TC02300

Appeal number: TC/2012/01095

INCOME TAX –penalty for late filing of tax return – section 93 (2) Taxes Management Act 1970 – first and second surcharges under sections 59C (2) and (3) Taxes Management Act 1970 in respect of late payment of tax – whether reasonable excuse

FIRST-TIER TRIBUNAL
TAX CHAMBER

JOHN WOOLLEY **Appellant**

- and -

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

TRIBUNAL: JUDGE GUY BRANNAN

The Tribunal determined the appeal on 17 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 27 October 2011 (with enclosures), HMRC's Statement of Case submitted on 7 March 2012 (with enclosures)[and the Appellant's Reply dated 5 April 2012 (with enclosures).

DECISION

1. This is an appeal against a penalty imposed under section 93 (2) Taxes Management Act 1970 ("TMA") in respect of the late filing of the tax return for the year ended 5 April 2010 and against the first and second surcharges imposed under section 59C (2) and (3) TMA respectively in respect of the late payment of tax for the year ended 5 April 2010.

The facts

2. The appellant received a pension from Leicestershire County Council since May 2006. In November 2006, he commenced his own business which he carried on until January 2009, when he joined West Midlands Police ("WMP") as an employee. Therefore, from January 2009 the appellant received two sources of income: his pension from Leicestershire County Council and his salary from WMP.

3. His pension was taxed at source and his salary was subject to deduction of tax under the PAYE system. In calculating the appellant's PAYE coding in respect of his two sources of income, the appellant's personal allowances were incorrectly given against both his pension and his WMP income i.e. the allowances were given twice.

4. On 6 April 2010 HMRC issued to the appellant a notice to file a tax return for the year ended 5 April 2010. The notice was issued under section 8 TMA and required the appellant to complete a tax return for the year ended 5 April 2010. Section 8 TMA provides that a paper return must be submitted on the later of 31 October 2010 or three months from the date of issue of the return or notice to file. As regards tax returns submitted on-line, the filing date is later of 31 January 2011 or three months from the date of issue of the return or notice to file.

5. The appellant was on holiday for the first two weeks of January 2011 and returned on 17 January knowing that he had two weeks to file his online tax return. He was, however, unable to complete the online return because he had forgotten his access details.

6. The appellant rang HMRC on several occasions for help but was left waiting and on at least two occasions was left holding on for over 30 minutes and, on other occasions for 20 minutes, before giving up. The appellant ordered the access details online but was notified that it would take seven days for the details to be supplied, which meant that he was unable to file his return online before 31 January 2011.

7. The appellant filed his return for the year ended 5 April 2010 online on 6 February 2011. His tax liability was calculated automatically. His additional income tax liability for the year was £2,864. At the date of the submission of HMRC's Statement of Case (7 March 2012) this tax liability had not been paid.

8. When completing his tax return online the appellant entered the details of his pension from Leicestershire County Council and earnings from WMP. As already

noted, the online calculation indicated that he had an additional tax liability. The appellant took little notice of this and assumed that if there was extra tax to be paid it would be collected through a change in his tax coding.

9. Subsequently, the appellant received a written notice from HMRC in respect of his outstanding tax liability. When the appellant queried this notice he was informed that he had paid insufficient tax for the year ended 5 April 2010. He was informed that he had been given personal allowances in respect of both his pension and his WMP earnings. This was why he had underpaid tax. HMRC explained that, when he took up employment with WMP, WMP should have completed a Form P46.

10. A Form P46 is a form which an employer will ask a new employee to complete if that employee does not have a Form P 45 from his previous employment.

11. The appellant states that he did complete a Form P46 when he joined WMP. He was informed by WMP's payroll department that they did not keep a record of this document because they sent it directly to HMRC. The appellant also states that WMP informed him that they notify HMRC each tax year of the identity of employees in their employment whom they have paid.

12. HMRC state that they did not receive a Form P46 in respect of the appellant from WMP.

13. On 6 January 2010 the appellant received a PAYE coding notice from HMRC. It was headed: "Your tax code for the year 6 April 2010 to 5 April 2011 is BR." The letter read:

> "You need a tax code so WEST MIDLANDS POLICE AUTHORITY can work out how much tax to take off the payments they make to you. Your main HM Revenue & Customs office has worked out short tax code for your other employment(s) or pension(s) but we both need you to check that our information about you is correct. The wrong code could mean you pay too much, or too little, tax. Please keep your coding notices, you may need them if we send you a tax return.
>
> We have asked WEST MIDLANDS POLICE AUTHORITY to use code BR for this year, which means you will pay tax at 20% on your WEST MIDLANDS POLICE AUTHORITY income."

14. “BR” stands for basic rate.

