# TC01436

**Appeal number: TC/2009/15404**

***Income tax – self assessment – surcharges for late payment – alleged oral agreement with HMRC officer that not payable – whether officer empowered to enter into such agreement – held, no – whether on facts any agreement entered into – no – in absence of reasonable excuse, surcharges confirmed***

***Whether return made on correct basis – doubtful – held, any corrective action under Sch 1AB TMA 1970 time barred and figures in return conclusive***

**FIRST-TIER TRIBUNAL**

**TAX**

**CHERIE SMITH** **Appellant**

**- and -**

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

**TRIBUNAL: JOHN CLARK (TRIBUNAL JUDGE)**
**SUSAN HEWETT**

**Sitting in public at 45 Bedford Square, London WC1 on 29 June 2011**

**Philip Adkins of Philip Adkins Tax Investigations for the Appellant**

**Colin Brown, Appeals and Reviews Unit (Bristol), HM Revenue and Customs, for the Respondents**

## DECISION

1. This appeal, which has had a complex and chequered history, is against the first and second surcharges imposed under s 59C(2) and (3) of the Taxes Management Act 1970 ("TMA 1970") following the late payment of tax by Mrs Cherie Smith for the year ending 5 April 2006.

### *The facts*

2. The evidence consisted of two bundles of documents. Papers from earlier proceedings before both the First-tier Tribunal and the Upper Tribunal were also available to us. No oral evidence was given, but in presenting Mrs Smith's case, Mr Adkins provided information about the history of the matter. From this evidence and information, we find the following facts. We consider disputed evidence later in this decision.

3. Mrs Smith's mother, Mrs Nancy Wyld, owned and lived in a residential property. Following advice from a firm of solicitors, the property was put into a discretionary trust, of which the principal beneficiaries were her two children, John Hitchen and Mrs Smith. The object of putting the property into trust was to protect the property from Inheritance Tax. Mrs Wyld continued to live in the property until her death in 2004.

4. It appears that Mrs Wyld was treated as having reserved a benefit over the property, presumably on the basis that she had not paid a full rent; (there was no specific evidence to establish the reason). The whole value of the property was subject to an Inheritance Tax charge, on the basis that the transfer into the trust had been a gift with reservation of benefit.

5. After Mrs Wyld's death, Mr Hitchen moved into the property. He obtained a valuation from the District Valuer and agreed to purchase the property at that value (£325,000). In a letter from a different firm of solicitors ("the second solicitors") dated 26 January 2006 to Riley & Co, reference was made to a proposal to terminate the discretionary trust by an appointment in favour of the two beneficiaries, Mr Hitchen and Mrs Smith. The precise details of the transaction which actually occurred were not set out in the evidence, and it was not therefore clear why the disposal was not treated as having been made by the trustees, with the trustees in that capacity being responsible for the payment of capital gains tax on that disposal of 100 per cent of the property. The second solicitors expressed doubt whether private residence relief would be available in respect of Mr Hitchen's share, and considered that the only exemption available would be the Trustees' exemption on any disposal.

6. The second solicitors wrote on 15 May 2006 to Riley & Co, referring to the trust never having been registered with a trust company and thus to all intents and purposes having stood in the joint names of Mr Hitchen and Mrs Smith. The solicitors expressed the hope that in the event of any difficulties arising they would be able to persuade HMRC that there had never actually been a trust as such. (We consider below the implications of the existence or non-existence of any trust.)

7. In a much later letter to the Respondents ("HMRC") dated 15 August 2008, Mr Adkins referred to the trust as having been "incorrectly set up". Whether this meant that the trust had been completely invalid, or merely that it had not had the effect of saving Inheritance Tax, is not clear from the correspondence available to us.

8. As part of his agreement to purchase the property, Mr Hitchen agreed to pay out to Mrs Smith what Mr Adkins described in his letter as "her half share of £162,500". In addition he agreed to indemnify her against any further Capital Gains Tax to which she might be liable in respect of her share. The date of the transaction or transactions resulting in Mrs Smith giving up her interest in the property for that sum was not stated, but we find that it fell within the year to 5 April 2006.

9. According to a letter dated 22 July 2008 from the second solicitor's firm to Mrs Smith, the firm had written to Mrs Smith and her brother on 14 March 2006 advising each of them to make any necessary report [ie in connection with the disposal of their mother's property] when completing their returns in April 2006. (The actual letter dated 14 March 2006 was not included in the evidence.)

