



TC03347

Appeal number: TC/2013/04842

*Income Tax – surcharge liability – late payment – set off of losses –
reasonable excuse – appeal allowed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

SIMON THORP

Appellant

- and -

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

**TRIBUNAL: DR K KHAN
ELIZABETH BRIDGE**

Sitting in Reading on 26 November 2013

J Croad, Accountant and Tax Advisor, Martin & Co appeared for the Appellant

**J Ashworth, presenting Officer, with Mr S Goulding as an observer instructed
by the General Counsel and Solicitor to HM Revenue and Customs, for the
Respondents**

DECISION

Introduction

- 5 1. This matter involves the imposition of a surcharge for late payment of the Appellant's 2009/2009 tax liability.
 2. The question for the Tribunal is whether there is a reasonable excuse.
 3. If a payment is received late, a surcharge is chargeable for late payment unless the Appellant has a reasonable excuse for not paying on time. Facts
- 10 (1) The Appellant's 2008/09 tax return was submitted on 28 February and his tax liability was calculated at that time. The liability was paid in full on 26 March 2010 but was due on 31 January 2010. The late Surcharge Payment Notice for 2008-09 was £2,919.39 which was raised on 26 February 2013. This was sent to both the Appellant at his home address
15 and to his agent, Martin & Co.
 - (2) The Appellant's tax return for 2008/09, which was submitted on 23 February 2010, showed a refund due of £14,616.89.
 - (3) At the time, the Appellant was paying his previous tax liability (2007/08) in instalments. This was agreed with HMRC as tax was due on the
20 disposal of his business but the money due as consideration was not yet received. It was payable in instalments over a period of time and the final payment was made in March 2010.
 - (4) The tax credit of £73,004.70 for the period 08/09 was set against the balancing payment for 2007/08 which was payable on 31 January 2009.
 - 25 (5) On the Appellant's tax return for 2008/09 there was capital gains liability due of £58,387.81 less an income tax overpayment of £73,004.70. The income tax overpayment was due to trading loss of £178,060.25 in 2008/09 being carried back from 2008/09 to 2007/08.
 - 30 (6) It should be noted that the payment for the tax year 07/08 was agreed to be made on an instalment basis on the sale of the Appellant's business and was paid in 07/08; 08/09 and 09/10. The setting off of the tax credit of £73,004 arising in 08/09 against the liability of 07/08 rather than its set off against the liability for 08/09 was a decision taken by HMRC.
 - 35 (7) If it had been set off against the liability of 08/09 there would be no tax liability for that year.
 - (8) The tax calculation provided by HMRC for 2008/09 showed an income and capital gains tax liability of £58,387.81 which was due by 30 January 2010. HMRC informed the Appellant (through a customer services

message) that the liability did not take into account “any payments you may have made towards amounts due on these dates, or any other amounts which may be outstanding”.

Legislation and Law

5 4. Sections 59B and 59C Taxes Management Act 1970 sets out payment, surcharge liability and the reasonable excuse provisions.

5. The cases cited include:

(1) *Gary Edgecombe* FTT Appeal No. TC/2012/00896.

(2) *Norton v Thompson (Inspector of Taxes)* [2004] STC (SCD) 163.

10 **Evidence**

6. The Tribunal is provided with correspondence and other information passing between the parties together with the authorities cited.

Appellant’s submissions

7. The Appellant makes the following points:

15 (1) Since a tax refund of £14,616.89 was due for 2008/09 there should be no late surcharge payment for that period. The credit of £73,004.70 for 08/09 was set incorrectly against the balancing payment for 2007/08 when it should have been set against the 2008/09 tax liability as provided in TMA 1978, Schedule 1B, para.2(3) and (6).

20 (2) HMRC had the wrong postcode for the Appellant. On the tax return submitted on 28 February 2010 the correct address was given though it would appear that HMRC used the address of the Appellant’s farmhouse to send notifications. The agent of the Appellant, Martin & Co, stated that they started acting for him in January 2011 and no surcharge liability was
25 shown online until February 2013. On 2 July 2012, the statements on account of the Appellant showed a nil tax liability. It took 7 months before the surcharge notices were issued and sent out. The Appellant believes that this is unfair since under the Taxpayer’s Charter the Appellant has a right to certainty of his tax affairs.

30 **Respondents’ submissions**

(1) For the year 2008/09 there was a determination of the tax due irrespective of any losses claimed. This is the way the tax calculation is done.

(2) The taxpayer cannot use the anticipation of a credit to discharge the requirement to pay tax due. All tax due must be paid by the relevant due date. The loss

claimed does not form part of the self-assessment for the later tax year even though it is included in the return for the later year.

- 5 (3) The credit claimed was carried back to the 2007/08 liability since that liability was established. The set off against an earlier period would have established an overpayment and would have been repaid. Since the credit was set against the 2007/08 period it is not available for set off against the 2008/09 liability.
- 10 (4) There is no reasonable excuse in this case since the surcharge arises where the tax is outstanding 28 days after the due date and any delay in providing a penalty notice is not a reasonable excuse since it is not a statutory requirement for a penalty notice to be issued by HMRC.

Discussion and conclusions

8. The key point is whether HMRC should have set off the tax credit due against the 2008/09 liability and not against the 2007/08 liability. The Appellant says that if it was set off against the 2008/09 liability there would be no late payment surcharge as no tax was actually due for 2008/09. Moreso, the Appellant had agreed instalment payments on the 2007/08 to 2009/10 tax liability based on the instalment payments of the consideration on sale of his previous business.

9. The Appellant draws reference to TMA 1970 Schedule 1B, paragraph 2(3) and (6) and submits that the tax refund of £14,616.89 was due for 2008/09 and therefore no 2008/09 late payment surcharge arise. They also say that this is substantiated by the case of *Norton v Thompson (HMRC)* where it was held that the loss claim would relate to a later year for payment purposes although the tax calculation was based on the earlier year.

10. The Appellant's tax return shows a capital gains tax liability of approximately £58,387 for 2008/09. However there was an overpayment of income tax of £73,004.70. The overpayment was due to a trading loss, presumably arising from the Appellant starting a new business after the disposal of the previous business, which arose in 2008/09. This was carried back to 2007/08 under the relevant loss relieving provisions of Sections 64 and 72 ITEPA 2007. The carrying back of the losses means that a tax refund of £73,004.70 was due for 2007/08.

11. The Appellant had in place an agreement with HMRC to pay the previous year's (2007/08) tax liability by instalments. The tax credit for 2008/09 (£73,004.70) was set against the 2007/08 figures. This should not have been done given the payment agreement in place. It should have been set against the 2008/09 figures.

12. This would have meant a tax refund of £14,616.89 was due for 2008/09 and therefore no payment surcharge should arise. The case law has established that the loss claim relates to the later year for payment purposes although the calculation was based on the earlier year. Accordingly the appeal is allowed.

13. On the question of the Appellant's complaint under ESC A19 this should follow the procedure previously laid down by HMRC in their letter of 24 June 2013.

14. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

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**DR K KHAN
TRIBUNAL JUDGE**

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