[2017] UKFTT 144 (TC)

TC05638

Appeal number: TC/2014/3493

INCOME TAX – surcharges for late payment - whether agreement with HMRC to waive liability for unpaid tax – no- whether reasonable belief in such agreement – no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

ASHLEY BYRNE **Appellant**

- and -

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

TRIBUNAL: JUDGE BARBARA MOSEDALE
MS ELIZABETH BRIDGE

Sitting in public at the Royal Courts of Justice, Strand, London on 10 January 2017

Mr N G Stanley, of Norman Andrew & Co, for the Appellant

Mr A Khawar, HMRC officer, for the Respondents

DECISION

1. Mr Byrne lodged an appeal on 16 February 2014 with this Tribunal against what it described as liability of £25,362.83. The Notice of Appeal did not apply for permission to appeal out of time.

2. The way that the notice of appeal was worded, and in particular its reference to an appeal withdrawn some years earlier, and that it said 'the Tribunal should stand by its power of decision' and required 'all HMRC officers be instructed to withhold any action against our client' caused the Tribunal's registrar to be uncertain whether there was any appealable matter at the root of the notice of appeal.

3. As correspondence failed to establish whether the appellant was appealing anything within the jurisdiction of this Tribunal, the Tribunal ultimately set down a case management hearing to get to the heart of the matter.

4. That hearing took place in front of Judge Kempster on 23 November 2015. Judge Kempster recorded in his directions released the same date that the notice of appeal was intended to appeal against a statement of account issued by HMRC to the appellant on 17 October 2013. The statement of account recorded that Mr Byrne owed to HMRC:

   (1) Income tax for years 02/03 and 03/04 declared in the appellant's self-assessments;

   (2) Interest on this unpaid tax; and

   (3) Late payment surcharges on this unpaid tax.

5. Judge Kempster effectively struck out the appeal in so far as it related to anything other than the late payment surcharges, as this Tribunal has no jurisdiction over self-assessments and interest charges on income tax. He noted that if the notice of appeal was to be treated as an application to reinstate the appellant's earlier appeal (TC/10/8802), as that had been withdrawn because the assessment the subject of it was withdrawn by HMRC, he would refuse to reinstate it as there was nothing left to appeal.

6. We note, but only in passing because we do not have jurisdiction to review Judge Kempster's decision, that he was clearly right. S 31 TMA contains the rights of appeal and it gives no right of appeal against a self-assessment. That is not surprising: a self-assessment is completed by the taxpayer, there should be no need for a taxpayer to have a right to challenge his own actions. There is also no right to appeal an assessment of interest: that is no doubt because interest is applied automatically to a liability to tax. In other words, the tax shown on the 2002/3 and 2003/4 self-assessments still outstanding and the interest on that amount are payable by Mr Byrne and there is no appeal to this tribunal against that liability.

7. The Tribunal does have jurisdiction to deal with appeals against surcharges for late payments: however, it only has such jurisdiction when an appeal is made in time.

Mr Byrne's appeal was clearly many years out of time as it ought to have been lodged within 30 days of the imposition of the surcharges. The Tribunal, however, does have jurisdiction to extend the time and as HMRC did not object, Judge Kempster extended time on the surcharges and the appeals were admitted late.

8. Therefore, the only matter which was and could have been in front of this Tribunal at the hearing before us were the late payment surcharges. In detail they were as follows:

	1st surcharge		2nd surcharge	
2002/03	390.20	26.3.04	140.92	23.3.05
2003/04	980.98	27.8.04	980.98	25.8.05

9. The surcharges were imposed under s 59C Taxes Management Act 1970 which imposed a 5% surcharge if tax was left unpaid 28 days after the due date (s 59C(2) and a further (the second) surcharge imposed at 5% on the outstanding tax 6 months after the due date (s 59C(3). The due date is the 31 January of the year following the tax year so the due date for the 2002/3 tax year was 31 January 2004 and the due date for the 2003/4 tax year was 31 January 2005.

