# TC01530

**Appeal number: TC/2011/02010**

***INCOME TAX – Surcharge on late payment of income tax (Taxes Management Act 1970 s.59C) – Appeal dismissed***

**FIRST-TIER TRIBUNAL**

**TAX**

**REVEREND NEVILLE MARSTON** **Appellant**

**- and -**

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

**TRIBUNAL: Dr Christopher Staker (Tribunal Judge)**

**The Tribunal determined the appeal on 17 October 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 14 March 2011, and HMRC's Statement of Case dated 18 April 2011, and other papers in the case.**

DECISION

**Introduction**

1. This is an appeal against first and second default surcharges imposed pursuant to s.59C of the Taxes Management Act 1970 (the "TMA") in respect of the late payment of tax due on 31 January 2009 in respect of the 2007/08 tax year.

2. This case was allocated to the default paper category. The Tribunal originally had before it a notice of appeal with attachments stating that the Appellant was Reverend Marston, and two separate HMRC statements of case with attachments, in respect of Reverend Marston and Mrs Marston respectively. On 25 August 2011, the Tribunal issued directions to the parties to provide additional information and evidence. The Tribunal subsequently received further submissions from Reverend Marston on 31 August 2011, further submissions from HMRC on 14 September 2011, followed by an additional submission from Reverend Marston on 27 September 2011.

3. The first of the 25 August 2011 directions was that "the Appellant shall file with the Tribunal, and serve on HMRC, a notice stating whether both Reverend Neville Marston and Mrs J A Marston are Appellants in this case, and whether the appeal challenges both the HMRC decision of 21 February 2011 concerning the surcharges imposed on Reverend Neville Marston, as well as the HMRC decision of 22 February 2011 concerning the surcharges imposed on Mrs J A Marston". Regrettably, Reverend Marston has not complied with this direction, despite submitting further material twice.

4. Paragraphs 2 and 3 of the reasons for the directions issued on 25 August 2011 stated that:

> 2. Section 1 of the Notice of Appeal names the Appellant as Reverend Neville Marston. Section 4 of the Notice of Appeal states that the appeal is against a decision of HMRC of 22 February 2011 with reference number 916/ARU 14370/2754443593. However, that decision relates to default surcharges imposed not on Reverend Marston, but on Mrs Marston. There is a separate HMRC decision dated 21 February, with reference number 916/ARU 14368/7295296601, that relates to the default surcharges imposed on Reverend Marston.
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> 3. HMRC has proceeded on the basis that both Reverend Marston and Mrs Marston are appealing against both of these HMRC decisions. That also appears to the Tribunal to be the case. Direction 1(1) of these directions seeks confirmation of this.

5. It is unfortunate that this matter has not been clarified. In the absence of any clear confirmation that Mrs Marston is also appealing against the surcharges imposed on her, it is difficult for the Tribunal to be satisfied that it is seised of an appeal by Mrs Marston. However, ultimately, given the conclusion reached by the Tribunal in this case, this may be of little practical importance.

6. As a preliminary matter, it is also observed that parts of Reverend Marston's submissions consist of complaints about the way he has been treated by HMRC, and in particular by an HMRC official who handled his case. However, the Tribunal is only able to deal in this appeal with the question of whether or not the default surcharges were correctly imposed. Complaints about the conduct of HMRC staff that are not relevant to this question are matters that the Tribunal cannot determine. Accordingly, the Tribunal expresses no view on the merits of such complaints, except where relevant to the issue before it. Other avenues exist for raising such matters, which Reverend Marston appears to have pursued, since the papers include letters from HMRC's Quality Assurance and Complaints department. One of those letters dated 21 December 2010 offers a "consolatory payment" of £150 "in recognition of the poor service he received from HMRC". Whether those other avenues have been exhausted, or whether or not the result has been satisfactory, is not a matter for the Tribunal to decide.

## The relevant legislation

7. Section 59C of the TMA states in relevant part 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.
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> (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.
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> (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.
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> ...
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> (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—
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> (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.
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> ...
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> (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.
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> ...
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> (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.

...

(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.