10. On 3 July 2008 HMRC wrote to Mrs Smith to indicate that they had received information suggesting that she had disposed of a residential property in the year ended 5 April 2006 but had not been able to trace anything to indicate that the disposal had been declared for taxation purposes. They asked for information about her disposals in that year. Mrs Smith passed the letter to the second solicitors, who wrote to HMRC on 22 July 2008. HMRC wrote to Mrs Smith on 24 July 2008 to explain that as they did not hold her signed authority for them to communicate with HMRC about her affairs, they could not reply direct to them.

11. Shortly afterwards, Mrs Smith appointed Mr Adkins to act in place of the second solicitors in relation to the issues raised by HMRC's letter. He telephoned Mrs Studholme of HMRC's CGT Team at Shipley to explain that he would be acting on Mrs Smith's behalf. He explained that he had sent by fax to HMRC's Longbenton office a Form 64-8. Subsequently it turned out that this was not accepted as valid, as it had been faxed.

12. On 4 August 2008 Mr Adkins wrote to Steve Sunderland, an officer of HMRC at the Shipley office, enclosing a cheque for £10,000 on behalf of Mrs Smith in respect of her capital gains tax liability. Mr Adkins then spoke to Mr Sunderland on 12 August 2008 to explain the position. Mr Sunderland informed him of the need for a signed form 64-8, and was therefore prepared to have only a limited conversation about the case. Mr Adkins explained that the property had gone into a trust, and had come out again into joint ownership between Mrs Smith and her brother.

13. On 14 August 2008 Mr Adkins again telephoned Mr Sunderland. Part of Mr Sunderland's note of the conversation stated:

> "The way he sees it, if it went into a discretionary trust in 1999, came out and went into joint names and then Smith sold her half to the person living in it then it's all capital gains for her. Seems fine.

> All this talk of solicitors and suing solicitors is irrelevant. Not sure what he was driving at.
>
> I need to know when she inherited her interest in the property and at what value; followed by the amount she sold her interest for and in what amount. We should then be able to see if there is any capital gains tax to pay.
>
> If we can agree it all, he can have a cheque from her within a week and it proves that she's been co-operating. So, all he's worried about is the penalty position."

14. On 15 August 2008 Mr Adkins wrote to Mr Sunderland setting out information concerning the history of Mrs Smith's interest in the property and enclosing various copies of correspondence relating to her interest. Mr Adkins stated:

> "Solicitors, law advice centres, accountants have looked at this, and have given different opinions. However, it is my opinion that the trust may have been a sham, but it is clouding the issue. Mrs Smith has sold an asset that falls into C.G.T. in 2006. So C.G.T. is now due. My computations are overleaf."

15. His figures showed the acquisition value on 9 December 1999 as £190,000, and the later value on 29 August 2004 (the date of Mrs Wyld's death) as £325,000. He calculated the profit as £135,000, and Mrs Smith's share as half of this, ie £67,500. After taking account of the 2006 annual allowance of £8,500, £59,000 was liable to capital gains tax. At a rate of 18 per cent, this produced a liability of £10,620.

16. On 1 September 2008 Mr Adkins telephoned Mr Sunderland, who confirmed that he had received Mr Adkins' letter but because of leave, had not been able to do anything with it. Part of Mr Sunderland's note of the conversation was as follows:

> "He thinks the 'trust' was a sham and she thought the indemnity worked. My thought is that if the trust was a sham the indemnity would be a sham. In any case, if she thinks the indemnity works, she should give the bill to her brother to pay – it won't stop HMRC pursuing her for the debt. We cannot become involved in a potential family dispute.
>
> If he thinks she owes £10k, it would be wise of her to pay £10k now to save over £2 per day in interest charges. As far as his figure of £10k is concerned, I don't think 18% is correct (could be 10, 20 and 40% bands to be included) but I couldn't give any more detail.
>
> My initial thoughts are that we would be unlikely to be looking for a penalty. She thought it was taken care of and legal advice had been taken (however poor) but that would not be for me to decide. It would, however, be considered at the relevant time (and an early payment could only be seen as continuing goodwill)."