10. Mr Byrne's self-assessment for 2002/03 showed a tax liability of £13,755.00. Some £5,950.98 had been paid by the due date of 31.1.04, so the surcharge was charged on 5% of the balance. A further £4,985.57 had been paid by 30 July 2004, so the surcharge was only on 5% of the balance still outstanding as at that date.

11. Mr Byrne's self-assessment for the following year 2003/04 showed tax due of £19,619.67. None of this has been paid so a 5% surcharge on the full amount was charged on both occasions.

The appellant's case

12. To a large extent the facts were not in dispute: what was in dispute was the terms of an agreement which Mr Byrne reached with HMRC in July 2006. That was the crux of the dispute because Mr Byrne did not dispute that he had submitted the self-assessments for 2002/3 and 2003/4 as recorded above and he did not dispute that he had not paid the tax shown on those two self-assessments in so far as recorded above. It was his case that HMRC had agreed that he did not have to pay the outstanding tax shown as due on the self-assessments.

13. The appellant accepts that he has not paid the tax which HMRC say is outstanding: what he does not accept is that he was or is liable to pay it. Although the appellant's case was not put particularly clearly, so far as we understood it, his defences to liability were:

(a) Defence 1: That Mr Byrne was not liable to pay the tax shown on the self-assessments because the income was not his;

(b) Defence 2 & 3: there was an agreement reached in July 2006 which waived Mr Byrne's liability to pay his self-assessed tax liability.

(c) Defence 4: HMRC cannot enforce the liability because HMRC acted unlawfully;

14. We consider that (b) breaks into two possible defences: whether the liability to pay the tax was waived, and if not, whether a belief in the agreement was a reasonable excuse for not paying the tax. We will deal with all these defences after considering the facts.

15. We also note, as we have said, that we have no jurisdiction to discharge the appellant's liability to the self-assessed tax: nevertheless, as we do have jurisdiction to consider his liability to the surcharges, we are able to consider his liability to the self-assessments in the context of his liability to the surcharges.

Background to dispute

16. HMRC did not dispute the appellant's description of the background to the dispute: the dispute was over the terms of what was agreed in July 2006. The only evidence we had of what was agreed were HMRC internal memorandums and Mr Stanley's oral evidence.

17. We find that in around 1999 the appellant, who had operated previously as a self- employed sole trader, decided to set up a company through which to trade. He did this because a new and important customer preferred to trade with a company rather than an individual. For reasons not explained to us, his accountant Mr Stanley reached an agreement with HMRC that Mr Byrne would be taxed as if the company did not exist: in other words, the company would make nil corporation tax returns while Mr Byrne would declare the company's profits as his own income and pay tax accordingly.

18. We note that we are very surprised that HMRC considered it appropriate, in the exercise of its discretion granted by Parliament, to enter into an agreement to tax a person on something other than the true legal position. Apart from any other considerations, it does not seem to be an option made available to other self-employed taxpayers, who, on the contrary, have to make a choice between the usually more beneficial tax position of operating the business as a sole trader, or the benefits of limited liability given by incorporation. Mr Byrne, by this agreement, was given the benefit of limited liability *and* the tax position of a sole trader.

19. Nevertheless, Mr Khawar for HMRC did not challenge Mr Stanley's evidence about the terms of the 1999 agreement, and its existence explains why a further agreement was reached in July 2006. We move on to consider the background to that second agreement.

20. In about June 2003, Mr Byrne's personal relationship with his girlfriend broke up and a financial settlement was agreed whereby Mr Byrne's company would pay a

dividend, a part of which would be paid to Mr Byrne's ex-girlfriend as a shareholder. As the company had never declared profits, as Mr Byrne had declared all the company's profits as his income, Mr Stanley was concerned whether the company could legally pay a dividend.

21. This led to a long running correspondence with HMRC, in which the parties considered unwinding the existing position, so that the company would submit amended corporation tax returns and Mr Byrne would make a claim for relief.

