TC02206

Appeal number: TC/2012/01495

INCOME TAX–surcharge – second surcharge for late payment – Section 59C (3) Taxes Management Act 1970 – time to pay arrangement – arrangement cancelled – whether appellant notified – whether reasonable excuse – status of unsupported statements in Statement of Case

FIRST-TIER TRIBUNAL
TAX CHAMBER

PHILIP PROCTER **Appellant**

- and -

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

TRIBUNAL: JUDGE GUY BRANNAN

The Tribunal determined the appeal on 14 August 2012 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 9 January 2012 (with enclosures), HMRC's Statement of Case submitted on line March 2012 (with enclosures) and the Appellant's Reply dated 2 April 2012.

DECISION

1. This is an appeal against a surcharge charged under Section 59C (3) Taxes Management Act 1970 ("TMA") in respect of the late payment of income tax for the tax year ended 5 April 2009.

The Legislation

2. Section 59C TMA provides:

> (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.
>
> (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 93(5) of this Act, Schedule 24 to the Finance Act 2007 or Schedule 41 to the Finance Act 2008, 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—
>
> (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.
>
> (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 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.

3. Section 118 (2) TMA 1970 provides:

" For all the purposes of this Act, a person shall be deemed not to have failed to do anything required to be done within a limited time if he did it within such further time, if any, as the Board or the [tribunal] or officer concerned may have allowed; and where a person had 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 had ceased."

4. Section 108 Finance Act 2009 provides:

Suspension of penalties during currency of agreement for deferred payment

(1) This section applies if—

(a) a person ("P") fails to pay an amount of tax falling within the Table in subsection (5) when it becomes due and payable,

(b) P makes a request to an officer of Revenue and Customs that payment of the amount of tax be deferred, and

(c) an officer of Revenue and Customs agrees that payment of that amount may be deferred for a period ("the deferral period").

(2) P is not liable to a penalty for failing to pay the amount mentioned in subsection (1) if—

(a) the penalty falls within the Table, and

(b) P would (apart from this subsection) become liable to it between the date on which P makes the request and the end of the deferral period.

(3) But if—

(a) P breaks the agreement (see subsection (4)), and

(b) an officer of Revenue and Customs serves on P a notice specifying any penalty to which P would become liable apart from subsection (2),

P becomes liable, at the date of the notice, to that penalty.

(4) P breaks an agreement if—

(a) P fails to pay the amount of tax in question when the deferral period ends, or

(b) the deferral is subject to P complying with a condition (including a condition that part of the amount be paid during the deferral period) and P fails to comply with it.

(5) The taxes and penalties referred to in subsections (1) and (2) are—

Tax	*Penalty*
Income tax or capital gains tax	Surcharge under section 59C (2) or (3) of TMA 1970
Value added tax	Surcharge under section 59(4) or 59A(4) of VATA 1994
Aggregates levy	Penalty interest under paragraph 5 of Schedule 5 to FA 2001
Climate change levy	Penalty interest under paragraph 82 of Schedule 6 to FA 2000
Landfill tax	Penalty interest under paragraph 27(2) of Schedule 5 to FA 1996
Insurance premium tax	Penalty under paragraph 15(2) or (3) of Schedule 7 to FA 1994 which is payable by virtue of paragraph 15(1)(a) of that Schedule.
Any duty of excise	Penalty under section 9(2) or (3) of FA 1994 which is imposed for a failure to pay an amount of any duty of excise or an amount payable on account of any such duty.

(6) If the agreement mentioned in subsection (1)(c) is varied at any time by a further agreement between P and an officer of Revenue and Customs, this section applies from that time to the agreement as varied.

(7) The Treasury may by order amend the Table by adding or removing a tax or a penalty.

(8) An order under subsection (7) is to be made by statutory instrument.

(9) A statutory instrument containing an order under subsection (7) is subject to annulment in pursuance of a resolution of the House of Commons.

(10) In this section, except in the entries in the Table, "penalty" includes surcharge and penalty interest.

(11) This section has effect where the agreement mentioned in subsection (1)(c) is made on or after 24 November 2008.

The facts

Introduction

5. One of the difficulties in this appeal is that HMRC's Statement of Case has very few documents appended to it. In particular, the Statement of Case contains a section headed "Case History". This purports to be a description of HMRC's contacts with the appellant from 19 January 2009 to 19 December 2011, including descriptions of telephone calls. It is not clear whether this Case History is a verbatim record of those telephone conversations or whether it is a summary prepared by the Appeals Officer who prepared the Statement of Case. It is not clear what the source of this description might be. Usually, HMRC produce a printout of the electronic file in HMRC's records which contains their summary of dealings with particular taxpayers. No such printout was produced in this case.