17. On 17 September 2008 Mr Sunderland wrote to Mrs Smith. He explained that although he had no doubt that she had asked Mr Adkins to assist her with her tax affairs, there was no indication that the form of authority which she had completed for him had been received by the relevant HMRC team. Mr Sunderland was not able to accept as a valid authority the facsimile copy which Mr Adkins had sent. Mr

Sunderland enclosed a further form of authority, and asked Mrs Smith to complete this if she was content to allow HMRC to deal with Mr Adkins in respect of her affairs.

18. Mr Sunderland also indicated that, based on the information which Mr Adkins had provided, there was a considerable liability to capital gains tax for the year ended 5 April 2006. He mentioned that any such liability was her responsibility, regardless of any claimed indemnity that might have been put in place. He acknowledged the £10,000 on account of her liability, but stated that she would need to complete a self assessment tax return for that year. He enclosed the return form and notes for her to complete and return to him at his new office address by 24 December 2008.

19. In October 2008 Mr Adkins on behalf of Mrs Smith sent an additional cheque for £1,511 in respect of her tax liability.

20. After resolution of some confusion as to whether Mr Adkins had been registered with HMRC as Mrs Smith's agent, Mr Adkins submitted the return form. Mr Sunderland wrote to him on 18 November 2008 to point out that the form had not been signed by him or by Mrs Smith. The return could not be accepted as valid and Mr Sunderland could take no action in relation to any of the information within it. He therefore sent it back to Mr Adkins for signature by Mrs Smith, or by her attorney once appointed.

21. Mr Sunderland emphasised the time limit for submitting the fully completed and correctly signed return. He then stated:

> "I would mention here that, whenever it is possible to be done, the figures from any tax return that we receive will be accepted and recorded without correction. The tax liability will be calculated from the figures that are provided and will form the basis of any payment request that is subsequently made."

He also emphasised the nature of interest on tax as a statutory charge, and that it was thus not negotiable. If interest was due because tax was not paid on time, for whatever reason, it would be charged and payment would be pursued.

22. On 25 November 2008 Mr Adkins telephoned Mr Sunderland to indicate that he had received Mr Sunderland's two letters, one that of 18 November and the other relating to other years. Mr Sunderland recorded the following as part of his note:

> "At the end of it I think it unlikely that penalties will be charged (not because we sent anything back but because of the Trust problem) and that we will be looking for interest only plus surcharges if appropriate – it should have been paid nearly two years ago, after all – but the decision on that will be for someone else, not me."

23. With an undated letter received by HMRC on 2 December 2008, Mr Adkins enclosed two returns signed in person by Mrs Smith. One of these was the return for the year to 5 April 2006. This showed the taxable capital gains after allowable losses and taper relief as £54,000.

24. HMRC's tax calculation showed the gain after the annual allowance of £8,500 as £45,500; the tax amounted to £11,511.

25. On 2 January 2009 Mr Sunderland wrote to Mr Adkins to confirm that the 2006 (and 2007) returns had been processed and the figures had been transferred to HMRC's systems without any corrections.

26. In April 2009, HMRC's Leicester Group office issued a Notice of Surcharge for late payment of tax by Mrs Smith for the year ended 5 April 2006. The Notice referred to two surcharges, both at 5 per cent of £11,511, totalling £1,151.10.

27. Shortly afterwards, followed up by a letter dated 28 April 2009 asking about the progress of the appeal, Mr Adkins appealed against the surcharge notice, on the grounds that it had been agreed by Mr Sunderland six months or more beforehand that "penalties, or a surcharge would not be made"; Mr Adkins indicated that he had already appealed the interest charges on the grounds of the way in which HMRC had handled Mrs Smith's tax affairs.

28. On 11 May 2009 an assistant officer in HMRC's Cardiff office wrote to Mr Adkins to indicate that his appeal had been sent to a technical support officer to consider, and to ask for a copy of the letter from Steven Sunderland confirming that penalties and surcharges would not be made.

29. In a letter dated 12 May 2009 from the Cardiff office, an officer set out HMRC's views in respect of the appeal. An appeal against interest and surcharges could only be considered if there was a valid excuse for the tax having been paid late. None of the reasons given fell into this category. The officer stated:

> "The Capital Gain has been correctly charged on her as I understand that there was no valid trust and interest and a surcharge has [*sic*] correctly been levied as the tax was not paid at the correct time."

