



TC03496

Appeal number: TC/2014/00503

Value Added Tax –default surcharge – whether there was reasonable excuse for late payment –no – whether dis proportionate or unfair – no - default surcharge confirmed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

LIBERTY SCAFFOLDING LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE FIONAGH GREEN
MRS SHAMEEM AKHTAR**

Sitting in public at Bedford Square, London on 31 March 2014

In the absence of a Director or Representative for the Appellant

Mr Bruce Robinson Officer of HM Revenue and Customs and assisted by Mr Femi Ozo for the Respondents

DECISION

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Introduction

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1. The appeal was made out of time. HMRC did not object to the appeal proceeding out of time. The Tribunal considered the reasons for the late appeal and decided that it was in the interests of justice for the appeal to be allowed to proceed .

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2. This is an appeal against a surcharge of £1,039.54 for late payment of tax for the quarter period 1 June 2013 to 31 August 2013.

The Evidence

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3. The appeal was determined in the absence of a Director or Representative of Liberty Scaffolding Limited (the Company) and we were satisfied that the Company had been notified of the hearing. On 16 March 2014 David Tunbridge Director of the Company provided further information and asked for the appeal to proceed in his absence. The Tribunal decided that there was sufficient evidence and that it was fair and just to proceed. The evidence was contained within the Notice of Appeal, HMRC's Statement of Case and correspondence.

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The Facts

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4. The Company) has been in a default surcharge regime from the quarter ending August 2012. There have been three Surcharge Liability Notices issued before the Surcharge Liability Notice issued for the quarter period ending on 31 August 2013.

5. Schedule of Defaults

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Def No	Period Period Dates	Due Date*	Amount paid by due date £	Amount paid after due date £	Date payment received + method	Date return received	Tax Assessed	Surcharge Document issued	Surcharge issued date	Rate %	Amount £0.00
							Tax on Return				
1	08/12	30/09/12	0.00	3538.47	23/10/12 FPS	26/09/12		V160	12/10/12	FD	0.00 SLN
	01/06/12 – 31/08/12						3538.47				
2	02/13	31/03/13	0.00	5235.54	22/05/13 FPS	19/03/13		V161	12/04/13	2	0.00
	01/12/12 – 28/02/13						5235.54				
3	05/13	30/06/13	0.00	2174.20	24/07/13 FPS	27/06/13		V161	12/07/13	5	0.00
	01/03/13 – 31/05/13						2174.20				
4	08/13	30/09/13	0.00	10395.44	20/10/13	16/09/13		V162	11/10/13	10	1039.54
	01/06/13 – 31/08/13						10395.44				

6. The first default was for the period ending August 2012 and the Company entered the default surcharge regime.

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7. The second default for the quarter period ending 28 February 2013 was for 2% of the tax of £5235.54 paid late of £104.00 and less than the £400.00 in respect of which HMRC do not issue a surcharge.

10 8. The third default the quarter period ending 31 May 2013 was for 5% of the tax of £2174.20 paid late of £105.00 and less than the £400.00 in respect of which HMRC do not issue a surcharge..

9. The return for the quarter period ending 31 August 2013 was received on time on 16 September 2013.

15 10. The tax of £10,395.44 had a due date for payment of 30 September 2013 or by 7 October 2013 if payment is made electronically.

11. The tax of £10,395.44 was paid by the Faster Payments Service on 20 October 2013 by electronic payment 13 days late.

20 12. A Surcharge Liability Notice was issued to the Company on 11 October 2013 the surcharge being £1039.54, 10% of the tax of £10,395.44 paid late. The Company requested a review of the surcharge. HMRC upheld the penalty for the quarter period

ending 31 August 2013. A surcharge of the later quarterly period ending 30 November 2013 was cancelled as the tax had been paid by the due date.

13. There was no Agreement to Pay with HMRC in respect of the payment to be made by the due date for the quarter ending 31 August 2013.

- 5 14. The Company is a small family scaffolding company comprising two lorries and four workers and which has been trading for eleven years. There were cash flow problems with invoices being sent to customers and customers delaying payment.

10 The Legislation

15. Value Added Tax Act 1994 (VATA)

The default surcharge.

- 15 Section 59 (1) Subject to subsection (1A) below if, by the last day on which a taxable person is required in accordance with regulations under this Act to furnish a return for a prescribed accounting period—

(a) the Commissioners have not received that return, or

(b) the Commissioners have received that return but have not received the amount of VAT shown on the return as payable by him in respect of that period,

- 20 then that person shall be regarded for the purposes of this section as being in default in respect of that period...