6. A Statement of Case is, in general terms, a statement by HMRC of the main features of their case in respect of the appeal in question. It may refer to evidence, but comments, statements and assertions made in a Statement of Case are not themselves evidence.

7. Moreover, I have some concerns about the accuracy of the Case History. For example, and as the appellant points out, the Case History states that the appellant's appeal was rejected by HMRC and the appellant was notified on 21 October 2011. According to the correspondence enclosed with the Statement of Case the letter of rejection was dated 24 October 2011. Furthermore, the Case History states that the appellant requested a review on 29 November 2011. In the correspondence before us, the appellant requested a review in a letter dated 16 November 2011 and HMRC, in a letter to the appellant dated 2 December 2011, recorded his letter as having been received by HMRC on 18 November 2011.

8. These errors, although involving relatively minor matters of dating, do not fill me with confidence in the reliability of the description of events contained in the Case History.

9. I have decided that it would be unfair and unjust to rely on the unsupported statements made in the Statement of Case under the heading Case History. These statements have no obvious provenance and, in the case of records of telephone conversations as well as a number of other statements, are entirely unsupported by documentary evidence. In addition, as mentioned above, there are evidently errors in the few instances which can be checked against the documentary record.

10. I should add that a number of the descriptions of events and telephone conversations contained in the Case History have been challenged in detail in writing by the appellant as being incomplete or misleading. I am prepared to accept the appellant's letters (in particular, the letters of 16 November 2011 and 2 April 2012) as evidence because he was plainly a party to the events in question (e.g. telephone calls). There is no suggestion that the Appeals Officer who prepared the Statement of Case was a party to any of the telephone calls or correspondence relevant in this case.

11. It is important where appeals are assigned to the "default paper" category that both parties put forward all relevant documents. HMRC are, or should be, well aware of this requirement. Assertions made in a Statement of Case are not evidence. This has been said before by this tribunal but it appears that the message has not got through.

12. In the following description of the facts, therefore, I have relied on such documentary evidence as there may be (including the appellant's letters and other correspondence) and those statements in the Statement of Case which do not appear to be contentious or are supported by documentary evidence.

13. I should also point out that the presentation of HMRC's case in the Statement of Case was inaccurate and confusing. For example, HMRC claim that, under the heading "Points at Issue" that "Appellant say [sic] that HMRC had repeatedly asked for Income & Expenditure details…" It was not the appellant who said this but HMRC. The appellant denied it. Moreover, in paragraph 2 under the heading "In response to the appellant's points" the result statement that:

> " For the surcharge not have arisen in this case Appellant would have needed either to pay the liability due at 31 January 2009 in full or have had agreed time to pay arrangement in place by the trigger dated 28 February 2009."

14. First, the existence of the liability due at 31 January 2009 would have been true in respect of the tax year ended 5 April 2008, but not in respect of the tax year under appeal. Secondly, it was agreed on all sides that there was a time to pay arrangement in place before 28 February 2009.

Findings of fact

15. This is an appeal against the second surcharge for the income tax year ending 5 April 2009. The surcharge notice, issued pursuant to section 59C (3) TMA, was dated 13 August 2010 and was in the amount of £1,128.67. The surcharge notice recorded the unpaid tax for the year as being £22,573.50 and the surcharge was calculated at 5% of that outstanding tax.

16. The first surcharge notice, dated 13 May 2010, for the year ending 5 April 2009 in the same amount and issued pursuant to section 59C (2) TMA was cancelled by HMRC on 15 June 2010 (or 15 August 2010, see further below).

17. The reason for the cancellation of the first surcharge notice was because HMRC accepted that there was in place between the appellant and HMRC a "time to pay arrangement."

18. The details of the time to pay arrangement (which are authorised by section 108 Finance Act 2009) are as follows.

19. On 19 January 2009 the appellant contacted HMRC requesting time to pay his tax liabilities. From HMRC's Statement of Case it appears that the time to pay arrangement related to the tax year ended 5 April 2008 and also, at some stage, covered the tax year ended 5 April 2009. It is not clear from the papers at what stage the arrangement extended to cover the tax year ended 5 April 2009 but there appears to be no dispute between the parties that it did so extend. There is also no dispute between the parties that this time to pay arrangement was concluded on 19 January 2009 and that it involved the appellant in paying off his tax liabilities in the amount of £750 per calendar month.