22. Discussions led to an agreement in July 2006. Mr Byrne's case was that the result of this agreement was that:

(a) The 1999 agreement would not be unwound but it would come to an end on 5 April 2005. The effect of this is that the tax position for all years up to and including 2004/5 would be left undisturbed but for tax year 2005/06 onwards the company would declare the profits it made to tax and Mr Byrne would pay tax on the income he received from the company under PAYE;

(b) HMRC would take no issue against the company or its shareholders over the payment of the dividend being apparently unlawful, but would just treat it as a lawful dividend and allow tax to be paid in respect of it as normal;

(c) Mr Byrne's outstanding tax liabilities would be waived.

23. Mr Khawar did not challenge matters (a) and (b). He accepted that the agreement with HMRC included the term that tax years up to 2004/5 would be left as declared, in other words that the company's profits were declared on Mr Byrne's self assessment returns. Mr Khawar did not accept that the agreement included a term which provided for the waiver by HMRC of Mr Byrne's outstanding declared tax liabilities.

24. This was the main dispute on the facts between the parties and we move on to consider it.

Was waiver of declared tax liabilities a term of the agreement?

25. While it is for HMRC to prove that the taxpayer was liable to the tax, and that the taxpayer has not paid that tax, HMRC have discharged that burden by showing that the tax was declared on Mr Byrne's tax returns and Mr Byrne accepts that it is unpaid. As it is Mr Byrne's defence that his liability was later waived by HMRC, he has the evidential burden of proving that that waiver was a term of the agreement with HMRC.

26. The only oral evidence we had was from Mr Stanley. The HMRC officer with whom the agreement was reached was a Mr Wild. He was not called as a witness by HMRC and indeed we understand that HMRC's position is that he has left their employment. HMRC challenged Mr Stanley's evidence.

27. We find we were not satisfied with Mr Stanley's evidence. He did not appear to be a reliable witness. For instance, statements he made during the conduct of his client's case in the hearing were inconsistent. In particular, when we stated we were surprised that he could produce no documentary evidence of such an important term, he then insisted that there were documents in the bundle and/or back in his office which evidenced the agreement. Yet he could not identify any such documents nor did he want the opportunity to bring them along to the hearing; he then appeared to accept there were no further documentation other than that present in the hearing and stated that it was his practice to rely on oral agreements. This exchange was to be repeated four or so times in the hearing, with Mr Stanley repeatedly backtracking on his earlier statements.

28. Moreover, when asked directly whether he actually remembered this waiver of liability being agreed with HMRC, his response was simply that he was 'sure' that he would have made it clear. When it was pointed out to him that that was no answer to the question of whether he actually remembered the waiver being agreed, he asserted, rather unconvincingly, that he did remember it being agreed.

29. Further, what he said was inconsistent with what documents were before the court. HMRC were able to produce a memorandum written by Mr Wild on 24 July 2006 recording the agreement he reached in a telephone conversation with Mr Stanley. It recorded, contrary to Mr Stanley's evidence, only term (a) of the alleged terms set out at §22 above.

30. Another reason for doubting the reliability of Mr Stanley's evidence on the alleged agreement by HMRC to waive tax liability was that it seemed highly improbable. As both Mr Stanley and Mr Byrne said, there had never been any intention on anyone's part that tax would not be paid on the company's profits: the issue had simply been whether Mr Byrne would pay it or the company would pay it. It was pointed out to them that this position was inconsistent with their case that HMRC agreed to forgo tax due on the profits in 2002/3 and 2004/5 by waiving liability for the tax declared on Mr Byrne's self-assessments for those two years.

31. Mr Byrne's reply to this was that that was because HMRC recognised that regularising the position would require the company and Mr Byrne to draw up entirely new sets of accounts and tax returns for years past, and would require HMRC to process them all. This would be a lot of work and HMRC, therefore, he said, let him off the tax to avoid having to do it.

