TC01568

Appeal number: TC/2011/05954

VAT default surcharge – five defaults recorded and three surcharges levied – whether a Time to Pay arrangement existed – on the evidence, no – whether genuine belief that had a Time to Pay arrangement – yes – whether this amounted to a reasonable excuse – yes for three of the five periods – whether it was fair and just not to adjourn the appeal to hear further evidence – yes - appeal allowed in part

FIRST-TIER TRIBUNAL

TAX

G WILSON (GLAZIERS) LIMITED **Appellant**

- and -

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

TRIBUNAL: ANNE REDSTON (PRESIDING MEMBER)
JULIAN STAFFORD (TRIBUNAL MEMBER)

Sitting in public at Norwich Tribunals Service, 115 Queens Road, Norwich on 13 October 2011

Mr David Fiddy of Lovewell Blake LLP for the Appellant

Mrs Kay Walker of the HMRC Appeals and Reviews Unit for the Respondents

DECISION

1. This was the appeal of G Wilson (Glaziers) Limited ("the company") against VAT default surcharges of £1,048.12, £3,691.49 and £7,803.42 for the periods ending 30 April 2010, 31 July 2010 and 30 October 2010 respectively. The total surcharges were £12,243.03.

2. The appeal was extended to include two earlier periods for which no penalty was levied but which were taken into account in the calculation of these three surcharges. Five periods were thus under appeal before the Tribunal.

3. It was not in dispute that, for each period, some or all of the VAT had been paid after the normal due dates. The issues in the case were whether the company had a Time to Pay ("TTP") arrangement in place, and if not, whether it had a reasonable excuse for late payment.

4. We found that although there was no TTP agreement in place, the company had a reasonable excuse for late payment for the first three of the five periods. The surcharges for the final two periods are thus reduced to nil and 2% respectively, making a total surcharge of £1,040.50.

The law

5. The surcharges were levied under s 59 Value Added Tax Act 1994 ("VATA"). This is set out as an Appendix to this Decision

6. Under s 59(7) a person is not liable to a surcharge if he has a "reasonable excuse".

7. Under s 59(8) the reasonable excuse provisions apply not only to the surcharges actually levied, but also to defaults "taken into account in the service of the surcharge liability notice upon which the surcharge depends".

8. There is no definition in the legislation of a "reasonable excuse". It has been held to be "a matter to be considered in the light of all the circumstances of the particular case" (*Rowland v HMRC* [2006] STC (SCD) 536 at [18]).

9. It has recently been held by this Tribunal that "an excuse is likely to be reasonable where the taxpayer acts in the same way someone who seriously intends to honour their tax liabilities and obligations would act" (*B&J Shopfitting Services v R&C Commrs* [2010] UKFTT 78 (TC) at [14]).

10. In *RMD Response International v R&C Commrs* [2011] UK FTT(472) at [27], the taxpayer's "honest and genuine belief" was found to be a reasonable excuse, "at least until such time as it was put on notice that the honest and genuine belief was incorrect."

11. The Interpretation Act 1978, s 7, which HMRC refer to in their submissions, is as follows:

> "Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

The periods under appeal

12. Under the VAT default surcharge system the first default does not trigger a surcharge.

13. The second default normally triggers a 2% surcharge. In this case this second surcharge was also reduced to nil.

14. The three actual surcharges were appealed on 27 January 2011; this fell outside the 30 day time limit even for the third surcharge.

15. In relation to the earlier defaults, no formal written appeal was made by the company. However, their letter of 27 January 2011 and their Notice of Appeal to the Tribunal made it clear that they believed the same "reasonable excuse" defence applied to these earlier periods as well as to the three periods for which a surcharge was actually levied.

16. Before us, Mrs Walker said HMRC did not object to the company making a late appeal for any of the default periods.

Evidence

17. The Tribunal was provided with the correspondence between the parties. In addition HMRC provided the following documents:

(1) a schedule of defaults and the payments relevant to these defaults;

(2) internal HMRC notes of calls between Mr Roger Middleton, the company's Managing Director, and HMRC;

(3) a document headed 'Info Log Entry' which contains further records of communications between HMRC and Mr Middleton.

18. On behalf of the company, Mr Fiddy provided the following:

(1) a photocopy of the visitors' book for the company for the period from 2 July 2009 through to 23 July 2009;

(2) a witness statement from Mr Middleton, who also gave oral evidence and was cross-examined before the Tribunal;

(3) witness statements from Mrs Gabrielle Mendham, director of the company, and from Mr Robert Ingle, company secretary of the company;

(4) a schedule headed "Agreed Payment Schedule" for the period from 1 November 2008 through to 31 October 2010;

(5) a "Time to Pay" ("TTP") agreement letter from HMRC dated 16 March 2009;

(6) emails between Ms Liz Hill of Lovewell Blake LLP and Mr Middleton, dated 5 and 6 October 2011.