15. It is clear from this notice that in January 2010 HMRC were or became aware that the appellant had more than one source of income that was subject to deduction of PAYE. HMRC have not commented on this notice in their submissions save to note that the notice was given.

The legislation

16. So far as is material, section 8 TMA provides:

(1) For the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, and the amount payable by him by way of income tax for that year, he may be required by a notice given to him by an officer of the Board—

(a) to make and deliver to the officer, on or before the day mentioned in subsection (1A) below, a return containing such information as may reasonably be required in pursuance of the notice, and

(b) to deliver with the return such accounts, statements and documents, relating to information contained in the return, as may reasonably be so required.

17. Section 93 TMA provided:

(1) This section applies where—

(a) any person (the taxpayer) has been required by a notice served under or for the purposes of section 8 or 8A of this Act … to deliver any return, and

(b) he fails to comply with the notice.

(2) The taxpayer shall be liable to a penalty which shall be £100.

(3) If, on an application made to it by an officer of the Board, the tribunal so directs, the taxpayer shall be liable to a further penalty or penalties not exceeding £60 for each day on which the failure continues after the day on which he is notified of the direction (but excluding any day for which a penalty under this subsection has already been imposed).

(4) If—

(a) the failure by the taxpayer to comply with the notice continues after the end of the period of six months beginning with the filing date, and

(b) no application is made under subsection (3) above before the end of that period,

the taxpayer shall be liable to a further penalty which shall be £100.

(5) Without prejudice to any penalties under subsections (2) to (4) above, if—

(a) the failure by the taxpayer to comply with the notice continues after the anniversary of the filing date, and

(b) there would have been a liability to tax shown in the return,

the taxpayer shall be liable to a penalty of an amount not exceeding the liability to tax which would have been so shown.

(6) No penalty shall be imposed under subsection (3) above in respect of a failure at any time after the failure has been remedied.

(7) If the taxpayer proves that the liability to tax shown in the return would not have exceeded a particular amount, the penalty under subsection (2) above, together with any penalty under subsection (4) above, shall not exceed that amount.

(8) On an appeal against the determination under section 100 of this Act of a penalty under subsection (2) or (4) above that is notified to the tribunal, neither section 50(6) to (8) nor section 100B(2) of this Act shall apply but the tribunal may—

(a) if it appears … that, throughout the period of default, the taxpayer had a reasonable excuse for not delivering the return, set the determination aside; or

(b) if it does not so appear …, confirm the determination.

(9) References in this section to a liability to tax which would have been shown in the return are references to an amount which, if a proper return had been delivered on the filing date, would have been payable by the taxpayer under section 59B of this Act for the year of assessment.

(10) In this section—

"the filing date" in respect of a return for a year of assessment (Year 1) means—

(a) 31st January of Year 2, or

(b) if the notice under section 8 or 8A was given after 31st October of Year 2, the last day of the period of three months beginning with the day on which the notice is given.

"the period of default", in relation to any failure to deliver a return, means the period beginning with the filing date and ending with the day before that on which the return was delivered.

18. Section 59C TMA provided:

(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.

19. Regulation 14 Income Tax (Pay As You Earn) Regulations provides:

Matters relevant to determination of code

(1) If the Inland Revenue determine a code under this regulation, they must have regard to the following matters so far as known to them—

(a) the reliefs from income tax to which the employee is entitled for the tax year in which the code is determined, so far as the employee's title to those reliefs has been established at the time of the determination;

(b) any PAYE income of the employee (other than the relevant payments in relation to which the code is being determined);

(c) any tax overpaid for any previous tax year which has not been repaid;

(d) any tax remaining unpaid for any previous tax year which is not otherwise recovered;

(e) any tax repaid to the employee in excess of the amount properly due to the employee which may be recovered as if it were unpaid tax under section 30(1) of TMA (recovery of overpayment of tax etc) and which is not otherwise recovered;

(f) unless the employee objects, any other income of the employee which is not PAYE income; and

(g) such other adjustments as may be necessary to secure that, so far as possible, the tax in respect of the employee's income in relation to which the code is determined will be deducted from the relevant payments made during that tax year.

(2) If the Inland Revenue determine the code before the beginning of the tax year for which it is determined, the Inland Revenue—

(a) must have regard to any expected change in the amount of any relief referred to in paragraph (1)(a), but

(b) may disregard any such relief if they are not satisfied that the employee will be entitled to it for the tax year for which the code is determined.

(3) Paragraphs (1)(c) and (d) are subject to regulations 186 and 187 (recovery and repayment: adjustment of employee's code).

20. Regulation 46 Income Tax (Pay As You Earn) Regulations 2003 ("PAYE Regulations") provides:

Form P46 where employer does not receive Form P45 and code not known

(1) This regulation applies if—

(a) an employee commences employment without giving the employer Parts 2 and 3 of Form P45, and

(b) a code in respect of the employee has not otherwise been issued to the employer.