(2) Subject to subsections (9) and (10) below, subsection (4) below applies in any case where—

(a) a taxable person is in default in respect of a prescribed accounting period; and

- 25 (b) the Commissioners serve notice on the taxable person (a “surcharge liability notice”) specifying as a surcharge period for the purposes of this section a period ending on the first anniversary of the last day of the period referred to in paragraph (a) above and beginning, subject to subsection (3) below, on the date of the notice.

- 30 (3) If a surcharge liability notice is served by reason of a default in respect of a prescribed accounting period and that period ends at or before the expiry of an existing surcharge period already notified to the taxable person concerned, the surcharge period specified in that notice shall be expressed as a continuation of the existing surcharge period and, accordingly, for the purposes of this section, that existing period and its extension shall be regarded as a single surcharge period.

(4) Subject to subsections (7) to (10) below, if a taxable person on whom a surcharge liability notice has been served—

(a) is in default in respect of a prescribed accounting period ending within the surcharge period specified in (or extended by) that notice, and

(b) has outstanding VAT for that prescribed accounting period,

he shall be liable to a surcharge equal to whichever is the greater of the following, namely, the specified percentage of his outstanding VAT for that prescribed accounting period and £30.

(5) Subject to subsections (7) to (10) below, the specified percentage referred to in subsection (4) above shall be determined in relation to a prescribed accounting period by reference to the number of such periods in respect of which the taxable person is in default during the surcharge period and for which he has outstanding VAT, so that—

10 (a) in relation to the first such prescribed accounting period, the specified percentage is 2 per cent;

(b) in relation to the second such period, the specified percentage is 5 per cent;

(c) in relation to the third such period, the specified percentage is 10 per cent; and

(d) in relation to each such period after the third, the specified percentage is 15 per cent.

15 (6) For the purposes of subsections (4) and (5) above a person has outstanding VAT for a prescribed accounting period if some or all of the VAT for which he is liable in respect of that period has not been paid by the last day on which he is required (as mentioned in subsection (1) above) to make a return for that period; and the reference in subsection (4) above to a person's outstanding VAT for a prescribed accounting period is to so much of the VAT for which he is so liable as has not been paid by that day.

20 (7) If a person who, apart from this subsection, would be liable to a surcharge under subsection (4) above satisfies the Commissioners or, on appeal, a tribunal that, in the case of a default which is material to the surcharge—

(a) the return or, as the case may be, the VAT shown on the return was despatched at such a time and in such a manner that it was reasonable to expect that it would be received by the Commissioners within the appropriate time limit, or

25 (b) there is a reasonable excuse for the return or VAT not having been so despatched

he shall not be liable to the surcharge and for the purposes of the preceding provisions of this section he shall be treated as not having been in default in respect of the prescribed accounting period in question (and, accordingly, any surcharge liability notice the service of which depended upon that default shall be deemed not to have been served).

30 (8) For the purposes of subsection (7) above, a default is material to a surcharge if—

(a) it is the default which, by virtue of subsection (4) above, gives rise to the surcharge; or

(b) it is a default which was taken into account in the service of the surcharge liability notice upon which the surcharge depends and the person concerned has not previously been liable to a surcharge in respect of a prescribed accounting period ending within the surcharge period specified in or extended by that notice

5 (9) In any case where—

(a) the conduct by virtue of which a person is in default in respect of a prescribed accounting period is also conduct falling within section 69(1), and

(b) by reason of that conduct, the person concerned is assessed to a penalty under that section,

the default shall be left out of account for the purposes of subsections (2) to (5) above.

10 (10) If the Commissioners, after consultation with the Treasury, so direct, a default in respect of a prescribed accounting period specified in the direction shall be left out of account for the purposes of subsections (2) to (5) above

(11) For the purposes of this section references to a thing's being done by any day include references to its being done on that day.

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16. VATA Section 71 Construction of sections 59 to 70.

Section 71 (1) For the purpose 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...

The Issues

25 17. The issues for the Tribunal were whether—

(i) the Company was in a default surcharge period

(ii) the tax due for the quarter period 1 June 2013 to 31 August 2013 was paid by the due date

30 (iii) there was reasonable excuse for the late payment or for a default material to the surcharge

(iv) the surcharge was proportionate and fair

The Submissions of the Parties -

18. The Company

That -

(i) the Company had always paid tax on the correct date of the submission and that there had not been a previous problem

5 (ii) the Company is a small company trading for eleven years which was unusual for a scaffolding company and that it had complied with HMRC requirements throughout that period. It was not unusual for scaffolding companies to run up large debts and put their companies into receivership which was not something that this Company would do

10 (iii) late payment was accepted but the delay was due to cash flow difficulties and the economic circumstances. Invoices were sent to customers but customers delayed payment to the Company. There were no available funds to make payments but as soon as funds were received the tax was paid. The payment of tax was a priority for the Company.