20. The appellant states, and I accept, that the arrangement was for an initial period of six months. In a letter from HMRC to the appellant dated 19 January 2009, a Ms Wilkinson stated that the arrangement would be reviewed during August 2009 and that, if circumstances were unchanged, she saw no reason why the arrangement would not be extended under the same terms. I have not been provided with a copy of this letter but have accepted the appellant's description of its contents.

21. On 14 July 2009 the appellant spoke to a Mrs Kemp of HMRC who told him to keep paying £750 per calendar month for three months after which point the situation would be reviewed. The appellant states, and I accept, that the understanding between the appellant and HMRC was that the additional three months would give time for the submission of the appellant's tax return for the year ended 5 April 2009 and that the "quid pro quo" would be that the appellant was submit the return on or before 1 November 2009.

22. It is an important part of this appeal that HMRC contends that the appellant's time to pay arrangement was cancelled on 15 April 2010 and that the appellant argues that he was not notified of this fact. I shall now consider this issue, even though it involves, to some extent, breaking the chronological sequence of events.

23. HMRC wrote to the appellant on 20 September 2011 and informed him that his time to pay arrangement had been cancelled in April 2010. The appellant states that this was the first occasion on which he was informed that the time to pay arrangement had been cancelled. A letter from HMRC dated 24 October 2011 to the appellant gave some further details. HMRC stated that the time to pay arrangement had been cancelled by the Debt Management and Banking unit of HMRC on 15 April 2010 and that he had “been informed of this on numerous occasions." Letter does not give details of these "numerous occasions." The appellant denies having been informed of this until he received the letter of 20 September 2011.

24. I accept the appellant's evidence that he was unaware that the time to pay arrangement had been cancelled as far back as 15 April 2010 until he received HMRC's letter of 20 September 2011. There is no letter and there are no other papers in the correspondence before us which indicate that HMRC wrote to the appellant informing him of the termination of the time to pay arrangement in April 2010. I note that there is a statement by the Appeals Officer in the Statement of Case that he was unable to see anything in the notes to indicate that the reviewer considering the time to pay arrangement had contacted the appellant to discuss payment arrangements based on information gleaned from the tax return for the year ended 5 April 2009.

25. In my view, in the light of this admission and the following considerations, I have concluded that HMRC unilaterally cancelled the time to pay arrangement but failed to inform the appellant. I do not know whether this is "par for the course" in the time to pay world, but it seems remarkable to me. If HMRC, pursuant to section 108 Finance Act 2009, has agreed to allow a taxpayer extra time to pay his or her tax liabilities under the time to pay scheme, fair dealing and good practice would suggest that HMRC should at least inform a taxpayer if they decide to terminate the arrangement and should give some reasons for doing so. This would at least inform a taxpayer that it was now necessary to pay outstanding tax liabilities without further delay and, alternatively, permit further discussion if the basis for the termination of the arrangement was based on a misunderstanding.

26. That HMRC did not inform the appellant, when they decided on 15 April 2010 to cancel his time to pay arrangement, is clear from the fact that on 24 May 2010 HMRC (London North West DTO) wrote to the appellant saying:

> "We are disappointed to note that you have failed to honour the terms of the time to pay arrangement that was agreed to settle your outstanding tax liability. The arrangement may therefore be withdrawn unless arrears are paid within seven days of the receipt of this letter and all subsequent payments are made on time."

27. It is hard to make sense of this letter unless it is assumed that HMRC considered that there was a time to pay arrangement in existence on 24 May 2010 – that, at least, is the message that this letter must have conveyed to the appellant. It would also be odd to conclude that HMRC had informed the appellant of the termination of his time to pay arrangement when it appears that they were aware of this fact themselves. In fact, as the appellant noted, the letter was not necessary because his monthly payments £750 were not due until the last day of each month. In practice, the

appellant paid rather earlier each month and in respect of May 2010 made the payment on 19 May and, as we shall see, HMRC confirmed that the payment had been credited to their account on 21 May 2010.