**Consideration of the evidence and findings of fact**

8. The Tribunal must determine questions of fact on the evidence before it on the basis of the balance of probability.

9. On its consideration of the evidence as a whole, the Tribunal finds the following facts.

10. Reverend Marston and Mrs Marston jointly purchased an investment in 1990. Reverend Marston refers to it as a "bond", and a review letter of HMRC dated 21 February 2011 refers to it as a "foreign investment bond". However, a letter of HMRC dated 13 September 2011, submitted pursuant to the 25 August 2011 directions, refers to it as "the LCL International Life Assurance Policy".

11. Reverend Marston and Mrs Marston terminated this investment in July 2007. Reverend Marston refers to the "bond" being "sold". Other papers refer to the "policy" being "relinquished" or "surrendered".

12. Upon the termination of the investment, Reverend Marston and Mrs Marston made a gain which gave rise to a tax liability in the 2007/08 tax year. Neither of them included their tax liability on their share of the gain in any tax return filed by the 31 January 2009 due date, or paid the amount of that tax liability by the due date.

13. HMRC subsequently opened an enquiry into their tax liability. This led to HMRC issuing Reverend Marston and Mrs Marston tax returns for 2007/08 on 10 June 2010. Reverend Marston's completed tax return was returned on 15 July 2010 and processed on 16 July 2010. Mrs Marston's completed tax return was returned on 29 July 2010 and processed on 17 August 2010.

14. It appears that after the tax returns were processed, HMRC advised Reverend Marston and Mrs Marston that they each had an outstanding tax liability for the

2007/08, and informed them of the amount of that liability. Reverend Marston disputed the amount of that liability. HMRC subsequently agreed to reduce the amount of the liability.

15. The reasons why HMRC agreed that the initial assessment was too high are not entirely clear. HMRC review letters to Reverend Marston and Mrs Marston dated 21 and 22 February 2011 respectively state in this respect "I am sorry but an error was made in processing the tax return", suggesting that the initial assessment was an error on the part of HMRC. However, the HMRC letter dated 13 September 2011 states that "Both returns were processed reflecting foreign income gains ... as noted in the calculation provided by the Appellants", perhaps suggesting that HMRC considers Reverend Marston to be at fault. The Tribunal makes no express finding on the reason why a higher amount was initially calculated by HMRC, but assumes on the basis of what is stated in the February 2011 review letters that it was a mistake on the part of HMRC.

16. HMRC says that its agreement to reduce the amount of the liability followed a review undertaken after Reverend Marston's Member of Parliament intervened with a letter to HMRC dated 25 August 2010.

17. Reverend Marston states that after HMRC advised him of the initial figure, it then subsequently revised the figure to almost double it, such that the joint liability of Reverend Marston and Mrs Marston would have been almost the whole of the gain from the termination of the investment. Only after this did HMRC then subsequently agree to reduce the figure. This claim that HMRC sought initially to increase the figure before subsequently agreeing to reduce it is not reflected in the HMRC material. The Tribunal makes no finding on this particular claim.

18. In addition to the intervention of his Member of Parliament, Reverend Marston also suggests that HMRC's agreement to reduce the figure was prompted by a further opinion that Reverend Marston obtained from a tax adviser. In his submission received on 31 August 2011, Reverend Marston says that he paid this tax adviser £280, and that he feels that HMRC should be responsible for this fee in all the circumstances. The HMRC material does not expressly refer to the figure being reduced due to a tax adviser's opinion, although the 21 December 2010 letter from HMRC's complaints department does conclude that it would not be "appropriate to contribute to accountancy fees because I understand no fees were incurred during the period of poor service, only necessary fees thereafter in connection with filing his tax return". The Tribunal also makes no finding on this particular claim that Reverend Marston obtained an opinion from a tax adviser that he submitted to HMRC to show that HMRC's calculations were wrong.

19. Regardless of the precise course of events, the evidence is that on 23 September 2010, HMRC revised the outstanding tax liability of Reverend Marston to £1,473.72 and of Mrs Marston to £2,062.22. According to the 13 September 2011 letter of HMRC, the tax liability on the gain made from termination of the investment was calculated on the basis that it was reduced by the percentage of time that Reverend Marston and Mrs Marston were outside the United Kingdom during the period that

they held the investment (some 11 years (4015 days) out of the 6281 days that they held the investment). The evidence is that in this period, they were in the Seychelles.

20. According to HMRC, surcharge liability notices were issued on 17 September 2010, and payment in full of the tax liabilities was not received until 18 December 2010. In support of this, printouts from the HMRC computerised statements have been produced.

