



**TC06694**

Appeal number: TC/2018/02417

*INCOME TAX – surcharges and penalties for the late payment of income tax – whether the Respondents have satisfied the burden of establishing that they notified the Appellant of the relevant surcharges and penalties in the appropriate form and that, in the case of some of the surcharges and penalties, there was no extant time to pay arrangement in place in respect of the relevant underlying tax liability – no – appeal upheld*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**ANDREW SOBITAN**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE TONY BEARE  
MR DAVID WILLIAMS**

**Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 3  
August 2018**

**The Appellant represented himself**

**Mrs Bisi Saivu and Miss Melissa Kumbula, Officers of HM Revenue and  
Customs, for the Respondents**

## DECISION

This decision relates to an appeal against various surcharges and penalties for the late payment of income tax dating back to the tax year of assessment ending 5 April 1999. Exactly which surcharges and penalties are the subject of this appeal is a matter of some doubt. The Respondents' skeleton argument for the purposes of the hearing indicated that the sole issues at stake in this appeal were penalties in respect of the tax years of assessment ending 5 April 2011, 5 April 2012 and 5 April 2013. And yet, when the Officers representing the Respondents arrived at the hearing, they provided a list of surcharges and additional penalties stretching back to the tax year of assessment ending 5 April 1999 and forward to the tax year of assessment ending 5 April 2016 which, they said, were also included in this appeal.

1. We therefore understand the full list of surcharges and penalties to be as follows:

Tax Year Ending:	Description:	Amount:	Due/Issue Date:
5 April 1999	First surcharge	£136.70	9 June 2000
5 April 2005	First surcharge	£152.43	26 May 2006
5 April 2005	Second surcharge	£115.58	27 October 2006
5 April 2006	First surcharge	£179.94	27 April 2007
5 April 2006	Second surcharge	£179.94	28 September 2007
5 April 2007	First surcharge	£320.69	18 April 2008
5 April 2007	Second surcharge	£320.69	15 September 2008
5 April 2008	First surcharge	£400.91	6 May 2009
5 April 2008	Second surcharge	£400.91	15 September 2009
5 April 2009	First surcharge	£759.22	11 November 2011
5 April 2009	Second surcharge	£759.22	11 November 2011
5 April 2010	First surcharge	£566.43	11 November 2011
5 April 2010	Second surcharge	£566.43	11 November 2011
5 April 2011	30 days late payment penalty	£373.00	10 April 2012
5 April 2011	6 months late payment penalty	£373.00	4 September 2012
5 April 2011	12 months late payment penalty	£373.00	4 June 2013
5 April 2012	30 days late payment penalty	£437.00	4 June 2013
5 April 2012	6 months late payment penalty	£437.00	14 August 2013
5 April 2012	12 months late payment penalty	£437.00	12 January 2016
5 April 2013	30 days late payment penalty	£72.00	12 January 2016
5 April 2013	6 months late payment penalty	£72.00	12 January 2016
5 April 2013	12 months late payment penalty	£72.00	12 January 2016

5 April 2014	30 days late payment penalty	£242.00	12 January 2016
5 April 2014	6 months late payment penalty	£192.00	12 January 2016
5 April 2014	12 months late payment penalty	£192.00	23 February 2016
5 April 2015	30 days late payment penalty	£252.00	21 April 2016
5 April 2015	6 months late payment penalty	£252.00	18 September 2016
5 April 2015	12 months late payment penalty	£252.00	30 March 2017
5 April 2016	30 days late payment penalty	£192.00	20 April 2017

2. The above table represents our best efforts to understand the nature of the subject matter of this appeal. The paperwork provided to us before and at the hearing was incomplete. We set out at paragraph 12 below the various deficiencies in that respect. The level of confusion which the list of deficiencies set out in that paragraph epitomises is symptomatic of how this case has generally been presented by the Respondents and it is that confusion which is largely responsible for the outcome recorded below.