28. Eleven days before the letter of 24 May 2010, on 13 May 2010, HMRC had issued the appellant with the first surcharge notice referred to above. He telephoned HMRC's Helpline on 20 May 2010. He spoke to a person in HMRC's East Kilbride Office. The appellant was informed that the surcharge notice had been issued in error and that the HMRC official would sort it out by contacting the "Processing Office. He also informed the appellant that there had been a previous error when surcharges for the year ended 5 April 2008 had been cancelled. The reason given for the errors was that a time to pay arrangement under the Business Payment Support Scheme is was in place.

29. After receiving the letter of 24 May 2010, the appellant had a conversation with a Ms Rafferty of HMRC on 1 June 2010. Miss Rafferty confirmed that HMRC had received the appellant's monthly payment for May 2010 and that it had been credited to HMRC's account on 21 May 2010 (the cheque had been dated 19 May 2010). She agreed to pass on the contents of the telephone conversation to the writer of the letter of 24 May 2010. She also confirmed that the agreed monthly payment had been made on time in each calendar month of 2010.

30. There was a statement in HMRC's Case History that this call had been "discontinued." The appellant stated that the call was late in the afternoon and the HMRC official, in his words, "could not wait to put the phone down and simply did so." For that reason, the appellant called HMRC again on 2 June 2010.

31. In the conversation on 2 June 2010, the appellant spoke to a Mr Rushworth at HMRC's Shipley Office. Mr Rushworth explained that the two computer systems which dealt with these matters "weren't talking to one another." This was, according to Mr Rushworth, why the time to pay arrangement had not been noted on the second system which issued a letter of 24 May 2010. He stated that he had stopped the second system from incorrectly issuing any more letters. He also clearly stated that the (first) surcharge "had been stopped."

32. On 22 June 2010 HMRC issued to the appellant a Self-Assessment Statement which showed that the first surcharge for the year ended 5 April 2009 had been suspended (and was subsequently shown to have been cancelled on 15 June 2010 in a statement dated 15 August 2010). In my view, this corroborates the appellant's version of the telephone conversation on 2 June 2010 as regards the first surcharge notice.

33. I should note that if I had taken account of HMRC's Case History in their Statement of Case it would have been hard to understand why the first surcharge was suspended on 15 June 2010. There is no record in the Case History of the telephone conversations that preceded 15 June 2010 in relation to the first surcharge. This strongly suggests to me that the record of telephone conversations contained in the Case History is materially incomplete. The only reference to a first surcharge was to

that in respect of that in respect of the previous tax year in a conversation on 2 March 2009. I should also note that the Case History refers to the penalty being cancelled after a review of the surcharge appeal on 10 August 2010, although the Self-Assessment Statement of 15 August 2010 dates the cancellation of the first surcharge for the year ended 5 April 2009 as occurring on 15 June 2010. It is possible that the 15 June date is a mistake, but I think nothing turns on this point. The Case History does, however, state that the 10 August 2010 review of the first surcharge cancelled the surcharge because a time to pay arrangement was in place. Although, for the reasons given above, I do not place much reliance on the Case History this does seem to be an admission that by 10 August 2010 the HMRC official who purported to cancel the arrangement on 15 April 2010 had not communicated his or her decision within HMRC or (as I have indicated above) to the appellant.

34. On 13 August 2010 HMRC issued the second surcharge notice in respect of the tax year ended 5 April 2009. This is three days after, according to the Case History, HMRC had reviewed the first surcharge notice and concluded that it should be cancelled because there was a time to pay arrangement in place. Curiously, the Self-Assessment Statement of 15 August 2010 has a date for the second surcharge notice of 15 September 2010. This is the surcharge notice under appeal.

35. The appellant telephoned HMRC's Portsmouth office on 23 August 2010. He was informed that the first surcharge had been cancelled and that the new notice related to a second surcharge. He was further informed that the second surcharge should not have been sent out and that HMRC would put in appropriate note on the system. The appellant was told that he would have to telephone the Department of HMRC dealing with time to pay arrangements himself.

36. Accordingly, the appellant telephoned HMRC's Washington Office on the same day. HMRC's Washington Office informed the appellant that the second surcharge would be stopped. It will be recalled that this was less than two weeks after an HMRC review concluded that the first surcharge notice should be cancelled because there was a time to pay arrangement in place. HMRC's Case History states that the appellant told HMRC that his return for the year ended 5 April 2009 may be incorrect and that the return for the year ended 5 April 2010 would show no profit. The appellant, however, denies this and states that he told HMRC that because there were losses in the year ended 5 April 2010 these would be carried back against the year ended 5 April 2009 which would change the situation. To my mind, the appellant's explanation makes more sense. In any event, it was agreed that the return for 5 April 2010 should be submitted as soon as possible.

