

GUERNSEY TAX TRIBUNAL

CONSOLIDATED UPDATE – PART TWO

LATE PAYMENT SURCHARGE APPEALS DECIDED BY THE GUERNSEY TAX TRIBUNAL FROM 30 JUNE 2006 ONWARDS

Explanatory Notes.

1. Matters are identified by year and number. Where a number is missing the reason is one of the following: (i) the matter was settled without a hearing, (ii) it did not turn on any point of law or of fact, or (iii) the matter was referred to the Royal Court by way of Case Stated, (iv) the matter awaits hearing, or (v) it is reported in Part One of the update and does not relate to a Late Payment Surcharge.

2. The information provided is solely key points in the decision together with details of some or all of the relevant legislation and cases considered by the Tribunal. A professional person who has a bona fide reason for requiring more detailed information should write to the Clerk to the Tribunal who will then pass on the request to the appellant taxpayer or their personal representative. It will be the decision of the taxpayer as to what further information can be provided and what conditions may be imposed.

3. As from 2005, the Tribunal will, as far as possible, endeavour to give all its written decisions in a neutered form so as to facilitate its release by the taxpayer appellant whilst retaining anonymity.

4. In the following summaries, the words “Tax Law” refer to the Income Tax (Guernsey) Law, 1975, as amended, in the form that was in force at the relevant time. “Guernsey” includes Alderney. “another jurisdiction” means a country other than Guernsey (and Alderney).

5. These summaries are prepared for guidance only and are not to be taken nor intended to be taken as an authoritative statement or interpretation of the Tax Law and the compilers accept no responsibility for any errors or omissions howsoever caused.

6. Late Payment Surcharges were introduced by the Income Tax (Surcharges and Supplements) (Guernsey) (Amendment) law 2005, the relevant portion of which became operative on 30 June 2006.

7. The phrase ‘Late Payment Surcharges’ is generally abbreviated as ‘LPS’.

2006/4. A taxpayer is bound by errors and omissions of their professional representative. A surcharge is payable at the rate of 5% of the amount of tax due under the Tax Law at the close of the settlement date. This amount remains payable notwithstanding any subsequent reduction of the amount on which the original surcharge was based. The Tribunal cannot vary a surcharge that is correctly imposed under the Tax Law. (No cases were cited. The Tribunal considered sections 76, 79(1)(d), and 199 of the Tax Law and the Income Tax (Surcharges and Supplements) (Guernsey) (Regulations), 2005).

2006/5. A taxpayer claimed to have posted a settlement cheque two days in advance of the settlement date. The Administrator claimed that he did not receive it until after that date and imposed a surcharge. On the particular facts relating to this case, the

Tribunal allowed the appeal. The Tribunal observed that although it was the duty of the taxpayer to pay on time, a taxpayer was entitled to rely upon the postal system. The Tribunal made recommendations to the Administrator as to steps that he might take to avoid similar problems in the future. (No cases were cited. The Tribunal considered sections 76 and 199 of the Tax Law, section 11 of the Interpretation (Guernsey) Law 1948, and section 116 of the Companies (Guernsey) Law, 1994).

2006/6. A taxpayer is liable to a surcharge under section 199 of the Tax Law if the Administrator does not receive payment by the settlement date, in this case 30 June 2006. Although the Administrator did not impose surcharges on any payment received on 03 July 2006, he was not acting in a discriminatory way by imposing surcharges on payments received after that date. Under section 76 of the Tax Law, an allegation of discrimination against a taxpayer who paid after that date is not a ground of appeal against the imposition of a surcharge. The Tribunal recommended that taxpayers organise their affairs so as to ensure that payments are received by the Administrator on or before the settlement date. (No cases were cited).

