. We note, however, that the chain of events which led to the Appellant incurring this surcharge was set in motion by HMRC erroneously removing the Appellant's fuel benefit from his PAYE coding. Secondly, the online tax return which the Appellant completed did not, unlike the paper version, draw the Appellant's attention to the fact that the return had to be submitted by 30 December if a taxpayer wanted HMRC to collect tax due through the taxpayer's PAYE tax code. These are matters which could properly be taken into consideration by HMRC in the exercise of its discretion, although whether and how HMRC exercises its discretion in this case is, as we have said, a matter entirely for HMRC.

25. For these reasons we dismiss this appeal.

20 26. 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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GUY BRANNAN

TRIBUNAL JUDGE

RELEASE DATE: 19 APRIL 2011

35 Amended pursuant to Rule 37 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 on 5 July 2011.

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