



**TC07072**

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**Appeal number: TC/2018/05788**

10 *INCOME TAX – Surcharge for late payment of APN amount – appeal against  
surcharge late – whether to grant permission to notify appeal to HMRC –  
permission refused.*

15 **FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**PETER BODMAN**

**Appellant**

**- and -**

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

**Respondents**

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**TRIBUNAL: JUDGE RICHARD THOMAS**

25 **Sitting in public at Taylor House, London EC1 on 1 February 2019**

30 **The Appellant in person**

**Ms Ally Keating, litigator in HMRC, for the Respondents**

## DECISION

1. On 1 February 2019 I heard an application by Mr Peter Bodman (“the appellant”) for permission to notify an appeal out of time to HMRC. At the end of the hearing I gave an oral decision refusing him leave. At the time both parties agreed that I could issue a “short” decision under rule 35(3) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 and that decision was duly released on 6 February 2019.

2. On 2 March 2019 Mr Bodman applied to the Tribunal for a decision with full findings of facts and reasons, and this is that “full” decision.

### Facts

3. The surcharge arises as a result of the appellant’s failure to pay the amount of an advance payment notice (“APN”) which was issued on 8 November 2016 in an amount of £36,839. The due date for payment was 9 February 2017 or if later 30 days after HMRC had made a decision on any representations.

4. The appellant made representations on 5 February 2017 and on 28 March 2017 HMRC issued their conclusions about the representations.

5. On 10 October 2017 HMRC issued a surcharge notice under s 59C Taxes Management Act 1970 (“TMA”) for the tax year 2007-08 in the sum of £1,705.88.

6. On 27 November the appellant called two different offices of HMRC, including Debt Management & Banking (“DMB”).

7. On 28 November the appellant called DMB to arrange a time to pay (“TTP”) agreement.

8. On 29 November 2017 HMRC confirmed the TTP and informed the appellant of the amounts outstanding, the APN amount and the surcharge.

9. On 23 March 2018 the appellant phoned HMRC to say he wished to appeal the surcharge and asked to know the correct process for doing so.

10. On 25 May 2018 DMB demanded payment of £1,733.21 (ie the surcharge plus interest).

11. On 2 July 2018 the appellant sought to notify an appeal against the surcharge.

12. On 16 July 2018 HMRC refused to accept the appeal as it was late and the reasons given for lateness did not amount to a reasonable excuse, as there was no event outside the appellant’s control which prevented him notifying an appeal in time.

13. Following further points made by the appellant and an HMRC reply informing the appellant how to seek permission from the Tribunal to make a late appeal, the appellant did so on 25 August 2018.

## Law

### 14. Section 59C TMA provided in 2007-08:

5 “(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.

10 (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.

...

(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—

15 (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.

20 (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.

25 (9) On an appeal under subsection (7) above section 50(6) to (8) of this Act shall not apply but the Commissioners may—

(a) if it appears to them 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

30 (b) if it does not so appear to them, 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.

...

35 (12) In this section—

“the due date”, in relation to any tax, means the date on which the tax becomes due and payable;

40 “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.”

### 15. The relevant provisions of TMA (see s 59C(8) TMA) are:

*“48 Application to appeals and other proceedings*

(1) In the following provisions of this Part of this Act, unless the context otherwise requires—

- 5 (a) “appeal” means any appeal under the Taxes Acts;  
(b) a reference to notice of appeal given, or to be given, to HMRC is a reference to notice of appeal given, or to be given, under any provision of the Taxes Acts.

(2) In the case of—

- 10 (a) an appeal other than an appeal against an assessment, the following provisions of this Part of this Act shall, in their application to the appeal, have effect subject to any necessary modifications ...;

...

...

*“49 Late notice of appeal*

15 (1) This section applies in a case where—

- (a) notice of appeal may be given to HMRC, but  
(b) no notice is given before the relevant time limit.

(2) Notice may be given after the relevant time limit if—

- 20 (a) HMRC agree, or  
(b) where HMRC do not agree, the tribunal gives permission.