30. On 13 May 2009 an assistant officer from the Cardiff office set out HMRC's view that Mrs Smith did not have a reasonable excuse for the late payment of the tax, and offered a review.

31. On 17 May 2009 Mr Adkins responded to the 11 May letter from the Cardiff office. He explained that Mr Sunderland had not sent a letter concerning the penalties and surcharges. Mr Adkins stated:

> "It was agreed verbally on the telephone that Mrs Smith would not be charged penalties and surcharges."

Mr Adkins set out detailed further comments on the history of the matter.

32. On 18 May 2009, Mr Adkins telephoned Mr Sunderland to tell him that Mrs Smith had been notified of a liability of approximately £2,500 of interest and surcharges. In his note of the conversation, Mr Sunderland expressed the opinion that the interest charge was absolutely correct and should be paid. He confirmed to Mr Adkins the amount outstanding on that date. Mr Sunderland referred to a record of an

appeal against the surcharges, and expressed the opinion that the surcharges were correctly due and payable because there did not seem to be any reasonable excuse lasting from 31 January 2007 to December 2008, although he acknowledged that the reviewer might decide otherwise.

33. Mr Adkins sent to HMRC's Leicester Group office further payments of £600 on 12 June 2009, £400 on 10 July 2009, £110 on 14 October 2009 and £330.16 on 27 October 2009, on account of Mrs Smith's liabilities. After continuing correspondence, Mr Adkins notified the appeal to the Tribunals Service on 15 October 2009. (According to a statement of account subsequently sent by HMRC to Mr Adkins on 23 November 2009, this left outstanding as at the latter date a balance of £1,167.80; we find that the latter sum was made up of the two surcharges and further interest outstanding.)

34. The appeal was allocated to the default paper category and the appeal was considered by reference to the papers. The summary decision dismissing the appeal was released on 13 April 2010. After Mr Adkins had notified his request to appeal to the Upper Tribunal, a request for full facts and findings was made. The full decision was released on 13 May 2010, and sent to Mr Adkins under cover of a letter dated 18 May 2010. On 6 July 2010 the application for permission to appeal was refused. Mr Adkins then applied on 13 July 2010 to the Upper Tribunal for permission to appeal. On 26 July 2010 an Upper Tribunal Judge refused the application for permission to appeal. Mr Adkins accordingly applied for an oral hearing of the application.

35. On 16 March 2011 the oral hearing took place before Upper Tribunal Judge Sir Stephen Oliver QC. HMRC had indicated that they would not attend the hearing. In his Decision Notice, the Judge was satisfied that there had been procedural irregularities that affected the allocation of the appeal to the default paper category. The second of these, which in effect invalidated the decision itself, was that the Tribunal Chairman (a non-legal member) was not authorised to decide the appeal. The Judge was also satisfied that Mr Adkins had understood that the case would proceed on the agreed basis that his account of there having been an agreement that no "penalties" would be imposed was to be taken as an undisputed fact; on that basis he had wrongly allowed the appeal to be dealt with as a default paper case.

36. The Judge directed that the application for permission to appeal to the Upper Tribunal be allowed, that the decision of the First-tier Tribunal be set aside, and that the appeal be relisted as a basic category appeal at a London venue to be heard by a differently constituted Tribunal.

37. The present hearing took place before us in accordance with the latter Direction; it had been listed for hearing by us in Southampton on 10 June 2011, but was relisted for hearing in London on 29 June, presumably in order to comply with the terms of the Direction.

*The law*

38. The relevant parts of s 59B TMA 1970 provide:

"**59B Payment of income tax and capital gains tax**

(1) Subject to subsection (2) below, the difference between—

(a) the amount of income tax and capital gains tax contained in a person's self-assessment under section 9 of this Act for any year of assessment, and

(b) the aggregate of any payments on account made by him in respect of that year (whether under section 59A of this Act or otherwise) and any income tax which in respect of that year has been deducted at source,

shall be payable by him or (as the case may be) repayable to him as mentioned in subsection (3) or (4) below . . .

. . .

(3) In a case where the person—

(a) gave the notice required by section 7 of this Act within six months from the end of the year of assessment, but

(b) was not given notice under section 8 or 8A of this Act until after the 31st October next following that year,

the difference shall be payable or repayable at the end of the period of three months beginning with the day on which the notice under section 8 or 8A was given.

