



TC02040

Appeal number: TC/2011/03829

VAT – default surcharge – reasonable excuse

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

PAUL RYAN (UK) LTD

Appellant

- and -

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

**TRIBUNAL: JUDGE CHARLES HELLIER
NIGEL COLLARD**

Sitting in public in Brighton on 10 January 2012

The Appellant was not represented

Colin Strudwick for HM Revenue and Customs

DECISION

Hearing in the absence of the Appellant.

5 1. No one appeared to represent the appellant at the commencement of the hearing. A telephone call to the appellant's number elicited the information that Mr. Ryan, the director of the appellant who had signed the notice of appeal, was off sick and that no one there knew anything about the hearing.

10 2. We were satisfied that the appellant company had had proper notice of the hearing. Taking into consideration the ability for the appellant to apply to set aside our decision if it was just so to do, and the absence of any communication from the appellant in relation to the hearing, we considered it just to continue the hearing in the absence of a representative of the appellant.

15 3. The appellant is reminded of its right under rule 38 of the tribunal's rules to apply to have this decision set aside. The tribunal will do so if it considers that it is in the interests of justice so to do where the appellant's representative was not present at the hearing.

The Appeal

20 4. The appellant appealed against a default surcharge of £1400.32 assessed by HMRC under section 59 VAT Act 1994 in respect of the 01/11 period (the VAT period ending on 31/01/2011), being 15% of the VAT shown on its return for that period of £9335.53.

25 5. A default surcharge may be assessed only if the taxpayer defaults in a "surcharge period". A surcharge period may be brought into existence only if a taxpayer defaults and HMRC serve a notice creating a surcharge period (see section 59(2) and (4)). Such a period runs for 12 months from the period of the default but may be extended if the taxpayer defaults in respect of a VAT period ending within the surcharge period and HMRC serve an extension notice extending the period to the end of 12 months after the period of that later default. And so on. (See section 59(3) VATA 1994).

35 6. There was no suggestion in the appellant's notice of appeal or in the correspondence before us that the appellant disputed that: (1) it had defaulted in respect of the periods 10/08, 04/09, 10/09 and 07/10; (2) that a surcharge notice had been served creating a surcharge period in respect of the first of those defaults; and (3) that extension notices had been served extending that period to July 2011.

7. Thus the alleged default of the appellant for the 01/11 period fell within a surcharge period starting on 31 October 2008 and ending on 31 July 2011: a surcharge could therefore be assessed.

8. The amount of the surcharge is prescribed by section 59(7). It is a percentage of the outstanding VAT for the period of default. That percentage is 2%, 5%, 10% or 15% according to whether the default is the first, second, third or fourth or subsequent default in the payment of VAT in the (extended) surcharge period. In this case the
5 01/11 default would be the fourth default, and the rate of surcharge would be 15%.

9. Section 59(7) contains no provision permitting a reduction in the percentage charged or any mitigation of the charge. Where, however, there is a reasonable excuse for the default the default may be ignored and no surcharge arises (see section 59(7)).

10. A "default" is a failure to deliver a VAT return on time or a failure to pay the VAT shown on the VAT return on time.

11. It was clear that the VAT shown as due on the 01/11 return was £9333.53. The appellant's notice of appeal and its correspondence did not suggest that this VAT was not paid late. We therefore find that, unless the appellant had a reasonable excuse for the late payment, a surcharge of $15\% \times £9333.53 = £1400.32$ was properly assessed
15 for the period.

Reasonable excuse

12. Section 71(1) of VAT Act 1994 provides:

"For the purposes of any provision of sections 59 to 70 which refers to a reasonable excuse for any conduct -

20 (a) an insufficiency of funds to pay any VAT due is not a reasonable excuse; and

(b) where reliance is placed on any other person to perform any task, neither the fact of that reliance nor any dilatoriness or inaccuracy on the part of the person relied upon is a reasonable excuse."

25 13. However it is accepted law that the reason for an insufficiency of funds may provide a reasonable excuse for a default even if the insufficiency on its own cannot.

14. The VAT for the 01/11 period was due on 7 March 2011 if paid electronically. Payment was in fact made on 30 March 2011 by BACS. It was thus 23 days late.

30 15. In its notice of appeal the appellant explained that its main area of activity was doing the work for insurance claims. This was seasonal work which came in surges. When a surge came the appellant had to pay out for the costs of extra staff to do the work and then had to wait some time before the insurance companies made payment. Thus a surge in work produced a deficit in cash. In the winter of 2010/11 the company was particularly busy and ran very close to its overdraft limit in the early months of
35 2011.

16. This account of the appellant's position is supported by its VAT returns which show net VAT due for the periods from October 2008 to April 2011 of between £5,000 and £20,000, and periods of drought and surge. Thus in recent periods:

Period	VAT due
7/10	£19.6K
31/10	£5.4K
1/11	£9.3K
30/11	£10.5K

17. In a letter to HMRC of 26 April 2011 the appellant says:

"We were unable to make payment as our debtors owed us £168K on 9 March. It made our cash flow almost non-existent.

5 "We received a payment of £44K on the 28 March we then paid the VAT on that day as soon as we had the funds."

18. Prior to an earlier adjourned hearing to consider this appeal the appellant provided copies of bank statements for the period 17 January to 16 April 2011 and aged debtors' analyses at the end of January, February and March 2011.

10 19. The debtors' analyses showed debtors of £122K at the end of February, and of £99K at the end of March. In our view they support the statements quoted above.

15 20. The bank statements showed an overdraft limit of £60,000 in the period to 16 March 2011 but a reduction in the overdraft limit to £40,000 at 16 April 2011, although the amount of the debit balance at that date substantially exceeded that amount.

20 21. On 7 March 2011, when the VAT was due for the 01/11 quarter (and was the latest day on which a CHAPS payment could be made to get the VAT to HMRC on time) the company was overdrawn by £51,454; at the end of 3 March (the latest day for a BACS payment to pay the VAT on time) the overdraft was £59,516. In the period to 14 March the overdraft was at about £55,000 and fell to £48,000 on 14 March. Thus the first time the VAT payment could have been made in full without breaching the overdraft limit was on 14 March 2011.

25 22. We find that the winter surge in the appellant's work load gave rise to a cash shortage which meant that at 7 March 2011 it could not have paid its VAT in full without breaching its overdraft facility or causing it to be unable to make necessary payments in the following weeks.

30 23. This lumpy pattern of business appears to have caused difficulties to the appellant in the past: the defaults in 04/09, 10/09, and 7/10 seem to coincide with surges in outputs. In the past (February 2009 and September 2010) the appellant had contacted HMRC to arrange time to pay; but it did not do so for the 01/11 period. Had

the appellant arranged with HMRC permission to delay the payment of the 01/11 VAT, a surcharge would not in our view have been appropriate.

24. In our judgement it was reasonable to expect that the appellant would be aware of the effect of the lumpy nature of its business would have on its ability to meet VAT obligations, and when, in the winter of 2010/11, a surge came, to have taken steps - such as approaching the bank for additional temporary facilities (if a more permanent facility could not be arranged), seeking more capital, managing its workload and payment profile, or seeking permission from HMRC to pay later - to avoid a default for 01/11. As a result we do not find that the appellant had a reasonable excuse for its default for that period.

Conclusion

25. We dismiss the appeal.

Rights of appeal.

26. 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.

CHARLES HELLIER
TRIBUNAL JUDGE

RELEASE DATE: 25 May 2012