37. In the meantime, the appellant had continued to pay £750 per month under the time to pay arrangement.

38. HMRC’s Case History states that on 20 September 2011 and HMRC reviewer rang the appellant and left a message to return the call. The appellant denies this. He says that he has no record of any such call and that if he had received a call he would have returned it. In my view, the facts of this appeal show that the appellant was

proactive in calling HMRC and I am satisfied that if he had received a message he would have returned the call.

39. As noted above, HMRC wrote to the appellant on 20 September 2011 stating that his time to pay arrangement had been cancelled in April 2010. Neither HMRC nor the appellant have provided a copy of this letter.

40. The appellant telephoned HMRC's Southampton Office on 30 September 2011 in response to their letter of 20 September and spoke to a Mr Smith. HMRC's Case History states that the appellant requested time to pay over 12 months. The appellant denies this and states that he telephoned as a result of receiving HMRC's letter of 20 September – a letter which he described as "surprising."

41. The appellant says that he telephoned HMRC on 30 September 2011 to tell them that the second surcharge notice was incorrect because there was a time to pay arrangement in place. He denies that HMRC, as claimed in the Case History, advised that there was no such arrangement in place. Instead, Mr Smith checked on his computer system and confirmed to the appellant that there was indeed such an arrangement in place. Mr Smith informed the appellant that because the surcharge had been issued (albeit incorrectly) the appellant should appeal against it and the appeal would be justified. Mr Smith also mentioned that the appellant might continue to receive automatically generated chasing letters but he should not worry about them and that no action would be required from the appellant. The appellant agreed to submit his tax return for the year ended 5 April 2011 early (by the end of November 2011) to demonstrate that his income remained very low. It was also specifically agreed that in the meantime it would be acceptable for the appellant to continue to pay £750 per calendar month. I accept the appellant's version of his telephone call with Mr Smith.

42. Also, on 30 September 2011 the appellant's accountants wrote to HMRC's Stoke on Trent Office (Debt Management) as follows:

> "Further to your letter of 20 September 2011 and your subsequent telephone conversation with our above client.
>
> We would advise that at the time of the surcharge [the appellant] had an agreement in place under the Business Support Scheme to pay his outstanding liabilities, this was I understand confirmed by you in conversation with [the appellant].
>
> Our understanding of the scheme is that while interest of course continues to accrue no late payment surcharges would be payable.
>
> Could you please cancel the surcharge of £1,128.67 accordingly."

43. It is apparent from this that on 30 September 2011 the appellant and his accountants believed that there was an existing time to pay arrangement in place. In the light of HMRC's confusion surrounding the first surcharge (ultimately resolved in the appellant's favour) and the assurances given by Mr Smith on 30 September 2011, I think the appellant was justified in believing the time to pay arrangement was still in

place and that the letter of 20 September 2011 represented further confusion within HMRC.

44. On 4 October 2011 the appellant's accountants received a telephone call from HMRC in response to their letter of 30 September 2011. What was said on this telephone call is disputed. The Case History in the Statement of Case says that the HMRC officer advised that the arrangement had been cancelled on 15 April 2010 and that it appeared that the appellant could pay more. The Case History also records that the HMRC officer advised the accountants that the appellant had not provided his income and expenditure details. It also records that the accountant stated that since the time to pay arrangement was made his client's estate agency business had reduced, but his golf course and farming business continued to do well. The Case History states that a letter was sent to the appellant again advising that the arrangement was cancelled on 15 April 2010 and that in the absence of the up-to-date income and expenditure details enforcement action would continue.

45. The appellant disputes this version of the telephone conversation he states that his accountant categorically denies the assertions made concerning the estate agency, golf course and farming business and that, therefore, these topics were not discussed with him. He states that the only discussion he had with his accountant was when the accountant telephoned him to say how difficult and aggressive an HMRC officer had been during a telephone call he had received that morning.

46. Because I do not feel I can fairly rely on the Case History and because the appellant was not party to this conversation I do not think I can sensibly reach any firm conclusion in relation to the content of this conversation.