(4) In any other case, the difference shall be payable or repayable on or before the 31st January next following the year of assessment."

39. Section 59C TMA 1970, to the extent relevant to the present appeal, provides:

"**59C Surcharges on unpaid income tax and capital gains tax**

(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.

. . .

(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.

. . .

(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."

*Arguments for Mrs Smith*

40. Mr Adkins had set out the following grounds of appeal in the Notice of Appeal:

(1) The two surcharges were never mentioned;

(2) In fact the agreement was that if Mrs Smith paid the outstanding capital gains tax, no other penalty would be made;

(3) "The continual desultory way [HMRC] have handled the matter."

41. For the reasons which we give later in this decision, we do not set out here Mr Adkins' arguments relating to the latter ground of appeal.

42. In opening his argument on behalf of Mrs Smith, he explained that she was disabled and needed help with her affairs. This was relevant to the way in which her affairs had been handled by HMRC.

43. Mr Adkins stressed the "verbal agreement" which he submitted had been arrived at with Mr Sunderland. This was that if Mrs Smith paid the capital gains tax, no charges other than interest would be payable.

44. He contended that Mr Sunderland should have been produced as a witness; Mr Adkins strongly asserted that agreement had been reached in the form just described. The surcharge had come "out of the blue"; Mr Sunderland was not present to enable the position to be considered.

45. In reply to Mr Brown's submissions, Mr Adkins argued that there had been a reasonable excuse; at all times, Mrs Smith had thought that she was covered by the trust.

46. On the question of interest on the surcharges, if contrary to his case they were found to be due, Mr Adkins submitted that interest should not run from the date of the Tribunal decision on 18 May 2010.

*Arguments for HMRC*

47. Mr Brown reviewed the background behind the appeal and its history. He referred to the obligation under s 7 TMA 1970 to give notice of chargeability; Mrs Smith had given no such notice. The due date for the tax was set by s 59B TMA 1970; because s 59B(3) did not apply because Mrs Smith had not given notice under s 7, the position was governed by s 59B(4), so that the due date was 31 January 2007.

48. Surcharges were imposed under s 59C. Under s 59C(2), a 5 per cent surcharge had been incurred at the end of February 2007. The date specified in s 59C(3) was six months from the due date, so that the second surcharge had been incurred on 1 August 2007. Mr Brown referred to s 59C(5) and (9). The tax had been paid on 15 October 2008, so that the period of default ended the day before. HMRC were ignoring a small sum of £2.18 outstanding from an earlier year; they accepted that Mrs Smith was intending to pay the full amount of the capital gains tax.

49. He referred to the burden of proof. It was for HMRC to show that payment had been made late; this had been established. It was then for Mrs Smith to show reasonable excuse. HMRC relied on particular documents for its view that there was no reasonable excuse. The first was the note of a meeting at the second solicitors' office on 10 January 2006 referring to the possibility of liability to capital gains tax; Mrs Smith had signed a copy of the note. The second was the reference to the advice given by the second solicitors on 14 March 2006 (see paragraph 9 above). Mr Brown then referred to Mr Sunderland's note of the telephone conversation with Mr Adkins on 25 November 2008 (paragraph 22 above).

50. For the appeal to succeed, it was necessary for Mrs Smith to show that she had had a reasonable excuse for the late payment and that this had continued through until 14 October 2008.

51. In HMRC's view, on the basis of the documents mentioned, Mrs Smith was aware of her obligation to complete a return. She should have asked for advice from HMRC or a professional adviser. Mr Brown submitted that she had failed to exercise due care, and had thus been negligent; he referred to *Blyth v Birmingham Waterworks* [1856] EWHC Exch J65. She had failed to act in respect of notice of chargeability,

and by the first day of the period of default, having been aware of the position nine months previously, should have acted immediately.

52. He submitted that if there were any grounds for complaint about HMRC's handling of the case, this was not a matter for the Tribunal.

53. In respect of the conversation between Mr Adkins and Mr Sunderland on 1 September 2008 (see paragraph 16 above), Mr Brown submitted that the note was correct; there was a difference between penalties and surcharges. In any event, a later event could not explain the earlier failure to act. There had been no reasonable excuse for the previous period. The position was not affected by the conversation. In addition, Mr Sunderland had said that it was not for him to decide.