(3) If the following conditions are met, HMRC shall agree to notice being given after the relevant time limit.

(4) Condition A is that the appellant has made a request in writing to HMRC to agree to the notice being given.

25 (5) Condition B is that HMRC are satisfied that there was reasonable excuse for not giving the notice before the relevant time limit.

(6) Condition C is that HMRC are satisfied that request under subsection (4) was made without unreasonable delay after the reasonable excuse ceased.

30 (7) If a request of the kind referred to in subsection (4) is made, HMRC must notify the appellant whether or not HMRC agree to the appellant giving notice of appeal after the relevant time limit.

35 (8) In this section “relevant time limit”, in relation to notice of appeal, means the time before which the notice is to be given (but for this section).”

**Discussion**

16. The position is that the appeal made by the appellant was notified to HMRC after the time allowed by law. HMRC have not accepted that the appellant had a reasonable excuse for making the appeal late, and have refused to accept it.

17. I must apply the three *Denton* stages<sup>1</sup>, endorsed as appropriate for this Tribunal in *Marland v HMRC* [2018] UKUT 178 (TCC).

18. The first stage is to ask whether the delay is serious and significant. It is about seven months (or four if the attempts to find out how to appeal in March 2018 is treated as an appeal) compared with the three months treated as serious and significant in a binding authority, *Romasave (Property Services) Ltd v HMRC* [2015] UKUT 254 (TCC). In my view, judged against a time limit of 30 days, the delay is serious and significant whichever view is taken of the time when an appeal was made.

19. The second stage is to ask what the reason for the delay is. The appellant says in his grounds of appeal that

(1) HMRC DMB did not mention any time limit for appealing the surcharge when seeking payment.

(2) He was asked in November 2017 when setting up the TTP what he wanted to do about the surcharge, and he said he would reply following legal advice.

(3) He wasn't informed by his agent that there was time limit.

(4) He contacted HMRC in March 2018 to find out how to appeal but was not told until July.

20. HMRC's response is that the surcharge notice clearly sets out what the recipient must do if they disagree and that an appeal must be made within 30 days. If the appellant did contact HMRC in March 2018 that was still over three months late.

21. I do not accept that any good reason has been given for the delay. The appellant in his communications refers to being given a reference number for the surcharge ending \*959. The first document on which the number is shown is the notice of surcharge, and it is shown immediately above the section of the notice about appealing. It is impossible to understand why the appellant did not realise what this meant. There is nothing in the DMB Notes to show that when setting up the TTP he asked about appealing.

22. The third stage is to weigh up all the circumstances, including the reasons for the delay, the prejudice to the parties and the merits if they reveal a strong case either way. I have taken into account:

(1) The seriousness of the delay. It is serious and significant even in relation to the lesser delay to March, which on a charitable interpretation might be regarded as the date to take.

(2) The reason given for the delay was not a good one.

(3) The prejudice to HMRC is non-existent. HMRC have prepared a comprehensive statement of case which will need to be considered if I grant

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<sup>1</sup> See *Denton & others v TH White Ltd & others* [2014] EWCA Civ 906

permission, but they would have done that anyway had the appeal not been late. Thus there is little if any harm to the efficient conduct of litigation.

5 (4) The prejudice to the appellant is obviously that he will have to pay £1,705.88 in penalties, but that is natural consequence of a failure to appeal in time.

10 (5) His reason for not paying seems to boil down to the fact that he was awaiting a response to questions he raised about the APN. HMRC seemed to have agreed not to enforce the APN until this was resolved but he was never told that no surcharge would be issued: in fact the contrary was said to him. The merits of any appeal against the surcharge itself are non-existent and so an appeal is bound to fail.

23. Having considered these circumstances and bearing in mind in particular the need to conduct litigation efficiently and the need to uphold time limits laid down for good reason, I deny the appellant permission to notify the appeal to HMRC.

15 24. 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  
20 accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

25 **RICHARD THOMAS**  
**TRIBUNAL JUDGE**

**RELEASE DATE: 4 APRIL 2019**