32. We found this explanation highly improbable. The tax at stake was over £22,000 and the cost to HMRC of the unwinding could not approach anything like that figure: moreover, the cost in accountancy fees to Mr Byrne and his company of any unwinding would equal, but more likely far exceed, any cost to HMRC. That alone would be sufficient incentive to Mr Byrne to agree, like HMRC, to let the past alone without any need for a waiver of tax liability.

33. Mr Stanley's rather different explanation for HMRC's alleged generosity was that HMRC recognised that the company had accrued losses which, if the income was

reallocated to the company, would result in a nil tax liability. We consider this explanation highly improbable too. Mr Stanley's case was that the business was profitable, which was why the settlement with Mr Byrne's girlfriend included a substantial dividend in her favour. He gave no explanation from where the losses could have arisen, nor why, if the company had had losses, he had been prepared to allow Mr Byrne personally to pay tax on the company's profits, rather than declare them in the company and offset them against the losses in order to avoid unnecessary tax liability.

34. In conclusion, no credible explanation was given to us for why HMRC would have agreed to waive the payment of over £22,000 in tax owing by Mr Byrne for 2002/3 and 2003/4. The only evidence that such agreement existed was Mr Stanley's oral evidence, which we reject as unreliable. The only evidence left before us of the terms of the agreement therefore was Mr Wild's telephone note and that does not record such a term: indeed, it strongly implies the opposite, that there was no waiver. We reject the appellant's case that his agreement with HMRC in July 2006 or at any time involved an agreement by HMRC that he would be relieved from liability to pay the outstanding tax self-assessed by him in 2002/3 and 2003/4.

35. We move on to consider the appellant's defences.

Defence 1: the income was not Mr Byrne's

36. Mr Stanley's position was that Mr Byrne declared income on his self-assessment returns for 2002/3 and 2003/4 which was not his income, but income belonging to the company owned and controlled by him, and which properly ought to have been returned on a corporation tax return. Therefore, said Mr Stanley, the self-assessments were wrong and Mr Byrne is not liable to pay them.

37. We do not agree with this analysis. As we have already stated, there was and is no appeal against an amount of tax shown as owing on a self-assessment. The law in that respect is not surprising: tax is self-assessed so a taxpayer cannot expect to have a right to challenge his own actions. Moreover, s 59B(1) TMA provided that the amount of tax shown on a self-assessment is payable (less any amounts paid on account). S 59B(4) provided that it was payable on or before 31 January of the year after the year in which the relevant tax year ended.

38. In other words, Mr Byrne was liable to pay the amounts shown on his self-assessment. It is irrelevant that he returned income that was not his own: the fact that he self-assessed himself to tax on that income means that the tax is payable.

39. We note that while a taxpayer has no right to challenge his own self-assessments, he does have a right to amend them. The amendment must be made in accordance with the terms of s 9ZA TMA which requires the amendment to be made within 12 months of the filing date. Mr Byrne made no amendment of his self-assessment returns so cannot rely on this and he is many years out of time to make an amendment now.

40. Bearing in mind that the facts are that it was agreed that he would return this income instead of it being returned by the company, it may be that under equity he would have been estopped from making any such amendment even if it had been made in time (unless of course at the same time he corrected the company's tax position). But we do not need to decide this because he did not attempt to make such an amendment.

41. We also note that HMRC in their discretion may permit an amendment to be made late: we can see no reason why HMRC would exercise that discretion in this case bearing in mind the agreement that existed between HMRC and Mr Byrne up to 5.4.6. We also note that in any event to the extent that the company's profits were remitted to Mr Byrne, he would have been liable to pay tax on the gross amount of them, as the company did not administer PAYE, so the self-assessment may not have been far from right in any event.

42. We reject the appellant's first defence.

Defence 2: the liability to pay the tax was waived by HMRC

43. This defence is that the agreement of July 2006 meant that the tax which had become due as at 31 January 2004 and 2005 ceased to be payable and therefore, with hindsight, the surcharges for non-payment imposed in 2004 and 2005 should be discharged.