54. Mr Brown asked for a series of findings to be made; we consider these below.

*Discussion and conclusions*

55. At first sight, this appeal might seem to relate to two questions concerning liability to the surcharges; first, whether Mrs Smith had a reasonable excuse for late payment, and secondly, the extent to which liability to the surcharges might be affected as a result of the discussions between Mr Adkins and Mr Sunderland. On closer consideration, however, we consider that the appeal can be dealt with on two levels. One, looking at the matter as it initially appears, is to accept the return as valid. However, we think it more appropriate to examine the other level first, and then to return to that "surface level".

56. At this other level, the question is whether the information given in the return prepared for Mrs Smith by Mr Adkins was submitted on the correct basis; if it was not, and correcting the position would have the effect of reducing or eliminating Mrs Smith's liability to tax, the consequence would be that the liability to surcharges would be correspondingly reduced or eliminated. We therefore consider the basis on which the return was prepared and submitted.

57. The acquisition cost of the property was given as that at the time when the property was put (or purported to be put) into the trust; Mrs Smith's acquisition cost was treated as half of that amount. The disposal proceeds were calculated as half of the probate value as at Mrs Wyld's death. The resultant calculation of the gain produced the £54,000 gain as mentioned above. The question for consideration is whether this approach was correct.

58. If the trust was valid, any liability to CGT on the appointment of the property to the beneficiaries would appear to be that of the trustees, whether these were Mrs Smith and her brother or some other person or persons. (It appears from the correspondence that the trustees may have been different persons, but the position is not definitively established.) It is not clear why the absence of registration of the trust would have had any effect on its validity, despite the comments in the second solicitors' letter dated 15 May 2006. The trustees' gain would presumably have been calculated on the difference between the acquisition value and the value at the date of

the appointment, which would not necessarily have been the same as the probate value on Mrs Wyld's death. The liability would not have fallen on Mrs Smith in her personal capacity, whether or not she had responsibility for the gain in the different capacity of trustee. As indicated by the second solicitors, the trustees' gain on the whole property would not appear to have qualified for any private residence relief by reference to Mr Hitchen's occupation; we are not in a position to make any finding one way or the other. The trustees would have been obliged to give notice of chargeability and to complete a return including their computation of the gain. As these steps have not been taken, the trustees would be in their own default for failure to comply with their obligations and to account for the tax due.

59. If the trust was not valid, the property would appear at first sight to have remained in Mrs Wyld's estate. On this basis, it would be regarded as transferred to the beneficiaries of her estate at probate value, giving them a base cost for capital gains tax purposes equal to their respective shares of the estate. According to the second solicitors' letter dated 13 October 2005, Mrs Wyld had made a will, and Mrs Smith was one of the executors. Although it might be assumed that her estate passed to Mr Hitchen and Mrs Smith in equal shares, in the absence of evidence as to the provisions of the will, it is possible that the estate was subject to other dispositions; the only information available is contained in this letter, in which the value of her estate is stated as having been £31,522 (ie not including the property at its probate value of £325,000). This suggests that although the value of the property was included in her estate for Inheritance Tax purposes, the existence of the trust was not disregarded for the purposes of the administration of her estate. We therefore find ourselves unable to discover the precise basis for the suggested approach of treating the trust as somehow invalid or never having been entered into.

60. If, despite appearances, the property did pass to Mrs Smith and her brother in equal shares in the absence of a valid trust, the result would have been that Mrs Smith's base cost for her share of the property was £167,500. Unless the value at the time of the transfer of her half share was significantly greater than that figure, she would either have made no capital gain, or her gain would have been well within the annual exempt amount for capital gains purposes.

61. On either of these hypotheses, Mrs Smith in her personal capacity would not have made a capital gain in excess of the annual exempt amount for the relevant year in respect of her share in the property, rendering it inappropriate for her to complete a return. The result would be that the return prepared for her by Mr Adkins would not have been correct, and that she would have had no liability to capital gains tax for the year to 5 April 2006.