The facts

19. From this evidence the Tribunal found the following facts.

20. Mr Middleton suffered from poor health and was absent from work on many occasions.

The earlier periods

21. In late 2008 and early 2009 the company suffered a significant downturn in income caused by the economic recession. Cashflow was particularly difficult. Mr Middleton realised that the company would be unable to pay all its VAT on time.

22. On 2 March 2009 a TTP arrangement was agreed with HMRC. The terms of the agreement were that the VAT for the quarter ended 31 January 2009 would be paid in three instalments on the 7th day of March, April and May.

23. On 3 June 2009 Mr Middleton again contacted HMRC and a further TTP agreement was made for the VAT payment due on 7 June 2006. Again, the amount was to be paid in three roughly equal instalments, with each payment being made on the 15th of June, July and August 2009.

24. One or both of these TTP agreements was agreed, on HMRC's behalf, by a Mr Murphy.

25. On 3 July 2009 Mr Stuart Clarkson of HMRC visited the company. The content of this meeting is disputed. Mr Middleton says that Mr Clarkson confirmed that the company could continue with monthly payments; Mrs Walker disputes this. We discuss this meeting later in our Decision.

26. Instead of paying the VAT due for the period ending 31 July 2009 on the due date, the company continued to pay by equal monthly instalments, on 9 September, 8 October and 10 November. HMRC recorded this as a default, but as it was the first default, no surcharge was levied. Mrs Walker says that HMRC sent a surcharge liability notice ("V160") to the company on 11 September 2009.

27. We were provided with a facsimile of the V160; paper copies of the original forms are not retained by HMRC. The V160 opens by saying "our records show that you are in default for the period from 01/05/09 to 31/07/09." It goes on to explain that "late payment may result in the imposition of the surcharge."

28. On the back of the form, there are a number of FAQs. FAQ1 reads:

> "**What is a default**? You will be in default if your VAT return or the VAT shown on that return as payable is not received in the VAT Central Unit by the due date."

29. At the bottom of the page, in bold, are the words "An agreement with an HM Revenue & Customs office to defer payment does not prevent a surcharge from being imposed for defaulting." Other than this, the V160 does not refer to TTP arrangements.

30. Mr Middleton says he has no recollection of receiving the V160 and questions whether it was ever sent. Again, we discuss this further below.

31. The VAT due for the period ending 31 October 2009 was also paid in three instalments, and this was again recorded as a default.

32. The structure of the surcharge regime means that a surcharge of 2% of the amount paid late (£53,865.19) should have been charged. However, no surcharge was levied: HMRC's schedule shows the correct rate of 2% but a nil surcharge. Mrs Walker was unable to explain why no surcharge was levied.

33. HMRC say that they sent out a form V161 on 11 December 2009; again we were provided with a facsimile. This says:

> "Our records show that you are in default for the period from 1 August 2009 to 31 October 2009...the Commissioners do not propose to surcharge you on this occasion....if you default again...you may become liable to a surcharge assessment calculated at the rate of 5%."

34. The back of the form, with its FAQs and note in bold at the end, is identical to the V160.

35. Again, Mr Middleton says he has no recollection of receiving this form, and questions whether it was ever sent.

36. The next VAT return period ended on 31 January 2010. This period is not included in HMRC's schedule of defaults. Mr Fiddy says, and we accept, that the company again paid its VAT in three equal annual instalments on 9 March 2010, 8 April 2010 and 11 May 2010. Mrs Walker was unable to explain why this period did not trigger a default.

The first surcharge

37. The company paid its VAT for the return period ending on 30 April 2010 in three instalments. HMRC recorded this as a default and charged a 5% penalty of £1,048.12. The surcharge notice had an issue date of 11 June 2010.

38. On 21 June 2010 Mr Middleton called HMRC. The HMRC call record says:

> "Caller made a TTP agreement in 2009 and has had a surcharge? Advised he has to make a separate TTP agreement for each return. Caller has never been told this and always sends as much as he can afford. Transferred to DMTC."

39. Mr Middleton's recollection of this call is that he spoke to a Miss McCracken who "said she would look into the matter, although it was not her remit to do so". He then says "I thank her and left matters.".

The second surcharge

40. The due date for the return period ending 31 July 2010 was 7 September if paid electronically.

41. The amount due of £53,800.18 was paid by BACs in three instalments, on 7 September, 6 October and 8 November 2010. The first of these amounts was therefore paid on the due date.

42. On 14 September one of the company's largest customers went into administration, owing the company in excess of £130,000. The company's cashflow came under severe strain. Mr Middleton injected personal funds into the company to allow it to continue trading.