47. The appellant telephoned HMRC on 4 October 2011 in response to the call to his accountant. He characterised the lady with whom he spoke as "extremely aggressive in her manner". She stated that the file notes did not refer to the arrangement made on 30 September 2011 (i.e. four days before) to pay £750 per calendar month until the return for the tax year ended 5 April 2011 had been submitted. He states that the HRC officer with whom he spoke said that Mr Smith, the HMRC officer in the Southampton Office with whom the appellant spoke on 30 September 2011, had "no authority to agree anything" and "no, I couldn't speak to anyone else about it." The officer stated that she could do no more about it and informed the appellant that the matter had been referred to a different department involved in debt collection/seizure of assets.

48. The appellant was concerned by his conversation on 4 October 2011 and telephoned HMRC the following day, 5 October 2011. HMRC's Case History records this telephone conversation, noting that the appellant stated that he had until the end of November 2011 to submit his tax return for the year ended 5 April 2011 and that he would continue to pay £750 for October and November. In effect, in my view, this is simply the appellant stating what he believed he had agreed with Mr Smith in the telephone conversation 30 September 2011. It states it the appellant was advised that the time to pay arrangement had been cancelled but further states that the appellant

indicated that he would continue to pay £750 per month and that he would submit his return which would show that there would not be a large liability to tax.

49. The appellant confirmed that he received a letter from HMRC dated 4 October 2011. He states that the letter claimed HMRC "continued to ask for updated details of your financial circumstances but you have failed to provide this information." The appellant denies that he had ever been asked to provide this information. He also points out that it ignored the fact that HMRC themselves had agreed to the appellant accelerating the submission of his tax return for the year ended 5 April 2011 for the purpose of clarifying his financial position.

50. On 24 October 2011 HMRC's Cardiff Office wrote to the appellant informing him that HMRC had considered his appeal against the second surcharge notice and had concluded that he did not have a reasonable excuse for not paying his tax liability on the due date. They declined to accept that he had a time to pay arrangement in place. As noted above, the letter stated that:

> "the arrangement was cancelled by Debt Management and Banking unit on 15 April 2010 and you have been informed of this on numerous occasions. All the payments you have made on [sic] monthly basis since than [sic] have been accepted [sic] without prejudice basis."

51. As noted earlier, the letter did not go into any detail concerning the "numerous occasions."

52. The letter also stated:

> "I note that you have not attempted to increase the payments nor to date provided your weekly/monthly income and expenditure details to my colleagues who have repeatedly asked for it. The time to pay by instalment is not a statutory right but only allowed under HMRC discretion."

53. On 16 November 2011 the appellant wrote to HMRC's Londonderry Office requesting an independent review and completed the appropriate form "Request for a review of decision." His letter set out in some detail his version of events including the various conversations with HMRC in which he was assured that the time to pay arrangement was still in place – the most recent conversation having occurred just over three weeks prior to HMRC's letter of 24 October 2011 in respect of which the appellant was requesting a review. The appellant denied that he had been asked to provide income and expenditure details and asked for details of occasions on which that request had been made.

54. The appellant's request for a review was acknowledged by a letter from HMRC's Londonderry Office on 2 December 2011 which asked him to forward any further information which the appellant wanted HMRC to take into account as part of the review.

55. On 19 December 2011 the appellant received two letters from HMRC. The first letter was sent by HMRC's Londonderry Office. This informed the appellant that:

> "Debt Management and Banking is the department responsible for monitoring time to pay arrangements. As your appeal was on the grounds that a time to pay arrangement was in place I have referred your case to Debt Management and Banking [an address in Essex] who will review the original decision."

56. On the same day the appellant received a letter from Debt Management – Time to Pay Monitoring Office in Romford, Essex. The letter did not take the usual form of a statutory review letter. Indeed, in my experience of HMRC review letters, the letter was unusually brusque. The letter stated:

> "Thank you for your appeal dated 16 November 2011.
>
> I am unable to accept this late appeal against a surcharge because as [sic] the arrangement was cancelled on 15 April 2010.

57. The letter concluded by informing the appellant of his statutory appeal rights and reminded him that interest continued to accrue on overdue amounts. The letter did not explain why the arrangement was cancelled or what steps had been taken to notify the appellant of this fact. In my view, this letter was a wholly unsatisfactory letter to write in relation to a review contemplated by section 49A–H TMA. It did not address the issues raised by the appellant in his letter of 16 November 2011, viz that the appellant had not been informed of the decision of 15 April 2010 to terminate the arrangement, that he had been assured in telephone conversations with HMRC on a number of occasions that the arrangement was still in place and that he had not been requested to provide details of his income and expenditure.