2006/10. A Taxpayer overlooked payment due on 30 June 2006 because of family matters and the Administrator imposed a LPS. The amounts of the assessment and surcharge were not in dispute. The Taxpayer, who paid on the first reasonable opportunity and had a good payment record, asked for these matters to be taken into consideration. The Tribunal considered section 76 of the Tax Law and held that it had no power to do this and dismissed the appeal. It made recommendations to the Administrator that the wording of the Statements of Account should stress that no reminders will be sent and that a LPS may be imposed. (No cases were cited).

2006/12. By a majority of 5-2 the Tribunal found that the wording on the Notices of Assessment and Statements of Account sent to the Taxpayer were not so ambiguous as to permit him not to pay an amount shown as due on 30 June. The Administrator must agree expressly to any deferment of payment. (Section 199(10&11) of the Tax Law considered). The Tribunal made suggestions to the Administrator concerning the wording of documents sent to Taxpayers. (No cases cited).

2006/21. An alleged failure of the Administrator to give advance notice of changes in the Tax Law is not a valid ground of appeal under Section 76. The Tribunal's powers are only those given to it by law. The Tribunal observed that there is no requirement for the Administrator, or the States of Guernsey, to give publicity to changes in its revenue or any other law. This may be inconvenient for taxpayers, for the public at large, or for non-residents, but is a fact of life. (No cases cited).

2006/23. A Taxpayer who fails to appeal against an assessment, (whether final, estimated, provisional or otherwise), and/or fails to ask for and obtain express agreement for deferred payment must pay a late payment surcharge on the full amount of tax payable but unpaid on the due date. (No cases cited).

2006/28. The due date for an assessment made before 10 June is 30 June. (Section 81(1)(a) of the Tax law). A Taxpayer does not have 30 days within which to make a payment in respect of an assessment issued on 09 June. (No cases cited).

Extract from Decisions on Late Payment Surcharge Appeals.

The following extract is taken from a text common to many of the latest decisions made by the Tribunal concerning LPS appeals.

“3. The Income Tax (Guernsey) Law, 1975, as amended (the “Tax Law”) contains specific provisions concerning appeals. Section 76 of the Tax Law states that a taxpayer ‘shall be entitled to appeal to the appropriate body by giving the Administrator notice in writing (stating the grounds of appeal) within 30 days of the date of the notice of assessment.....etc.’. By section 80A(b) of the Tax Law, the appropriate body in this appeal is this Tribunal because the Taxpayer had delivered returns for the Years of Charge in question.

4. Section 76 of the Tax law has the proviso that the appropriate body, in this case this Tribunal, *may* admit an appeal if it is *satisfied* that owing to absence, sickness or other reasonable cause a person has been *prevented* from giving the [notice within 30 days]. (Italics added).

5. The Tribunal refers to the three italicised words. Firstly, the word ‘may’ denotes that the Tribunal is not obliged to admit a late appeal. It has discretion whether or not to do so. Secondly, the word ‘satisfied’ means that the Tribunal must be satisfied on balance of probabilities that absence, sickness or other reasonable cause was such as prevented the notice being within time. The third word ‘prevented’ means that absence, sickness, or other reasonable cause was something that went beyond mere inconvenience but was active in preventing the notice being within time.

6. Section 199(1) of the Tax Law makes a person liable to a surcharge if any amount due from him under the Tax Law (including for the avoidance of doubt, any penalty) is not paid on or before the settlement date. Section 199(2) defines the settlement date as the date on or before which the amount in question is payable. We shall refer to such a surcharge as a “Late Payment Surcharge” (“LPS”).

7. The powers of the Tribunal to set aside or vary a LPS are severely limited by statute. Proviso (a) in Section 76 of the Tax Law states that the only grounds of appeal against a LPS are that-

- a. the surcharge or additional surcharge is not payable,
- b. the surcharge or additional surcharge has been miscalculated, or
- c. (there has been an unreasonable delay on the part of the Administrator in making an assessment).

This third proviso is not applicable to this appeal.