(1A) The employee must provide the following information in Form P46.

(1B) The information is—

(a) the employee's national insurance number (if known),

(b) the employee's full name,

(c) the employee's sex,

(d) the employee's date of birth, and

(e) the employee's full address including postcode.

…

(1C) …

(2) The employee must indicate in Form P46 which . . . of the following statements applies—

…

Statement C: that the employee either has another employment (which is continuing) or is in receipt of a retirement pension or an occupational pension]

. . ..

(2A) A Form P46 must be—

(a) signed by the employee; or

(b) delivered by the employer by an approved method of electronic communications after he has complied with paragraph (2B).

(2B) To the extent that the information contained in it relates to the employee, the employer must verify the content of a Form P46 before it is delivered.

(2C) If, despite the requirements of paragraphs (2) to (2B), a Form P46 is sent or delivered to an officer of Revenue and Customs without the requirements of those paragraphs being satisfied, the employer must deduct tax on the non-cumulative basis using code 0T from the employee's earnings.

(3) The employer must provide the following information in the Form P46—

(a) the date on which the employment started;

(b) the employee's works payroll number and the department or branch (if any) in which the employee is employed;

(c) the title of the job;

(d) the employer's PAYE reference;

(e) the employer's name;

(f) the employer's full address, including the postcode; and

(g) the tax code used in relation to the employee's earnings.

(4) The employer must keep the Form P46 until required to send it to the Inland Revenue in accordance with regulations 47 to 49.

(5) Before sending the Form P46, the employer must indicate in the Form which code is being used in respect of the employee and whether it is being used on the non-cumulative basis.

(6) For the purposes of paragraph (1)(b), the employer must ignore any code issued to the employer in respect of an employee's earlier employment which has ceased.

(7) This regulation ceases to apply in the circumstances mentioned in regulation 51(2) (late presentation of Form P45: before employer required to send Form P46).

21. Regulation 49 provides:

> **Procedure in Form P46 cases: (a) Statement C applies (not seconded expatriate), or (b) … or (c) Form P 46 not signed when required**
>
> (1) This regulation applies in any case which is not dealt with by regulation 47 or 48 which concerns an employee to whom regulation 46(1) applies.
>
> (2) On making the first relevant payment to the employee, the employer must—
>
> (a) send the Form P46 to Her Majesty's Revenue and Customs,
>
> (b) prepare a deductions working sheet and enter both the total payments to date and the total tax to date before the first payment as nil,
>
> (c) deduct tax on the cumulative basis using the basic rate code.
>
> (2A) To comply with paragraph (2)(a)—
>
> (a) the employer must send the Form P46 to Her Majesty's Revenue and Customs even if the employee has not provided all of the information required by regulation 46, and
>
> (b) the employer must provide any of the information required by regulation 46(1B) that the employee has not provided.
>
> (3) On making any subsequent relevant payment before the employee's code is issued, the employer must continue to deduct tax on the cumulative using the basic rate code.
>
> (4) In the case of a seconded expatriate, the emergency code must be used instead of the basic rate code mentioned in paragraphs (2)(c) and (3) (see also regulation 7(3) about the codes).

22. Section 118 (2) TMA provides:

> "…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."

Arguments of the parties

23. Essentially, the appellant argues that he was entitled to file his tax return on 31 January 2011. The inability to get through to HMRC's helpline to obtain his access details prevented him from successfully submitting his return online by 31 January 2011 because he was unable to obtain his access code in time.

24. As regards the under-deduction of tax for the year ended 5 April 2010, the appellant submits that HMRC had all relevant information necessary to determine the correct PAYE coding in respect of his pension and his employment with WMP. He had completed Form P46 (although it was WMP's obligation to file the form), even

though HMRC had no record of that being received. Furthermore, information submitted by WMP and, presumably, by his pension fund identified him as a recipient of PAYE income. The under-deduction of tax had arisen as a result of HMRC's incompetence. Accordingly, he should not be subject to either the first or second surcharge.

25. HMRC submits that Form P46 was not submitted when the appellant commenced employment with WMP. Moreover, it was for the appellant carefully to check his notice of coding to ensure that it was correct.

26. Furthermore, in respect of both section 93(8) and section 59C(9) TMA a reasonable excuse must exist throughout the "period of default". The period of default is, in the case of section 93, the period beginning with the filing date and ending with the day before that on which the return was delivered (section 93 (10). In respect of section 59C, the period of default is the period beginning with the date on which tax remains unpaid after the due date for payment and ending with the day before that on which the tax was paid (section 59C (12)).

27. As regards the surcharges imposed under section 59C, HMRC argued that a reasonable excuse to do not exist throughout the period of default. The appellant did not appear to deny that there had been an underpayment text of the year ended 5 April 2010 but was bewildered, as he put it, as to the method of calculation.