58. The appellant appealed to this tribunal on 9 January 2012.

59. The appellant appears to have continued to pay £750 per calendar month and has, therefore, not yet discharged his tax debt for the tax year ending 5 April 2009.

Discussion

60. In my view, HMRC failed to inform the appellant that they had decided to terminate his time to pay arrangement after the review on 15 April 2010. I do not know why the reviewing officer failed to take the simple step of informing the appellant but I am clear that the appellant was not informed. I accept the appellant's evidence that the first intimation that he received that HMRC had cancelled the arrangement was in their letter of 20 September 2011. I also accept the appellant's evidence that he had been told by HMRC in a conversation on 23 August 2011 and in another conversation as late as 30 September 2011 that the time to pay arrangement was in place and the surcharge had been incorrectly issued. In other words, by 30 September 2011 the appellant could justifiably assume that the time to pay arrangement was still in force.

61. Moreover, the fact that the original time to pay agreement was subject to review does not prevent the appellant's reliance upon the agreement being reasonable. It was initially stated by HMRC that there would be a review after six months, but I accept the appellant's evidence that HMRC indicated to him that there was no reason why,

absent a change in circumstances, the agreement should not be extended beyond that time. In any event, the agreement does not appear to have been reviewed until 15 April 2010 but, as we have seen, the outcome of that review was not notified to the appellant. In these circumstances, therefore, it was reasonable for the appellant to continue to rely on the time to pay agreement.

62. Furthermore, I do not accept HMRC's assertion that the appellant had been repeatedly asked for a statement of income and expenditure. It is notable that the appellant in his letter of 16 November 2011 asked HMRC to indicate where this request had been made. HMRC have produced no correspondence to substantiate this claim. The earliest letter which mentions this request is a letter of 4 October 2011. It is possible, but unproven, that the request was made in a letter of 20 September 2011 (according to HMRC's Case History) but HMRC have not produced a copy of this letter.

63. The appellant was informed by HMRC in letters dated 4 October 2011, 24 October 2011 and 19 December 2011 that the time to pay arrangement had been cancelled. The appellant, in my view, could be forgiven for assuming that there had to be some mistake because those letters indicated that the arrangement had been terminated on 15 April 2010. In contrast, HMRC in conversations subsequent to that date had assured him that the existence of the arrangement was still shown on their computer. Moreover, HMRC's letter of 24 May 2010 had plainly been written on the basis that a time to pay arrangement was still in force. Furthermore, the first surcharge notice had been cancelled in June (or August) 2010 on the same basis. These points were made by the appellant in his letter of 16 November 2011. But the response to this letter from HMRC on 19 December 2011 did not deal with the points raised by the appellant.

64. Section 59C (9) TMA provides that I may set aside the imposition of the surcharge if it appears that, throughout the "period of default", the taxpayer had a reasonable excuse for not paying the tax. The period of default is defined in subsection (12), in relation to any tax which remained unpaid after the "due date", as meaning the period beginning with that date and ending with the day before that on which the tax was paid.

65. Section 118 (2) TMA provides that where a person had 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.

66. For the reasons given above I am satisfied that the appellant had a reasonable excuse at the time the second surcharge notice was issued and, indeed, until 30 September 2011. I am also satisfied that the appellant’s reasonable excuse extends to the present time. In the period from 20 September 2011 (the date on which the appellant first became aware that HMRC were contending that the time to pay arrangement had been revoked in April 2010) until 19 December 2011 (the date on which the outcome of HMRC's "review" was notified to the appellant), the appellant can justifiably be regarded as seeking to clarify what is, on any analysis, a confused

position with HMRC. Thereafter, until the date that this decision is notified to the parties, the matter has been under appeal which, in my view, constitutes a reasonable excuse for the appellant not to pay the tax that would otherwise be due.

67. However, it is clear that HMRC now regard the time to pay agreement as being at an end. Therefore, pursuant to section 118 (2) TMA the appellant must pay his outstanding tax due in respect of the year ended 5 April 2009 (or enter into another time to pay arrangement) without unreasonable delay or risk another surcharge being levied.

68. It is my hope, however, that the parties will enter into discussions with a view to reaching a sensible compromise.

69. For these reasons, I cancel the second surcharge in respect of the tax year ending 5 April 2009, issued on 13 August 2010.

70. 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.

GUY BRANNAN
TRIBUNAL JUDGE

RELEASE DATE: 21 August 2012