62. We have not considered whether any other combinations of circumstances might have occurred other than, or beyond the scope of, the above two hypotheses. On the basis of our comments above, or the possibility of such other circumstances, we have very considerable doubts whether Mrs Smith's return was prepared on the correct basis. Mr Sunderland's letter dated 18 November 2008 emphasised (see paragraph 21 above) that in normal circumstances it was not up to HMRC to seek to correct a taxpayer's self assessment return. In the light of his comments in the telephone

conversation dated 14 August 2008 (see paragraph 13 above) concerning acquisition and disposal values, it appears that he may have had some question in his mind as to the basis on which the return had been submitted. In the absence of evidence, we are unable to make any finding to this effect.

63. Even if the return was not made on a correct basis, it stands until any action is taken to correct it. Under paragraph 3 of Schedule 1AB TMA 1970, which applies to claims made on or after 1 April 2010, a claim for repayment of tax under that Schedule may not be made more than four years after the end of the relevant tax year. In Mrs Smith's case, this is the year to which the return relates, ie to 5 April 2006. It is therefore too late to take corrective action in respect of Mrs Smith's capital gains tax, even if her return was submitted on an incorrect basis.

64. If the time limit for making such a claim had not expired, we would have been prepared to stay the appeal for an appropriate period to allow the position to be investigated and a claim made if justification had been established. However, it is too late for this course to be followed, and we have to deal with the liability arising in consequence of Mrs Smith's return on the assumption that it was correct.

65. We therefore return to the "surface level". We accept Mr Brown's submissions as to the matters to be proved, and as to the burden of proof. We are satisfied that the tax was paid late, and that Mrs Smith is therefore liable to the two surcharges unless she can prove that she had a reasonable excuse for the late payment. However, we do not consider that we are confined to consideration of the "reasonable excuse" question. The points raised by Mr Adkins require us to examine the further questions whether an officer of HMRC can dispense with liability to surcharges in an individual case whether or not there is a reasonable excuse, whether there was an agreement that Mrs Smith should be absolved from liability to the surcharges, and whether there is some more general power given to HMRC to dispense with surcharges.

66. Dealing first with s 59C(9) TMA 1970, we consider whether throughout the period of default Mrs Smith had a reasonable excuse for not paying the tax. In the absence of any evidence to show that she was not liable for the tax, and taking into account the basis on which her return had eventually been prepared and submitted, we have to assume that she was liable to pay the tax. We accept Mr Brown's submission that Mrs Smith was aware on the basis of the second solicitors' advice given on 14 March 2006 that appropriate information needed to be given to HMRC when Mrs Smith and Mr Hitchen completed their returns in April 2006. If Mrs Smith was not expecting to complete a return, we accept that she needed to take advice either from HMRC or from a professional adviser to establish what she needed to do in respect of her possible liability to capital gains tax. (Had proper advice been taken at that stage, it could have been established who was required to give notice to HMRC of the disposal of the property, and what was the proper basis for liability.)

67. Our conclusion is that on the basis of the second solicitors' advice given at the time, Mrs Smith was aware of the need to take action. She did not do so. We accept Mr Brown's submission that this inaction amounted to negligence. If notice had been given to HMRC by 31 October 2006, a return could have been completed and

submitted by or before the normal filing date, and the tax could have been paid on time. As this failure to act preceded the period of default in relation to the payment of the tax, we find that at no stage during the period of default did Mrs Smith have a reasonable excuse for not paying the tax.

68. Mr Adkins' case was that there was a "verbal agreement" [ie an oral agreement] with Mr Sunderland that no surcharges would be imposed. Before considering the factual position, we need to examine s 59C TMA 1970. Sub-sections (2) and (3) both use the words "the taxpayer shall be liable". This appears to us to be mandatory, particularly when viewed in the wider context of the self assessment system and the general requirement for taxpayers to comply with their obligations to pay tax on time. Although sub-s (5) uses the words "An officer of the Board *may* [our emphasis] impose a surcharge under subsection (2) or (3) above", we interpret this as being the method of empowering an officer of HMRC to take the appropriate actions under the section consequential on the taxpayer having failed to pay tax by the due date. We do not consider that "may" implies any form of discretion on the officer's part. Any question of discretion only arises under sub-s (11); we would not expect this discretion to be exercised by an officer in Mr Sunderland's position.

69. We do not consider, therefore, that Mr Sunderland had power to dispense with the surcharges in the absence of his being satisfied that Mrs Smith had a reasonable excuse for the defaults. From his note of a telephone conversation with Mr Adkins on 18 May 2009 (which we accept was much later than the conversations on 1 September and 25 November 2008), we consider it unlikely that Mr Sunderland would have taken that view:

> "Per SA notes he has made an unsuccessful appeal against surcharges (whilst providing evidence that Smith knew in March 2006 that CGT would be due but did nothing about it!)."