Decision

28. The PAYE system is, in essence, a method of withholding income tax from payments of employment income. However, the primary method of collection of income tax arises under the self-assessment regime. Under-payments of PAYE can, in limited circumstances, be collected in subsequent periods by an adjustment to the employee's code (see Regulation 186 of the PAYE Regulations: e.g. the under deduction must be less than £2,000 and, in the case of an online return, the return must be delivered before 31 December following the end of the relevant tax year). In other cases, an underpayment of tax must be collected through the self-assessment system.

29. In my view, HMRC had in their possession sufficient information to enable correctly to determine the appellant's correction notice of coding. It was clear that WMP notified HMRC that it was paying employment income to the appellant. I also accept the appellant's statement that he completed Form P46 when he joined WMP. There is no evidence, however, that WMP sent the Form to HMRC.

30. Regulation 14 of the PAYE Regulations provides that HMRC "must" have regard to certain matters "so far as is known to them" in determining the code for the purposes of PAYE. One of those matters is any "PAYE income of the employee." Under section 683 Income Tax (Earnings and Pensions) Act 2003, "PAYE income" would include the appellant's pension income from Leicestershire County Council. Payments by the pension fund to the appellant, together with the appellant's details, would have been returned to HMRC under regulation 73 of the PAYE Regulations on

an annual basis. There is, therefore, no reason why HMRC should be unaware of the fact that the appellant during the year ended 5 April 2010 had two sources of PAYE income. Indeed, the notice of 6 January 2010 is only explicable on the basis that they were aware. Therefore, in my view, HMRC failed to discharge their duty under Regulation 14.

31. Nonetheless, it should have been apparent to the appellant when he examined his notices of coding in respect of the two sources of income that his personal reliefs had been taken into account twice in calculating his coding. A taxpayer must check his or her notice of coding to ensure that the basis upon which the coding is determined is correct. A taxpayer cannot simply abdicate responsibility for the correctness of his notice of coding, even if HMRC have made a mistake. When the appellant filed his tax return on 6 February 2011 the automatic calculation of his tax made it clear that there was an underpayment of tax and that the appellant had an outstanding tax liability. Even if there has been a mistake in the determination of a taxpayer's PAYE code the taxpayer must still pay the underpaid tax pursuant to the self-assessment system. For that reason, I consider that the appellant cannot be said to have a reasonable excuse for the first and second surcharges imposed under section 59C.

32. In addition, section 59C (9) requires that the reasonable excuse must exist throughout the period of default. In this case, it should now be readily apparent to the appellant that, notwithstanding any confusion or inefficiency on the part of HMRC in relation to his notice of coding, tax had been underpaid for the year ended 5 April 2010 because double relief had been given for his allowances. Indeed, as already noted, when the appellant filed his tax return on 6 February 2011 the automatic calculation of his tax made it plain that there was an underpayment of tax and that the appellant had an outstanding tax liability. Notwithstanding this, the appellant has still not paid the outstanding tax – or at least he had not done so by 7 March 2012. In my view, the appellant's delay in settling his tax liability deprives him of any reliance he could otherwise place on the defensive reasonable excuse. The reasonable excuse did not last for the whole period of default

33. Section 118 (2) TMA also has a general reasonable excuse defence. In my view, this defence applies in addition to that specified in section 59C (9). The drafting of section 59C clearly excludes certain other provisions of the Act. For example, in section 59C (9) section 50 (6) TMA is specifically excluded. No attempt is made to exclude section 118 (2). However, I do not think section 118 (2) assists the appellant. Section 118 (2) provides that a reasonable excuse can be relied upon if a taxpayer acts without unreasonable delay after the excuse has ceased. In my view, the appellant has failed to pay his tax without unreasonable delay once the confusion caused by HMRC's notices of coding became apparent.

34. As regards the penalty under section 93 TMA, I consider that the appellant has failed to show any reasonable excuse for failing to submit his tax return on time when required to do so by a notice served under section 8 TMA. The fact that the appellant failed to memorise or keep a note of his access code was his fault. It would be reasonably apparent to any taxpayer that leaving the completion of a tax return until a

few days before the deadline of 31 January runs the risk that any hitch may result in the late submission of return. The fact that HMRC's helpline was unable to deal promptly with the appellant's enquiries before the 31 January deadline – hardly surprising in the two weeks before 31 January – does not, it seems to me, constitute a reasonable excuse. The real cause of the failure to submit the tax return was the fact that the appellant could not remember his access code and that there was too little time before the 31 January deadline to put that right.

35. For these reasons, I have decided that the penalty under section 93(2) TMA and the first and second surcharges under section 59C TMA should be upheld and these appeals must be dismissed.

36. 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: 4th October 2012