TC03199

Appeal number: TC/2013/02563

VAT – Default Surcharges – reasonable excuse, appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

ADROIT ENGINEERING LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE LADY JUDITH MITTING
MISS SANDI O'NEILL

Sitting in Birmingham on 11 December 2013

The Appellant was not represented

Lisa Taylor, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. The Appellant was appealing against default surcharges raised in respect of consecutive quarters from periods 09/11 to 09/12 inclusive, the cumulative amount of the surcharges being £9,042.91.

2. When the case was called on to the hearing there was no attendance on behalf of the Appellant. The Tribunal clerk telephoned the company, speaking to Mr Christian Dunn, a director, who referred to a letter which he had sent into the Tribunal dated 8 December 2013 advising that they would not be attending due to pressure of work and asking the Tribunal to proceed in their absence. A copy of the letter was emailed across, on receipt of which we agreed to proceed.

3. The Appellant had been in the surcharge regime continuously since period 06/09. No appeal had been lodged against any of the surcharges until the current appeal against the five in question. The earlier surcharges remain unappealed.

4. The grounds of appeal dated 25 March 2013 raised three issues. Firstly, back in July 2011, the company's production director had been taken ill and indeed did not return to work and retired through ill health in June 2012. During this time and the time leading up to his absence, his illness had had a major impact on the production side of the business. His role as production director was to manage the production of the company including ordering and quotations and ensuring goods were despatched on time. His absence placed considerable pressure on the two remaining directors who had to fulfil the production role in addition to their own existing commercial duties. Secondly, whilst it was accepted that some penalty was due, the amount is scandalous and did nothing to help a small company trying back to get back onto its feet. Thirdly in November 2012, the Appellant company was sold to Melting Solutions Limited who have provided extra commercial and financial support.

5. By letter dated 14 August 2013 to the Tribunal, a further ground of appeal was added, namely that the company had been in a Time To Pay agreement from 3 May 2011 to 9 March 2012. Under the agreement, the company paid £3,500 per month and the surcharges for the periods 09/11 and 12/11, which together totalled £4,266.93 were, it was asserted, included in the payment plan and the surcharges for these periods were therefore invalid.

6. There was nothing further in the correspondence to flesh out or add anything to the above grounds of appeal and we were of course without the benefit of any oral representations.

7. Dealing first with the illness of the production director, without any further evidence as to how this impacted upon the business, we are unable to find that this amounts to a reasonable excuse for any of the periods. We also note, particularly, that although payments for all periods were late, the returns were not. It would therefore appear that notwithstanding the staff shortages, the tax had in each instance been able to be calculated before the due date and all that was lacking was the ability to pay it.

8. The question of the Time To Pay agreement, we found much more problematic. The principal problem was that there was no copy of it before the Tribunal and we understand from Ms Taylor that it is the practice of HMRC not to keep a copy which we would have thought to be unwise in the extreme. We do not therefore know the terms of the agreement and Ms Taylor could not help us. We were told that it was purely in connection with the older debt and did not include any agreement with regard to periods 09/11 and 12/11 but whether or not that was sufficiently clear to enable the Appellant to understand that is another matter. However, the Appellant provided no further evidence as to the effect which the TTP had on their payment pattern. It is not enough merely to assert that a TTP renders the surcharges "invalid". We have looked at the surrounding evidence and we find that the monthly payments made under TTP did not cover the default surcharges for 09/11 and 12/11. The Appellant paid the VAT due in full but late in both quarters which correctly triggered the imposition of surcharges at the maximum of 15%. Even if the Appellant had believed at the time that the seven monthly TTP payments of £3,500 which were made from 1 September 2011 to 2 February 2012 did meet the two surcharges totalling £4,266.93, HMRC sent the Appellant a statement of its account on 17 August 2012 in response to the Appellant's letter of 31 July 2012 which raised the issue. The ledger entries clearly show that the outstanding debt to HMRC at the end of August 2011 was £33,285.64. On 1 November when the VAT due was £14,769.25 the outstanding debt to HMRC had reduced to £15,211.42. The VAT payment was made on 15 November which triggered the surcharge of £2,215.38 for the 09/11 quarter. The VAT for 12/11 due on 31 January 2012 was £13,677.03 and this was met in two tranches on 16 February and 29 March. This triggered the default surcharge of £2,051.55. The Appellant's outstanding debt to HMRC was £10,426.80 on 3 January 2012 and was £20,603.83 after crediting the final monthly payment on 2 February before the agreement was cancelled in March 2012 by HMRC. The Appellant did make further electronic payments to HMRC so that at the end of March the outstanding debt to HMRC had reduced to £6,846.81. However, at no time during the period in question did the Appellant's outstanding liability to HMRC fall to a level which would have meant that the monthly payment did not go to paying off the arrears from periods earlier than 09/11 and 12/11. We believe that it should have been obvious to the Appellant, at least when they received a copy of HMRC's schedule of ledger entries in August 2012, that the payments made under the TTP agreement did not cover the surcharges for 09/11 and 12/11. For these reasons we do not believe the presence of a Time to Pay agreement has any bearing on this matter and does not constitute a reasonable excuse.

9. The Appellant contends that the surcharges were "scandalous" but does not expand upon this or indeed specifically mention proportionality although we take from the phrase that that is what the Company implies. All we can say in relation to this is that following the reasoning of the Upper Tribunal in *Total Technology (Engineering) Limited*, we find that there is nothing in the default surcharge system which renders it disproportionate. The Appellant has clearly found difficulty in making its quarterly VAT payments for a considerable period of time and over that time the percentage applied had increased until reaching the maximum of 15% which applies to each of the periods under appeal. Given this history and the structure of the surcharge regime, we find nothing in the circumstances of this case to lead us to

believe that the surcharges here are disproportionate and find no reasonable excuse in this ground either.

10. In summary, we find that the Appellant does not have a reasonable excuse in relation to any of the periods under the appeal. The percentages applied are correct given the history of defaults and the company did not raise any challenge to the mathematical calculation of the surcharges. We find therefore that the surcharges have been correctly issued, there is no reasonable excuse and the appeal is dismissed.

11. 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.

LADY JUDITH MITTING
TRIBUNAL JUDGE

RELEASE DATE: 6 January 2014