The relevant law

3. The surcharges in the table set out at paragraph 2 above have been imposed under Section 59C Taxes Management Act 1970 (the “TMA 1970”). That section has now been repealed but it applied to a number of the tax years of assessment which are the subject of this decision. In relation to the tax years of assessment in respect of which Section 59C TMA 1970 applied:

(a) under Section 59C(2) TMA 1970, where a balancing payment or payment on account in respect of a tax year of assessment was still unpaid more than 28 days from the due date for the balancing payment in respect of that tax year of assessment, a surcharge equal to 5% of the tax unpaid at that date arose;

(b) under Section 59C(3) TMA 1970, any tax that remained unpaid more than six months from the due date for the balancing payment in respect of that tax year of assessment was subject to a further surcharge equal to 5% of the unpaid tax; and

(c) under Section 59C(5) TMA 1970, an officer of the Board was required to serve a notice on the taxpayer informing him or her that a surcharge was being imposed. The relevant notice was required to state the day on which it was issued and the time period within which an appeal could be made against the surcharge. A separate notice was required whenever a further surcharge was imposed.

4. The penalties in the table set out at paragraph 2 above have been imposed under Schedule 56 Finance Act 2009 (“Schedule 56”). The relevant provisions of Schedule 56 are as follows:

5 (a) under paragraph 3(2) of Schedule 56, where a payment of tax specified in the table set out in paragraph 1 of Schedule 56 is not paid by the date falling 30 days after the date when it was due, a penalty equal to 5% of the tax unpaid at that date arises;

10 (b) under paragraph 3(3) of Schedule 56, where any such tax remains unpaid after the end of 5 months from the day following the date when it was due, a penalty equal to 5% of the tax unpaid at that date arises;

(c) under paragraph 3(4) of Schedule 56, where any such tax remains unpaid after the end of 11 months from the day following the date when it was due, a penalty equal to 5% of the tax unpaid at that date arises; and

15 (d) under paragraph 11 of Schedule 56, where a taxpayer is liable to a penalty under the schedule, the Respondents must assess the penalty, notify the taxpayer and state in the notice the period in respect of which the penalty is assessed.

5. There is no express provision in Section 59C TMA 1970 which permits the Respondents to enter into a time to pay arrangement with a taxpayer and which  
20 suspends the surcharges that would otherwise arise under that section in such a case for the duration of the relevant time to pay arrangement as long as the taxpayer complies with the terms of the arrangement. However, the Respondents are permitted to enter into such arrangements under their powers of collection and management of revenue in accordance with the Commissioners for Revenue and Customs Act 2005.  
25 In contrast, there is an express provision for time to pay arrangements in paragraph 10 of Schedule 56. That paragraph provides for penalties to be suspended during the currency of a time to pay arrangement but specifies that, if the relevant taxpayer fails to adhere to the arrangement and the Respondents serve on the taxpayer a notice specifying any penalty to which the taxpayer would become liable apart from the  
30 suspension, then the taxpayer will become liable to the penalty in question.

### Discussion

6. There are two distinct issues to be addressed in this decision. They are:

35 (a) Whether we should give the Appellant permission to make a late appeal against the various surcharges and penalties which are in issue between the parties. In reaching our conclusion on that issue, it is for the Appellant to satisfy us that there is a good reason for the delays which have occurred in his making this appeal; and

40 (b) Whether, assuming that we do give that permission, the Appellant should be entitled to succeed in his appeal on the basis that the Respondents have not satisfied the burden of proof which is upon them to show that the various surcharges and penalties were properly imposed and have been notified to the Appellant in the proper form. It is well accepted

that, in reaching our conclusion on that issue, it is for the Respondents to show both that the relevant surcharge or penalty was properly imposed and that the Respondents notified the relevant taxpayer of the relevant surcharge or penalty in the appropriate form.

5 7. For reasons which will become obvious in the course of this decision, the two issues set out above are inextricably linked.

8. The Appellant has for some time been experiencing difficulties in meeting his tax liabilities. He says that, over a considerable part of the period which includes the tax years of assessment in respect of which the various surcharges and penalties are  
10 sought to be imposed – that is to say, the period from and including the tax year of assessment ending 5 April 2007 to and including the tax year of assessment ending 5 April 2016 - he has had a time to pay arrangement in place, under which the Respondents agreed to accept payment of his tax liabilities by instalments and pursuant to which the imposition of surcharges and penalties was suspended as long  
15 as the Appellant did not default in his obligations under the relevant time to pay arrangement. The Appellant alleges that those time to pay arrangements were originally agreed orally over the telephone but we have been presented with written evidence to the effect that, from 2010, such arrangements existed – in the form of the letters from the Respondents at pages B13 and B14 of the hearing bundle.