43. On 17 September 2010 HMRC issued a default surcharge of 10% of the VAT not paid by the normal due date. This was £3,691.49 (10% of the two instalments paid in October and November). The surcharge notice was received by the company on 22 September 2010.

44. The first item on HMRC's Info Log Entry is undated but both parties agreed it applied to this period. It says (with explanations of the abbreviations provided to the Tribunal by HMRC):

> "2 x £18,457.46 from 09/10/10 TTP Letter to TP [taxpayer]. TP rang to complain about the surcharge. He was told some time ago by a Mr Murphy from King's Lynn office that he could always pay VAT on a monthly basis in arrears – prov he paid it that wouldn't be a problem. TP understood this was correct and for ever – I expl this wasn't the case hence the appeal...'

45. The 'Info Log entry' dated 4 October 2010 reads:

> "Rang Mr Middleton and he advised a further payment of £18,457.46 had been sent...I have agreed the last instalment can be pif [paid in full] on 20/12/10 providing the 10/10 rtn due 30/11 is submitted and pif by the due date. I also explained that to get out of the DS cycle trdr [trader] needs to get the 3 rtns in and pif following the 10/10. Trdr seems to have received conflicting advice from all over the place. I have advised the trdr if he defaults on this agreement i will cancel it and further action will be taken to secure the debt – Butler."

46. For his part, Mr Middleton records that he spoke to a Ms Butler who was "extremely helpful and suggested I appeal both surcharge notices and explain my now desperate trading situation."

47. Sometime in October Mr Middleton contracted salmonella and subsequently was admitted to hospital where he underwent a cholecystectomy. During this period the

company (which had 35 staff) continued to operate but responsibility for Mr Middleton's tasks was taken on by others on temporary basis.

The third surcharge

48. The VAT due for the quarter ended 31 October of £52,025.48 was not paid on the due date (for an electronic payment) of 7 December.

49. HMRC charged the company a 15% surcharge of £7,803.82. The surcharge liability notice has an issue date of 17 December 2010.

50. On 22 December 2010, the HMRC "Info Log entry" records as follows

> "payt promise –gabby mendam (dir) PYT on 22/12/2010 for £20,000, PYT on 24/12/2010 for BAL, by BACS. Late due to dir adv that she thought they had TTP agreed. Explained this was for old pyment under provision that 10/10 was pif which wasn't."

51. Two payments of VAT were then made, the first on 23 December 2010 of £20,000, with the balance being settled on 29 December 2010.

The meeting with HMRC

52. The central issue before the Tribunal was the meeting at which Mr Middleton says he was told he could continue to pay on a monthly basis without any limit as to time.

53. By the date of the Tribunal hearing Mr Middleton was clear that the HMRC Officer who visited the company was Mr Clarkson. He also knew, from the visitors' book, that the meeting took place on 3 July 2009.

54. However, the company's earlier written submissions to HMRC and the Tribunal said that the meeting was with Mr Murphy, and it took place in November 2008.

55. As a result of this confusion HMRC was unable to produce evidence before the Tribunal as to the content of the meeting. Unsurprisingly, they could not locate a Mr Murphy who had a meeting at the company in November 2008. Mrs Walker said that she would like the hearing adjourned so that HMRC could consider calling Mr Clarkson as a witness.

56. At this point in the proceedings, Mr Fiddy said that his colleague, Miss Hill, had located Mr Clarkson and asked him to attend the Tribunal as a witness for the Appellant. He said that Miss Hill had recorded the conversation in an email dated 5 October 2011, a week before this hearing. Mr Fiddy apologised for not copying these emails either to the HMRC Appeals and Review Unit or to the Tribunal, ahead of the hearing.

57. The email record of Miss Hill's conversation includes this paragraph (where "you" is Mr Middleton):

> "He advised that he does not want to attend the Tribunal. I asked if he could supply copies of his note book – he said he had not taken any at the time. He said he was not 100% sure he recalled visiting you, but did remember your building and car park...
>
> He said he had visited you as his job was to undertake checks on 5% of time to pay agreements...he confirmed that he had not visited you to agree any detailed arrangement – he merely checked what had been put in place and whether you were able to meet the terms of the arrangement. He also stated that as far as he was concerned, time to pay agreements would only be created to cover a certain debt for a certain period of time eg for a single return and are not designed to run on for ever. I advised that it appeared that no-one had discussed default surcharges with you. Mr Clarkson said he would not have discussed them with you as this was not part of what he did."

58. The Tribunal adjourned so that Mrs Walker could speak to Mr Clarkson and decide whether to call him as a witness. However, Mr Clarkson was not in the office and could not be reached by phone.

59. The Tribunal then took time to consider whether we should adjourn the hearing to another date so that HMRC had the opportunity to ask Mr Clarkson to give evidence.