21. A letter from the Appellants' representatives to HMRC dated 15 November 2010 states that it was agreed that there had been underpayments of tax by the Appellants in the sums of £1,473.72 and £2062.22 respectively, and that the interest charges were accepted, but that it was requested that HMRC reduce the surcharges "as a gesture of goodwill and on the grounds that, at the time, the taxpayers were unrepresented and unaware of any liability on the encashment of their foreign investment". That letter also indicates that by 15 November 2010, the date of that letter, payment of the tax liability had not yet been paid in full by Reverend Marston, and had not yet been paid by Mrs Marston.

22. Reverend Marston's grounds of appeal state that "I am still not sure that I owe this sum", and at section 6 of the Notice of Appeal he states "I do not believe I owe the money". In his submission received on 27 September 2011, he states that he paid the necessary money "not because I felt it right ... but because it seemed better to put this behind us". On the other hand, his submission received on 31 August 2011 refers to HMRC's final figure as a "sensible amount".

23. The Tribunal finds that regardless of whether or not Reverend Marston is satisfied that the final figure of tax owed was correct, he has not appealed against the tax assessments. The Notice of Appeal, which was only filed in March 2011, only states that it is appealing against a February 2011 decision relating to surcharges. Any appeal against the tax assessment itself would be out of time, and the Notice of Appeal does not seek any extension of time for a late appeal.

24. The 15 November 2010 letter from the Appellants' representatives to HMRC expressly accepts HMRC's final figures. Whether or not Reverend Marston is now satisfied that they are correct, the Tribunal is satisfied that he has accepted them "to put this behind us". The Tribunal accordingly proceeds on the basis that Reverend Marston and Mrs Marston each had a tax liability of £1,473.72 and £2,062.22 respectively, due to be paid by 31 January 2009, that was not paid in full until late 2010.

25. The Tribunal finds that it follows that liability to the default surcharges exists under s.59C of the TMA unless there is a reasonable excuse for the late payment throughout the period of default in accordance with s.59C(9). Reverend Marston has not sought to dispute the amount of the default surcharges in the event that there is no reasonable excuse.

26. The circumstance advanced by Reverend Marston as amounting to a reasonable excuse is in essence that he believed that he and Mrs Marston were not liable to tax on the gain that they made when the investment was terminated in 2007.

27. Reverend Marston's grounds of appeal state as follows. When he considered selling the bond, he sought the advice of a tax adviser, who sent him a copy of an article by Brendan Harper. This article indicated that offshore bonds allow the investor to remove up to 5% of the original capital each year without incurring an immediate tax liability, and that this allowance accumulates if it is not used. The tax adviser also calculated Reverend Marston's tax. On the basis of this, Reverend Marston did not think that any tax would be owed when the bond was sold. The grounds of appeal state that "I had no reason to sell the whole bond at that time, and would have sold it over a number of years if I had understood the tax implications".

28. Reverend Marston's grounds of appeal also state that "This original adviser [that is, the tax adviser who sent a copy of the article by Brendan Harper] set the tax on the bond at £2000, but it does not take account of the fact that I paid UK taxes right through my period in the Seychelles, thus anticipating that I would receive 5% for the whole 17 years". This appears to indicate that the original tax adviser advised that Reverend and Mrs Marston *would* incur a £2,000 tax liability on selling the bonds, but that Reverend Marston did not consider that this advice took account of all relevant facts, and that Reverend Marston himself drew the conclusion that there would be no tax liability. The grounds of appeal do not suggest that the tax adviser ever expressly considered or stated a view on Reverend Marston's conclusion that he would have no tax liability at all.

29. Reverend Marston's submission received on 31 August 2011 enclosed a copy of the article by Brendan Harper. Referring to the article, Reverend Marston states that "I was genuinely perplex[ed] by its meaning", and that "This was added to" by the accompanying letter from the tax adviser. The submission states that the tax adviser calculated the tax liability "on 5% since my return from work in the Seychelles, but as I had paid tax (at source) on my works pension for the 11 years I was away, I felt I would be entitled to this allowance for this period as well". Again, the implication is that the tax adviser did not tell Reverend Marston that there was no tax liability. Rather, the implication is that Reverend Marston himself drew the conclusion that the tax adviser had not taken account of all relevant circumstances, and himself drew the conclusion that there was no tax liability. There is again no suggestion that the tax adviser ever expressly considered or stated a view on Reverend Marston's conclusion that he would have no tax liability at all. The submission states that Reverend Marston no longer has the letter provided by the tax adviser, but that he sent it to HMRC.