20 9. The Appellant adds that he was not notified that he had any obligation to pay any surcharges or penalties – whether in relation to the tax years of assessment in respect of which he alleges that there was a time to pay arrangement in place or in respect of the other tax years of assessment - until the Respondents produced a detailed list setting out the breakdown of the amounts which he owed to them in the  
25 course of bankruptcy proceedings filed by the Respondents against him in November 2016. At that point, he sought to clarify the nature of the liabilities in question and, upon being advised that, if he wanted the liabilities to be vacated, he would need to lodge an appeal in respect of them, he did so. His letter of 26 April 2017 at page B8 of the hearing bundle is clearly the lodging of that appeal because, at the start of that  
30 letter, he says that:

“I want to apply for a reduction on the late payment penalties, interest and surcharges on my Self Assessment account due to late payment...”

and then goes on to explain that that is because he had a time to pay arrangement (or, as he refers to it, a payment plan) in place since 2010. The Respondents accepted in  
35 their response to the Appellant of 4 April 2018 at page B3 of the hearing bundle that that letter should be construed as an appeal. Moreover, in the course of their oral submissions at the hearing, the Respondents accepted that the appeal should be regarded as relating to all of the surcharges and penalties in the table set out at paragraph 2 above, and not just to the surcharges and penalties in that table that relate  
40 to the period during which the Appellant alleges that there was a time to pay arrangement in place.

10. The hearing bundle does not include any correspondence between the parties between 16 June 2016 - when the Appellant wrote to the Respondents to plead with

them not to pursue the bankruptcy proceedings - and 26 April 2017 - when the Appellant wrote the letter referred to at paragraph 10 above. In addition, the hearing bundle does not include the Respondents' letter of 18 May 2016 to which the Appellant's letter of 16 June 2016 was responding. It did, however, include a letter  
5 from the Appellant of 21 March 2016 which referred to a letter from the Respondents of 17 February 2016 (also not in the hearing bundle) and to the fact that the Appellant had called the Respondents on 18 March 2016 and 21 March 2016 (of which there is no record in the hearing bundle or the additional pages which were provided to us at the hearing).

10 11. We have already recorded at paragraph 11 above some significant omissions in the evidence presented to us by the Respondents. At this point, and given those omissions, we think that it is worth recording a number of other anomalies and gaps in the evidence provided to us by the Respondents before and at the hearing. These are as follows:

15 (a) Although the hearing bundle on pages C2 to C6 contains a computer print-out showing that the penalties in respect of the tax year of assessment ending 5 April 2011, the tax year of assessment ending 5 April 2012 and the tax year of assessment ending 5 April 2013 were issued on  
20 various dates and there is a correlation between those dates and the due dates in respect of the penalties shown on page 14 of the additional pages which were provided to us at the hearing, the Officers of the Respondents were unable to produce either copies of the actual letters imposing the penalties in question or templates showing the form which those letters would have taken. As a result, it was impossible for us to determine  
25 whether, even if the relevant letters had been sent to the Appellant as the Respondents allege, each relevant letter satisfied the requirement of paragraph 11(1)(c) of Schedule 56 to state the period in respect of which the relevant penalty was being assessed. Moreover, in the absence of the actual letters or templates of those actual letters, it was impossible for us  
30 to determine whether, even if the relevant letters had been sent to the Appellant as the Respondents allege, the letters could be deemed to be valid notwithstanding their non-compliance with that requirement, pursuant to the relieving language in Section 114 TMA 1970 as interpreted in the decision of the Court of Appeal in *Donaldson v The Commissioners for Her Majesty's Revenue and Customs* [2016] STC 2511 ("Donaldson");

35 (b) In relation to the penalties other than those referred to at paragraph 12(a) above, none of the Respondents' statements in relation to the Appellant which were in the hearing bundle or the additional pages which  
40 were provided to us at the start of the hearing included any reference to the issue of any of the penalties in respect of the tax year of assessment ending 5 April 2015 or the tax year of assessment ending 5 April 2016. Thus, no evidence in the form of the Respondents' statements in relation to the Appellant has been produced to support the last four of the penalties  
45 in the table set out at paragraph 2 above;

5 (c) In any event, in relation to all of the penalties other than those referred to at paragraph 12(a) above, the Officers were unable to produce either copies of the actual letters imposing the penalties in question or templates showing the form which those letters would have taken. As a result, it was impossible for us to determine whether, even if the relevant letters had been sent to the Appellant as the Respondents allege, each relevant letter satisfied the requirement of paragraph 11(1)(c) of Schedule 10 56 to state the period in respect of which the relevant penalty was being assessed. Moreover, in the absence of the actual letters or templates of those actual letters, it was impossible for us to determine whether, even if the relevant letters had been sent to the Appellant as the Respondents allege, the letters could be deemed to be valid notwithstanding their non-compliance with that requirement, pursuant to the relieving language in Section 114 TMA 1970 as interpreted in the decision of the Court of Appeal in *Donaldson*;