15 (iv) there were difficulties with the online forms and the Company could not afford professional assistance. On receipt of the Surcharge Liability Notice Mr Tunbridge Director of the Company had telephoned his accountant for advice and his accountant had explained things to him

(v) HMRC were not helping small struggling companies

20 (vii) a reasonable excuse has been given and continued throughout the period of default

(viii) the surcharge was not fair or proportionate

19. HMRC

25 That -

30 (i) the Company has been in a default surcharge regime from the quarter ending August 2012. There had been three Surcharge Liability Notices issued before the Surcharge Liability Notice issued for the quarter period ending 31 August 2013. The potential financial consequences attached to the risk of further default were known to the Company. The Surcharge Liability Notice includes a warning that returns and any tax due must reach HMRC by the due date

(ii) the quarter period 1 June 2013 to 31 August 2013 had a due date of 30 September 2013. Where payment is made electronically the due date for payment is extended to seven days after the statutory due date, 7 October 2013

35 (iv) the return for the quarter period 1 October 2012 to 31 December 2012 was received electronically on time on 16 September 2013

(v) the tax due of £10,395.44 was received by the Faster payments service on 20 October 2013 13 days late

5 (vi) the Company had made electronic returns from the period ending March 2011 and would have been familiar with the process and the requirement to render payment electronically

(ix) there were no payment proposals or agreement for payment in respect of the tax due for the period 1 June 2013 to 31 August 2013.

10 (x) the Company was not on the Case Accounting system. Guidance given by HMRC would have alerted the Company to the Case Accounting system but the option was not taken up by the Company

(xi) there was no reasonable excuse for the late payment

Discussion

15 20. The first issue was considered. The Company was in the default surcharge regime from the quarter period 1 June 2012 to 31 August 2012 and three earlier Surcharge Liability Notices had been issued before the Surcharge Liability Notice for the quarter period ending 31 August 2013. The Tribunal considered whether the earlier defaults had been correctly imposed and decided that they were correctly imposed and that the tax had been paid late on each occasion. The potential financial
20 consequences attached to the risk of further default were known to the Company. The Surcharge Liability Notice includes a warning that returns and any tax due must reach HMRC by the due date. In the appeal documentation the Company dispute that it had paid tax late and said that the late payment for the quarter period ending 31 August
25 2013 was the first occasion but this is not correct. The Surcharge Liability Notice was correctly issued on 11 October 2013.

21. The second issue was then considered. The Tribunal decided that there was tax due which was not paid by the due date. £10,395.44 remained unpaid as at 1 October 2013. The Company accepted that payment was made late and did not dispute that it was not paid until 20 October 2013.

30 22. The Tribunal considered the third issue, whether there was reasonable excuse within Section 59 (7)(b) VATA 1994. The Tribunal considered whether there was a reasonable excuse for the late payment of the quarter period ending August 2013 and also whether there was a reasonable excuse for any of the three earlier defaults which were defaults material to the surcharge. Section 59 (7) (b) VATA defines a default
35 material to a surcharge as the default that gave rise to the surcharge or a default that was taken into account in the service of the surcharge liability notice on which the surcharge depends and the taxpayer has not previously been liable to a surcharge in the same surcharge period.