70. Although we do not consider that Mr Sunderland had the power to enter into an agreement with Mr Adkins, we turn to the factual question raised in the appeal, namely whether there was such an agreement. The only items of evidence available in this connection are the notes of telephone conversations kept by Mr Sunderland; Mr Adkins did not provide any form of note or record to support his contention. We consider that he was therefore relying purely on his memory of the conversation; he did not specify the date when it had taken place.

71. Having reviewed Mr Sunderland's notes of the conversations, we consider that Mr Adkins must have misunderstood what Mr Sunderland said to him. There is no suggestion in those notes that interest or surcharges would not be payable; Mr Sunderland simply expressed the view that penalties were unlikely. There is a clear distinction between penalties and surcharges. There is no suggestion that Mr Adkins asked for confirmation that if the tax was paid, nothing would be chargeable other than interest; indeed, in later correspondence with HMRC, he even questioned whether interest was payable.

72. We find that there was no agreement that surcharges would not be payable. Had it been possible to reach such an agreement, we find it inconceivable that HMRC would not have recorded such an agreement in writing.

73. Mr Brown asked us to make a number of findings. Although we have set out various findings above, we agree that these requested findings represent a fair summary of what we have found:

(1) Tax of £11,511 payable by Mrs Smith was due on 31 January 2007, on the basis of the return submitted;

(2) The tax was paid on the following dates and in the following amounts: £10,000 on 5 September 2008; the balance of £1,511 on 15 October 2008;

(3) The period of default was therefore 31 January 2007 to 14 October 2008;

(4) From around March 2006 or shortly afterwards, it was reasonable to expect that Mrs Smith would have sought advice from HMRC or a professional adviser;

(5) Following on from that, the failure in question was the failure to exercise due care and diligence, and amounted to neglect;

(6) As a consequence, there was no reasonable excuse for the failure either on the first day of default or subsequently.

74. Under s 59C(9) TMA 1970, in the absence of any reasonable excuse, we confirm the imposition of the two surcharges. They were correctly imposed and therefore remain payable by Mrs Smith. The only basis for any action to mitigate or remit the surcharges is the power of HMRC under s 59C(11). Whether there is a case for such action is a question outside our jurisdiction.

75. Mr Adkins asked that interest on the surcharges should not run for the period from the Tribunal decision on 18 May 2010. Although we understand his reasons for making this request, we do not consider that we have any power to adjust the interest. As discussed in the correspondence between HMRC and Mr Adkins, the obligation to pay interest is a statutory obligation. It therefore remains due, unless under some residual power HMRC decide to remit any part of it.

76. A significant part of the evidence and Mr Adkins' submissions related to the question of HMRC's handling of the matter. As this is not a matter within our jurisdiction on this appeal, we have not made any findings relating to this issue. It was accepted by Mr Sunderland in his letter dated 18 November 2008 that the service had not been of the highest order (although he emphasised the need to quote the full reference at the beginning of any letter to HMRC, rather than simply the name of the officer concerned). Mr Brown in his submissions to us acknowledged that HMRC "had not covered themselves with glory". We do not consider that in this whole lengthy process Mrs Smith has been well served by any of her advisers, or in consequence by the self assessment system and HMRC's operation of it in her case, nor by the appeals system before these Tribunals. If these matters had been properly considered in 2008, there would have been time to submit a claim under Schedule 1AB TMA 1970. The history of the whole matter has been very unfortunate. In

particular, advice from appropriately qualified persons should have been taken at a much earlier stage.

77. For the reasons we have given, we are unable to take any action to enable Mrs Smith's position to be remedied. Mr Adkins indicated in correspondence that he wished to take matters further through avenues other than HMRC or the tribunal appeals procedure. Before he does so, we would recommend that he considers carefully the implications of this decision; we think it inappropriate to comment further.

78. In the circumstances, we have no alternative course to follow; the appeal must be dismissed.

*Right to apply for permission to appeal*

79. 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.

**JOHN CLARK**

**TRIBUNAL JUDGE**
**RELEASE DATE: 12 September 2011**