15 (d) Similarly, the only evidence adduced by the Officers in respect of the surcharges were computer print outs setting out the due date for each of the surcharge in respect of the tax year of assessment ending 5 April 20 1999, the two surcharges in respect of the tax year of assessment ending 5 April 2005 and the two surcharges in respect of the tax year of assessment ending 5 April 2007 and recording the issue of the two surcharges in respect of the tax year of assessment ending 5 April 2009. No computer print-outs were produced to evidence the due dates for, or the issue of, the two surcharges in respect of the tax year of assessment ending 5 April 25 2006, the two surcharges in respect of the tax year of assessment ending 5 April 2008 or the two surcharges in respect of the tax year of assessment ending 5 April 2010. (This because neither the hearing bundle nor the additional pages which were provided to us at the hearing covered the year 2007, when the notices of the surcharges in respect of the tax year of assessment ending 5 April 2006 were allegedly despatched, or (with the exception of two inconsequential entries at lines 7 and 8 of page C9 of the hearing bundle) the year 2009, when the notices of the surcharges in respect of the tax year of assessment ending 5 April 2008 were allegedly despatched, and, although there is a reference on lines 41 and 45 of page 9 30 of the additional pages which were provided to us at the hearing to the surcharges in respect of the tax year of assessment ending 5 April 2009, there is, mysteriously, no mention in those lines of the surcharges in respect of the tax year of assessment ending 5 April 2010, even though, according to page 1 of the additional pages which were provided to us at the hearing, those surcharges were due on exactly the same date as the surcharges in respect of the preceding tax year of assessment (ie 11 November 2011));

35 (e) Moreover, the Officers were unable to produce any evidence as to the dates when notice of any of the surcharges apart from the surcharges in respect of the tax year of assessment ending 5 April 2009 was given to the Appellant or the form taken by any such notices (including the notices in respect of the tax year of assessment ending 5 April 2009) – whether by 40 45

producing the actual notices in question or templates of the notices that were sent. As a result, it was impossible for us to determine whether the requirements of Section 59C(5) TMA 1970 were satisfied in relation to the surcharges;

5 (f) The Officers representing the Respondents referred us to page B3 of the hearing bundle, which contains a letter from the Respondents dated 4 April 2018. That letter alleges that the time to pay arrangement set up by the Appellant in 2010 terminated on 22 September 2011 as a result of the Appellant's failure to comply with the terms of the arrangement.  
10 However, the alleged letter of 22 September 2011 is not in the hearing bundle and the Officers representing the Respondents were unable to produce it at the hearing. We have noted at paragraph 6 above that, pursuant to paragraph 10(3) of Schedule 56, where an instalment payment arrangement is in place, then, even if the taxpayer defaults under that arrangement, the taxpayer becomes liable to a penalty only if the Respondents serve on the taxpayer a notice specifying the penalty to which the taxpayer would become liable but for having entered into the instalment payment arrangement. No evidence has been presented to us that any such letter was ever sent by the Respondents or of the form which  
15 any such letter might have taken;  
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(g) The hearing bundle at pages B13 and B14 contains two communications that can be construed as evidence of a time to pay arrangement. The first letter, dated 30 September 2010 (at page B14 of the hearing bundle), refers to the fact that there is a direct debit in place and notifies the Appellant of the details of his payment instalments. The  
25 second letter, dated 31 January 2013 (at page B13 of the hearing bundle), simply refers to an agreement between the parties that the Appellant can make his payments by instalments but contains no details as to what those instalments might be and when they might be payable. In the absence of any indication in the hearing bundle or in the additional pages that were provided to us at the hearing that those arrangements were terminated as a result of non-performance by the Appellant – apart from the unsupported statement to that effect in the letter at page B3 of the hearing bundle referred to at paragraph 12(e) above - it is impossible to conclude that  
30 either of the time to pay arrangements referred to in the letters at pages B13 and B14 of the hearing bundle was cancelled;  
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(h) The documents presented to us for the purposes of the hearing included (at page B6 of the hearing bundle) a letter from the Appellant to the Respondents dated 21 June 2017 requesting a response to the Appellant's letter of 17 June 2017, a further letter from the Appellant dated 6 March 2018 (at page B5 of the hearing bundle) in which he notes that he has written to the Respondents on several occasions without any reply and then a third letter from the Appellant dated 26 March 2018 (at page B4 of the hearing bundle) in which, alluding to a letter from the Respondents dated 19 March 2018 which is not in the hearing bundle, he  
40 reminds the Respondents that he awaits a reply to his appeal. It was this  
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third letter which doubtless prompted the response from the Respondents of 4 April 2018 referred to at paragraph 10 above but some 10 months had passed between the Appellant's letter of 7 June 2017 notifying the Respondents that he wished to appeal against the surcharges and penalties and the Respondents' reply of 4 April 2018. The Respondents' assertion that the Appellant should have appealed more promptly against the various surcharges and penalties sits somewhat uneasily with the 10 month delay in their response to the Appellant's appeal;