8. Section 199(11) makes clear that the original LPS becomes payable notwithstanding any subsequent reduction of the amount on which the original surcharge was based. The Tribunal interprets the subsection as referring to a sum in dispute or due under an estimated assessment.

9. Further, lodging an appeal against an assessment does not have the effect of annulling a LPS. Section 199(10) states that any forbearance or failure of the Administrator to enforce payment does not affect the settlement date unless the Administrator has expressly agreed that the amount due may remain unpaid. The Tribunal interprets this subsection as meaning that a sum due must be paid on or before the settlement date unless the Taxpayer has asked for and the Administrator expressly agreed that collection be postponed.

10. The above provisions of the Tax Law may sometimes appear as unfair or harsh, but this Tribunal must apply the law as it stands and has no discretion to alleviate a difficult personal situation unless the Law so allows. The changes in the Tax Law that brought about late payment surcharges being applied equally to all taxpayers rather than on a case by case basis were as a result of a decision of the legislature and it is not for this Tribunal to question that decision.”

Matters considered during the first half of 2007.

Failure to pursue an appeal.

There have been a number of instances when taxpayers have lodged an appeal against a LPS but have failed either to send in documentation or attend the hearing. The Tribunal has commented in the following terms when dismissing such appeals:

“This Tribunal, appointed by and subject to the Royal Court, is totally independent from the Income Tax Authority. It does not have access to the taxpayer’s file held by the Income Tax Authority. Its function is to do justice between a taxpayer and the Authority. It is placed in a difficult position when a taxpayer lodges an appeal against a late payment surcharge and fails to follow it up. The Clerk to the Tribunal provides a taxpayer with details as to what must be done to prepare for the appeal. In this case, the taxpayer has not provided any documents, nor given any reason for wishing to appeal, nor attended at the time notified for the appeal, nor indeed made any contact with the Tribunal. In these circumstances all that the Tribunal can do is to accept the evidence of the Administrator that the taxpayer was sent a statement of account requiring the payment of a sum by a certain date (the settlement date), and that the sum was not so paid. These details are shown on the Notice of Surcharge. The Taxpayer received this Notice because without it the taxpayer would not have lodged an appeal. In the absence of manifest error on the part of the Administrator in the preparation of the surcharge Notice, which the Tribunal was satisfied was not present in this case, the Tribunal has no option other than to dismiss the appeal.”

Appeal 2007/5. Invalid grounds of appeal.

The taxpayer appeared in person and argued five grounds for appeal:

The taxpayer had a good record of paying tax due.

The Administrator had a duty to publish details of changed procedures for payment.

The taxpayer's accountants had already lodged an appeal against an estimated assessment in respect of which payment was made late.

The Administrator had not agreed an amended assessment prior to the due date.

The taxpayer had a credit balance at the end of 2005.

In dismissing the appeal, the Tribunal noted that alleged absence of information about changes is not a valid ground for appeal. The lodging of an appeal against an estimated assessment does not suspend a surcharge unless the Administrator has expressly agreed to suspend collection of the relevant tax. The existence of a previous credit balance does not remove the obligation to pay tax by the due date.

Appeal 2007/7 –FULL TEXT OF NEUTERED DECISION. The Tax Law does not permit the Tribunal to take a Taxpayer's personal difficulties into account.

“The Taxpayer did not attend but the Tribunal has before it a letter from the Taxpayer dated xx.yy.zz. In it, the Taxpayer claimed a good payment record and drew attention to personal difficulties.

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- (iii) (there has been an unreasonable delay on the part of the Administrator in making an assessment).

This third proviso is not applicable to this appeal.

Section 199(11) makes clear that the original LPS becomes payable notwithstanding any subsequent reduction of the amount on which the original surcharge was based. The Tribunal interprets the subsection as referring to a sum in dispute or due under an estimated assessment.