44. There is a legal question whether a later agreement can retrospectively cancel liability to surcharges for non-payment which have already arisen. But we would only need to decide that legal question if we accepted the appellant's factual case that there was a later agreement which waived his liability to pay the outstanding self-assessed tax for 2002/3 and 2004/5.

45. As we have rejected the appellant's factual case on this, see §34, we do not need to go on to consider the legal question whether an agreement in July 2006 would have negated liability to surcharges on unpaid tax which were imposed in 2004 and 2005.

46. We reject the appellant's second defence.

Defence 3: reasonable excuse?

47. We move on to consider the third defence and that is whether Mr Byrne had a reasonable excuse for non-payment of the outstanding tax. A reasonable excuse is relevant because s 118(2) TMA provides as follows:

> ....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....

48. It is well-established and clear from the wording of this provision that the Tribunal must consider whether there was a reasonable excuse for the entire time that the taxpayer failed to do what was required of him to be done. It is not enough to show a reasonable excuse as at the due date of payment, or as at the date the surcharges were imposed. The section only operates to negate liability if the taxpayer complied with his obligation without unreasonable delay after the excuse ceased. So in a case such as this one, where there has still been no compliance, the taxpayer would have to show that his reasonable excuse commenced no later than the due date of payment and continued up to the date of this hearing.

49. And it is in fact Mr Byrne's case that he has a reasonable excuse that continues to this day. It emerged in the hearing that his case is that he had two sequential reasonable excuses. It was Mr Stanley's position that Mr Byrne did not pay the tax on the due dates because, at the time the tax fell due, he was in negotiations with HMRC over the 1999 agreement, and knew that it was a possibility that the outcome would be that the 1999 agreement would be reversed, his self-assessments amended, and the profits declared in the company.

50. That excuse ceased when the July 2006 agreement was entered into as at that point Mr Byrne knew that the 1999 agreement would not be unwound and his 2002/3 and 2003/4 self-assessments would stand. However, it was his position that he believed, instead, as we have discussed above, that HMRC had agreed that he would never have to pay his 2002/3 and 2003/4 self-assessments, and, therefore, for that reason, he continued not to pay them. That excuse, he says, exists to this day and justifies the continuing non-payment.

51. We note that s 118(2) refers to 'a reasonable excuse' and does not appear to contemplate the possibility of one reasonable excuse being succeeded by another: however, we accept that s 118 should be treated as encompassing successive reasonable excuses as that is consistent with Parliament's intention to relieve a taxpayer of liability where he acted reasonably.

52. We make no finding in respect of the first reasonable excuse put forward (set out in §49) which related to the period from before the first due date and up to July 2006. The excuse has some rationality to it, although it was somewhat inconsistent (a) with the appellant's position that at that time he accepted that the tax had to be paid, either by himself personally or by his company, (b) with the filing of the self-assessments returns showing the company profits as his liability and (c) the fact some part payments of the tax were made by him in January 2004.

53. However, we do not need to make findings in respect of the first reasonable excuse because we can resolve the case by considering the second alleged reasonable excuse, as set out at §50, and concerning the period after July 2006.

54. We have found as a fact that the alleged agreement to let Mr Byrne off paying his 2002/3 and 2003/4 self assessments did not exist: §34. But that is not an end to the appellant's case on reasonable excuse: a reasonable excuse only requires him to

show that he acted as a reasonable taxpayer, mindful of his obligation to pay tax righty due, would have acted in the same circumstances.

55. We consider that a taxpayer who did not pay the tax because he reasonably believed that HMRC had agreed to waive the tax has a reasonable excuse for non-payment. So the question is whether (a) Mr Byrne , acting through his agent, actually believed that the tax did not have to be paid, and (b) whether such a belief was reasonable.

56. We have already rejected Mr Stanley's evidence on his beliefs, but putting even that aside, it is clear to us that neither Mr Stanley nor Mr Byrne could have reasonably held the beliefs which they say that they did.