(i) The Respondents' skeleton argument focuses exclusively on the fact that the Appellant does not have a reasonable excuse for his defaults whereas the Appellant is in fact arguing not that he has a reasonable excuse for his defaults but that he hasn't defaulted at all because he did not receive notice of the relevant surcharges or penalties and, in relation to some of the relevant surcharges and penalties, because there was an extant time to pay arrangement in place; and

(j) The Appellant told us at the hearing that he has been living for some 22 years at his current address – 98 Sheaveshill Avenue, The Hyde, London NW9 6RY – and yet the Respondents' records in relation to the Appellant refer to three changes in communication address – one on 15 February 2005 (at line 12 on page C9 of the hearing bundle), one on 12 June 2007 (at line 10 on page C9 of the hearing bundle), and one on 13 June 2016 (at line 12 on page C8 of the hearing bundle). No explanation for these entries in the Respondents' records in relation to the Appellant has been provided by the Respondents and it could explain why the Appellant did not receive the notices which the Respondents allege that they sent.

12. We think that it is fair to conclude from the matters referred to at paragraphs 11 and 12 above and the documents that have been presented to us that the tax affairs of the Appellant are in something of a mess and that the blame for that cannot be laid entirely at the Appellant's door. Moreover, given the clear difficulties that the Appellant has experienced and is continuing to experience in meeting his tax liabilities, it is not clear to us that he would be able to discharge the surcharges and penalties that are the subject of this appeal even if those surcharges and penalties were to be upheld.

13. Be that as it may, our role is solely to determine whether, on the facts presented to us, we consider it appropriate to allow the Appellant to make a late appeal and, if so, whether to allow that appeal on the basis that the Respondents have not satisfied the burden of proving that the Appellant received notice of the relevant surcharges and penalties in the appropriate form and, in relation to some of the relevant surcharges and penalties, that the relevant surcharge or penalty was properly imposed because there was no extant time to pay arrangement in place.

14. Based on the material inadequacies in the case presented by the Respondents as described above, we think that:

5 (a) the answer to the first question is that the Appellant should be allowed to make a late appeal because, on the balance of probabilities, we think that the Appellant did not become aware of the fact that he had liabilities to surcharges or penalties until he was presented with the detailed breakdown of the amounts which he owed to the Respondents for the purposes of the bankruptcy proceedings against him in November 2016 and he made his appeal after becoming so aware within a period that was reasonable, taking into account the fact that his priority between November 2016 and the date when he made his appeal was to meet his liabilities to the Respondents in order to stave off bankruptcy and not with the procedural aspects relating to the surcharges and penalties; and

10 (b) The answer to the second question is that the Respondents have not in our view satisfied the burden which is on them of proving that the relevant surcharges and penalties in each case were properly imposed and notified to the Appellant. In the case of many of the surcharges and penalties, this is both because the Respondents have not satisfied us that, on the balance of probabilities, the Appellant was notified of the relevant surcharges and penalties in the appropriate form and there was no extant time to pay arrangement in place and, in respect of the others, this is because the Respondents have not satisfied us that, on the balance of probabilities, the Appellant was notified of the relevant surcharges and penalties in the appropriate form.

15 15. For the above reasons, we uphold the Appellant’s appeal against the surcharges and penalties in the table set out at paragraph 2 above.

25 16. 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 30 “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

35 **TONY BEARE**  
**TRIBUNAL JUDGE**

**RELEASE DATE: 29 August 2018U**

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