Further, lodging an appeal against an assessment does not have the effect of annulling a LPS. Section 199(10) states that any forbearance or failure of the Administrator to enforce payment does not affect the settlement date unless the Administrator has expressly agreed that the amount due may remain unpaid. The Tribunal interprets this

subsection as meaning that a sum due must be paid on or before the settlement date unless the Taxpayer has asked for and the Administrator expressly agreed that collection be postponed.

The above provisions of the Tax Law may sometimes appear as unfair or harsh, but this Tribunal must apply the law as it stands and has no discretion to alleviate a difficult personal situation unless the Law so allows. The changes in the Tax Law that brought about late payment surcharges being applied equally to all taxpayers rather than on a case by case basis were as a result of a decision of the legislature and it is not for this Tribunal to question that decision.”

Under the circumstances the Tribunal cannot do other than confirm the surcharge imposed by the Administrator by Notice dated uu.vv.ww.

By section 199(8) of the Income Tax Law, a surcharge becomes payable 30 days after the settlement date and may be recovered as a civil debt. There is not any provision in the Law for the Administrator to suspend collection of a surcharge pending appeal. It follows that the surcharge is and remains due for payment.”

2007/14. Arrangement between the Administrator and GSCCA in respect of ETI deductions. Interpretation of section 81A(3) of the Tax Law.

The taxpayer received income both from employment and other sources. The former was subject to ETI deductions. The Administrator issued a transaction record that showed two interim assessments for the current year of charge and a final assessment in respect of the previous year. The statement of account showed a credit balance in favour of the taxpayer. The statement of tax due that accompanied this statement noted that tax paid under the ETI scheme had been ignored in arriving at the payments due. The credit balance was the difference between the tax paid under the ETI scheme and the tax noted as due.

The Administrator referred to an agreement made with the Guernsey Society of Chartered and Certified Accountants (“GSCCA”) that interim assessments would not include income, which had tax deducted at source, such as employment income subject to the ETI scheme. The purpose of this was to simplify administration both for his office and for accountants and taxpayers. The Administrator accepted that whilst this had no different result on the amount of tax due in June and December than would have been the case if the taxpayer’s full income had been included in the assessment, this practice was not in accordance with section 81A(3) of the Tax Law. He conceded that the Tribunal may be bound to uphold the appeal.

The Tribunal sympathised with the Administrator’s position of trying to simplify his administration and observed that, prior to the introduction of the 2006 LPS regulations, the arrangement with GSCCA had only penalised late payment in exceptional circumstances. Nevertheless the plain wording of section 81A(3) of the Tax Law meant that tax deducted under the ETI scheme could be applied towards any tax charged or chargeable. The Taxpayer’s appeal was allowed and the surcharge annulled.

ADDENDUM.

The effect of this decision has been overturned by the enactment on 27 June 2007 of the Income Tax (Guernsey) (Amendment) Law, 2007.

Appeal 2007/15 – Invalid Grounds of Appeal,

The Tribunal noted that there was not any dispute as to the amount of tax due, nor of the facts that the taxpayer had received both a Statement of Account and a note sent along with his tax return form at the start of 2007 that set out details of surcharges. The allegations by the taxpayer that information concerning surcharges was not sufficiently explicit in these documents were not a ground of appeal as permitted under proviso (a) to section 76 of the Income Tax Law. Appeal dismissed.

THIS IS A CONSOLIDATED UPDATE PUBLISHED ON 29 JUNE 2009 RELATING TO LATE PAYMENT SURCHARGE APPEALS ONLY. NO LPS APPEALS WERE HEARD DURING THE SECOND HALF OF 2007, THE WHOLE OF 2008, OR THE FIRST HALF OF 2009 SO ALTHOUGH THIS REPLACES THE CONSOLIDATED UPDATES THAT WERE ISSUED ON 07 JUNE 2007 AND SUBSEQUENTLY, IT IS IDENTICAL TO THEM.

For other appeals see Part One – for these, the consolidated update published on 17 July 2008 remains current..

N. Le Poidevin.

Clerk.

29 June 2009.