57. In our view a reasonable taxpayer would require an agreement which released him from liability, particularly for a substantial sum such as about £22,000, to be recorded in writing and would not act in accordance with any such agreement unless it was recorded in writing. If the agreement was not in writing, how could the appellant expect to enforce it if HMRC were later to renege on it? How could the taxpayer justify his non-payment unless he was able to point to a written agreement? As the alleged agreement was not recorded in writing, it was therefore foolish for Mr Stanley and Mr Byrne to believe it existed and act as if it existed.

58. This is all the more the case when a reasonable taxpayer would have been aware of the improbability of such a waiver by HMRC, and acting reasonably, would have required it to be evidenced in writing before accepting that that was what HMRC had agreed to.

59. So we find Mr Byrne was not acting reasonably in relying on a waiver which was not recorded in writing (and did not in fact exist). Therefore, he did not have a reasonable excuse for his failure to pay the tax from at least July 2006 onwards. As the tax remains unpaid to this date, we therefore find he did not have a reasonable excuse for the entire period for which he would require one if s 118 was to apply.

60. We dismiss this ground of appeal.

Defence 4: HMRC acted unlawfully

61. This defence was not stated very clearly. Mr Stanley's position seemed to be that HMRC acted unlawfully because they allowed Mr Byrne's company to declare a dividend when it had no profits.

62. Even if HMRC had acted unlawfully with respect to the dividend, however, it is not clear to us why Mr Stanley thought that could result in Mr Byrne's liability to the self-assessed tax and/or the surcharges being discharged. The two matters were not really related.

63. In any event, in so far as it is relevant, we do not accept that Mr Stanley proved that HMRC acted unlawfully in respect of the dividend. In particular, while the company's profits were not declared by the company on a corporation tax return, but

instead by Mr Byrne personally, nevertheless that did not alter the legal position that the profits belonged to the company. As a matter of company law, therefore it seems to us the company had profits out of which it could pay a dividend. So Mr Stanley has neither satisfied us that the company did act unlawfully, nor that HMRC were complicit in this, nor that in any event even he had proved these matters, that that could result in a waiver of liability for the tax and/or the surcharges.

64. And if it was also Mr Stanley's case that HMRC had acted unlawfully in reaching the 1999 agreement, and/or the July 2006 agreement with Mr Byrne, this was not clearly articulated. Nevertheless, we go on to consider this. The result of those agreements were that Mr Byrne declared company income as his personal income, and did not later amend his returns to unwind this incorrect declaration. As we have said at §18, we have concerns whether that agreement was within the bounds of a lawful exercise of discretion by HMRC. Nevertheless, Mr Byrne was a party to those agreements and benefited from them as up to 2005/6 he paid taxes as a sole trader rather than through his company and PAYE.

65. Assuming, but without finding, that HMRC did act unlawfully in entering into the 1999 and 2006 agreements which allowed Mr Byrne to declare 2002/3 and 2003/4 company income as his personal income, then we consider that this defence turns on a matter of public law. In other words, the claim would be that the liability under the self-assessments (and therefore for the surcharges) arose because company income was declared on personal returns as the result of an (alleged) unlawful agreement with HMRC. Whether the agreement with HMRC was unlawful is a matter of public law, in other words, it is a question of whether HMRC exceeded the discretion entrusted to it by Parliament by entering into the 1999 and 2006 agreements which permitted Mr Byrne to declare company income on his personal return. Putting aside the issue whether this Tribunal has jurisdiction to consider a case that the (alleged) illegality of an act by HMRC should be a 'defence' for an appellant, it seems to us in any event that the appellant is estopped from asserting any illegality against HMRC when he was a party to the alleged unlawful agreement and clearly benefited from it. Therefore, we consider that even if he could prove illegality, and even if the Tribunal had jurisdiction to consider it, the appellant is estopped from alleging the illegality in these circumstances. So we do not need to consider whether the agreement was unlawful nor the question of the Tribunal's jurisdiction.

66. We dismiss the appeal in its entirety.

67. 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.

Barbara Mosedale

TRIBUNAL JUDGE
RELEASE DATE: 26 JANUARY 2017