30. The submission of Reverend Marston received on 27 September 2011 states that what Reverend Marston received from the original tax adviser, in addition to the article by Brendon Harper, was a document entitled "LCL INTERNATIONAL", which was Appendix 1 to the HMRC submission received on 14 September 2011. According to that document, based on a surrender value of the investment of £73,154 on 2 October 2006, there would be a taxable gain of £12,621, and Reverend and Mrs

Marston would each have a tax liability of £1,262 after allowing for "Top slicing for 6 years (number of years in the UK)". The document further indicates at the bottom that there was an outstanding query with the tax authorities as to whether the whole gain is added to income to determine the effect on age allowance, or only the "time apportioned gain". The document states that "If the latter, surrender ... should be deferred to 6.04.07 in order to avoid age allowance being reduced. If the former, age allowance will be reduced in any event so surrender can proceed now". It would appear from the dates referred to in this document that it was prepared some time before October 2006. It seems clear from this document that the tax adviser did indeed expressly advise Reverend Marston that both he and Mrs Marston *would* have a tax liability when the investment was surrendered. Furthermore, the actual figure given in that document for the tax liability was based on the assumption that the investment would be surrendered on 2 October 2006 with a surrender value of £73,154, which does not correspond with what actually occurred.

31. The submission of Reverend Marston received on 27 September 2011 goes on to state that Reverend Marston believed from the Brendon Harper article and the document entitled "LCL INTERNATIONAL" that he was entitled to 17 years "top slicing" at 5%.

32. Reverend Marston's submission also suggests that the lateness of paying the tax was due to the conduct of HMRC in originally demanding an incorrect amount of tax that was much higher than what was owed. The submission states that Reverend Marston was "not informed until much later that if I sent the money I would be able to get it back if it proved wrong", but that "having been treated in such a cavalier fashion I had no faith in the working of the revenue".

**The Tribunal's view**

33. The Tribunal finds, as a general principle, that ignorance by a taxpayer of his or her tax liability, or of the due date for payment, does not of itself amount to a reasonable excuse for late payment.

34. In some cases, it has been held that a taxpayer who relies on expert advice may have a reasonable excuse if that advice turns out to be incorrect. In *RW Westworth Ltd v HMRC* [2010] UKFTT 477 (TC) (which concerned an appeal against cancellation of gross payment status under the Construction Industry Scheme), the Tribunal said at paragraph 13 that "In view of Mr and Mrs Westworth's lack of experience and expertise in accounting, administration and tax matters we consider that it was reasonable for the Company to retain the services of a consultant", and at paragraph 14 that "the Company had a reasonable excuse for the late PAYE payments".

35. In *Devon & Cornwall Surfacing Limited v HMRC* [2010] UKFTT 199 (also an appeal against cancellation of gross payment status), the appellant company which had no knowledge of tax or VAT matters had relied on a company secretary to ensure compliance with tax obligations. However, various tax obligations were not complied with. The Tribunal found in that case at paragraph 20 that it had been "reasonable for

the Company to rely on its secretary to comply with its tax obligations and it was this reliance which led to the failures to meet its obligations". That decision concluded at paragraph 23, referring to *Rowland v HMRC* [2006] STC (SCD) 536 and other cases, that "reliance on a third party, such as the company secretary, can be a reasonable excuse in the direct tax context".

36. In *Rowland*, which was the case particularly relied upon in the *Devon & Cornwall Surfacing* case, it was found that reliance on specialist accountants could in certain circumstances constitute a reasonable excuse for the purposes of s.59C(9)(a) of the Act. That was a case in which the appellant did not pay the tax on the due date because she had been expressly advised, apparently incorrectly, by reputable specialist accountants who had prepared her tax return that she only had to pay a lower amount. In that case, it was found (at para. 8(p)) that the appellant had "relied on [her accountants] implicitly as supposed specialists in [a] difficult and complicated area of tax law in which she had understood them to be specialists". It was further found in that case (at para. 8(q)) that as the appellant "did not have the specialist knowledge and expertise herself she employed and relied upon persons whom she reasonably believed to have such specialist knowledge and expertise".