23. There is no definition in law of reasonable excuse. Case law has determined that reasonable excuse is a matter to be considered in the light of all the circumstances of the particular case. A reasonable excuse is normally an unexpected or unusual (but not exceptional) event. The Tribunal had to consider whether the late payment of the tax was reasonably avoidable and whether the Company exercised reasonable foresight and due diligence and a proper regard to their obligations. If the exercise of reasonable foresight and of due diligence and a proper regard for the fact that the tax would become due on 1 October 2013 would not have avoided the insufficiency of funds which led to the default then the Company may have had a reasonable excuse for non-payment but the excuse will be exhausted by the date on which such foresight, diligence and regard would have overcome the insufficiency of funds. It is necessary to consider the actions of the Company from the perspective of a prudent taxpayer exercising reasonable foresight and due diligence, having proper regard for their responsibilities.
24. The Tribunal decided that the primary reason for the inability to make payment in full on time was an insufficiency of funds. Section 71 1 (a) of The Value Added Tax Act 1994 precludes an insufficiency of funds from providing a reasonable excuse. The Tribunal considered the reasons for the insufficiency of funds. The Company did not provide any evidence of any sudden reduction or withdrawal of bank funding or overdraft facilities or whether any efforts had been made to obtain alternative finances. There was no evidence of a sudden cash crisis. The returns show that there was an increase in business during the summer months of 2013 when the weather would be reasonable. The Company did not provide any evidence of steps taken to overcome the cash flow difficulties or any efforts to obtain advice regarding the Cash Accounting option. In 2009 Glen Vaughan & Associates had been an agent for the Company and in June 2009 contact had been made with HMRC regarding online submissions and to correct a direct debit. Bank details had been provided to HMRC in March 2013. The Company did not provide any evidence of steps taken to collect overdue debts in the summer months of 2013.
25. The Company was reminded by HM Courts & Tribunals Service on 13 February 2014 that all documents needed to be provided for the appeal including letters, bank statements, accounts, receipts, invoices, contracts or other documents but none were provided. The Company was also informed that the Tribunal would not usually postpone or adjourn the hearing to enable the documents to be produced. There was no mention made by David Tunbridge, Director of the Company, in his letter of 16 March 2014 that there were any other relevant documents which were not before the Tribunal. David Tunbridge asked for the appeal to proceed in his absence and the Tribunal decided that there was sufficient evidence upon which to proceed to a fair decision.
26. The Company had not paid any tax by the due date. HMRC guidance informs a taxpayer to pay as much as they can and that there are schemes to help with cash flow and to take a look at optional accounting schemes. Guidance is given by HMRC as to how to avoid a default and what to do if the tax cannot be paid by the due date. Special arrangements can be put in place by HMRC when there are difficulties in

paying tax on time. The Business Payment Support Service could have been contacted before the due date to arrange a Time to Pay arrangement.

27. The Tribunal accepted that there were outstanding invoices which had not been paid by customers. However a prudent taxpayer exercising reasonable foresight and due diligence would have made enquiries and contacted the Company's bank or considered other financial arrangements to meet its obligations and to pay tax by the due date or to contact HMRC for advice and regarding a Time to Pay agreement. There was no evidence of contact with HMRC in August or September 2013 regarding payment difficulties. The potential financial consequences attached to the risk of further default were known to the Company and the Surcharge Liability Notice includes a warning that returns and any tax due must reach HMRC by the due date.

28. The Tribunal decided that the Company was aware of its obligations in respect of the payment of tax. The Company was also aware that it was in a default surcharge regime. The return for the quarter period ending 31 August 2013 had been made on time and the liability of £10,395.44 was known. There had been an insufficiency of funds to pay Value Added Tax. The Tribunal decided in all the circumstances that the Company could have reasonably anticipated the difficulties and made contact with HMRC regarding advice and an agreement for Time to Pay and that there had not been any sudden event which it had not been reasonable to anticipate. The Tribunal decided that there is no reasonable excuse for the late payment or for the earlier defaults material to the surcharge and that the reasons behind the insufficiency of funds did not provide a reasonable excuse.

29. The Tribunal considered the fourth issue. The default surcharge regime as a whole is not disproportionate or non-compliant with the European Court of Human Rights nor in the circumstances of the late payment is the particular penalty disproportionate or non-compliant. The Tribunal has no power to reduce the penalty. The surcharge is only imposed on a second or subsequent default, and after the taxpayer has been sent a surcharge liability notice warning them that they will be liable to surcharge if it defaults again within a year. Taxpayers thus know their positions and should be able to conduct their affairs so as to avoid any default. The Tribunal accepts that the surcharges for the quarter periods ending 28 February 2013 and 31 May 2013 were not issued as the surcharges were less than £400.00. There was an increase in tax for the quarter period ending 31 August 2013 and the tax due was considerably higher and for a quarter period over the summer months however the surcharge of 10% is not disproportionate or unfair.

30. The appeal is dismissed. The surcharge of £10,395.44 at 10% on the unpaid tax for the period 1 June 2013 to 31 August 2013 is affirmed as it is in accordance with section 59 (4) Value Added Tax Act 1994 and there is no reasonable excuse for the late payment.

31. 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.

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**FIONAGH GREEN
TRIBUNAL JUDGE**

RELEASE DATE: 15 April 2014

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