37. The Tribunal accepts that in cases where highly specialised advice is required, a taxpayer may have no choice but to rely on the advice of a specialist. If Reverend Marston had been advised by a tax expert that he had no tax liability arising from the termination of his investment in 2007, he might well seek to rely on the cases referred to above in support of an argument that he has a reasonable excuse.

38. In his case, the Tribunal accepts that Reverend Marston did seek the advice of a tax specialist before he terminated the investment, probably some time in 2006. However, the Tribunal finds that the tax adviser expressly informed him that he and Mrs Marston *would* be liable to tax on the resulting gain when the investment was terminated. The tax adviser indicated that the amount of tax would be £1,262 for each of them, assuming that the investment was surrendered on 2 October 2006 with a surrender value of £73,154. According to the evidence provided by HMRC, the investment was in fact surrendered on 13 July 2007 with a value of £80,339.69.

39. The Tribunal is satisfied on the evidence that Reverend Marston formed his own view that he was not required to pay tax at all. There is nothing in the evidence to suggest that he put this view to the tax adviser, or that the tax adviser acknowledged this view to be correct.

40. Reverend Marston states that he formed this view on the basis of an article by Brendan Harper, which his adviser sent him. However, nothing in that article states unequivocally that in all of Reverend Marston's individual circumstances, he would have no tax liability. Indeed, the article ends with a statement that it is "general advice only and is not intended to be taken as specific investment or tax advice", and that it is "based on the assumption that further information would be required". Reverend Marston in any event says in his submission that he was "perplexed" by this article. Furthermore, his evidence is that he was sent this article by the same tax adviser who told him that there *would* be a tax liability. In the circumstances, the

Tribunal considers that it would not be reasonable for Reverend Marston to assume that there would be no tax liability, without putting to the tax adviser for further advice what Reverend Marston considered to be the implications of the article.

41. The Tribunal is therefore not persuaded that advice received from the tax adviser was a reasonable excuse for not paying the tax liability on time on 31 January 2009. Reverend Marston was not acting in accordance with specialist advice. Indeed, he was acting contrary to specialist advice.

42. Reverend Marston apparently suggests that the lateness of paying the tax was due to the conduct of HMRC in originally demanding an incorrect amount of tax that was much higher than what was owed.

43. The Tribunal finds, as a general principle, that a dispute between a taxpayer and HMRC over the amount of a tax liability is not of itself a reasonable excuse for not paying the correct amount of the tax liability on time. The taxpayer can pay the full disputed amount demanded by HMRC, and recover any overpayment in the event of a successful appeal. Alternatively, the taxpayer can pay the correct amount, and will then attract no surcharge liability once vindicated on appeal. It may be true that during the period of dispute, there may be some uncertainty over the correct amount of tax. However, to accept such uncertainty as a reasonable excuse for not paying the correct amount would be equivalent to accepting ignorance as a reasonable excuse.

44. In any event, HMRC did not specify any amount of tax owing until after the tax returns were filed in July 2010, and were processed by HMRC in July and August 2010. Even if the claiming of an incorrect amount by HMRC could be a reasonable excuse, that would not provide a reasonable excuse for the period from 31 January 2009 until July or August 2010. Furthermore, the final figure of tax owing was communicated by HMRC in September 2010, and accepted by Reverend Marston's accountant on 15 November 2010, yet payment was not made in full until 18 December 2010.

45. Thus, even if the demand by HMRC of an incorrect amount of tax could constitute a reasonable excuse, which the Tribunal does not accept, that would not in this case provide a reasonable excuse for the entire period of default. For a surcharge to be set aside under s.59C(9) of the TMA, the reasonable excuse must exist throughout the period of default.

46. The Tribunal has some sympathy for Reverend Marston and Mrs Marston. The tax liability was not a straightforward matter. The HMRC letter of 21 December 2010 referred to above has also recognised "the poor service he received from HMRC". However, for the reasons given, the Tribunal is not satisfied that there was a reasonable excuse throughout the period of default.

**Conclusion**

47. For the reasons above, the Tribunal dismisses the appeal and confirms the imposition of the surcharges.

48. 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.

**DR CHRISTOPHER STAKER**

**TRIBUNAL JUDGE**
**RELEASE DATE: 28 OCTOBER 2011**