60. We decided to continue to take evidence from the parties and to defer the decision on adjournment until that other evidence had been taken. At this point Mr Fiddy said that the Appellant would object to an adjournment because the continuing delay and uncertainty was causing significant stress to Mr Middleton.

61. We revert to the issue of adjournment later in this Decision.

Submissions on behalf of the company

62. Mr Fiddy said that the company had a reasonable excuse because it relied on its understanding that it could continue to pay monthly.

63. He questioned whether the HMRC Default Surcharge system was reliable, given that (if HMRC were right and there was no TTP arrangement in place after 30 April 2009) no 2% surcharge was levied, and no surcharge at all was recorded for the period ending January 2010.

64. He said that the company did not receive the V160 and V161 sent out following the end of the July 2009 and October 2009 periods: had these Notices been received, he says the company "would have done something about them".

65. The failure of the company's main customer compounded its financial stress and this, together with Mr Middleton's ill health, provided further grounds for a reasonable excuse defence.

66. Mr Fiddy concluded by saying that the company was a "reliable, organised and conscientious business" and that it was harsh to penalise it for paying late, especially

as the full sums were paid, albeit on a spread monthly basis rather than as a single amount.

Submissions on behalf of HMRC

67. Mrs Walker said that HMRC's standard practice was only to agree a VAT TTP agreement when the quarterly payment was known. This was because they had to programme the computer so that it knew what sum was to be received and the dates of receipt. Otherwise, when HMRC received the VAT return without the matching payment, a default would be recorded by the computer. Therefore no open-ended TTP agreements are made.

68. In relation to the V160 and V161, she said that these were sent to the company's address and that they had not been returned undelivered. She said that even if they had not been actually delivered, they were deemed to be received, by virtue of s7 Interpretation Act.

69. She submitted that the phone records showed that Mr Middleton had been informed on 21 June 2010 that "he has to make a separate agreement for each surcharge" and thus after that date it was not reasonable for him to rely on the reasonable excuse defence, even if it had existed in the earlier periods.

Discussion

70. The Tribunal took time to assess the evidence presented to the Tribunal and to make provisional findings based on that evidence. We then considered the issue of adjournment.

Was there a TTP agreement in place?

71. We noted that Mr Fiddy had not asserted that there was, as a question of fact, a TTP agreement. However, we thought it was right to consider this possibility. If there was such an agreement, then for the period of that agreement, there could be no defaults. It would be unnecessary to consider the question of reasonable excuse.

72. We accepted Mrs Walker's submission that HMRC practice is only to agree a TTP when the VAT for the quarter is known. We considered whether Mr Clarkson had, nevertheless, made such an agreement on HMRC's behalf with the company. We took into account Mr Middleton's recollection of the meeting on 3 July 2010 and Miss Hill's record of her conversation with Mr Clarkson. We also considered the fact that no surcharge had been levied for the period ending October 2009 (the 2% period) or for the following quarter.

73. Despite the fact that Mrs Walker was unable to explain the lack of surcharge for the October 2009 or January 2010 periods, our provisional finding, on the balance of probabilities, was that Mr Clarkson had not made such an agreement on HMRC's behalf with the company.

74. We thus went on to consider the question of reasonable excuse.

Reasonable excuse and genuine belief

75. Mr Middleton gave oral evidence that he honestly believed HMRC had provided the company with an open-ended TTP arrangement under which it could pay its VAT on a monthly basis without needing to make quarterly calls to HMRC. We found Mr Middleton to be a highly credible witness.

76. The HMRC call records for 21 June 2010 and the Info Log entries were consistent with Mr Middleton believing that that he had such an arrangement.

77. The company's other actions in the context of its VAT payments were those which a compliant taxpayer would take. Specifically:

(1) The company had called HMRC in early 2009, in advance of the due date for its first quarterly VAT payment, in order to agree a TTP arrangement; and did the same on 3 June.

(2) Once the TTP was in place, the company paid the agreed monthly amounts on time.

(3) In subsequent periods the company continued to make the monthly payments regularly and on time.

78. This Tribunal, in the recent case of *RMD Response*, found that genuine belief can amount to a "reasonable excuse", and that this subsists "at least until such time as [the company] was put on notice that the honest and genuine belief was incorrect. We agree, with the further proviso that the "honest and genuine belief" should be a reasonable belief.

79. We considered whether it was reasonable for Mr Middleton to have believed that Mr Clarkson had provided the company with an on-going TTP arrangement. We found that it was. Mr Clarkson was an officer of HMRC. His purpose was to discuss the TTP arrangement. The arrangement was a continuation of what had already been agreed, twice, by telephone, so it was not unusual or exceptional. Mr Middleton had no knowledge of how the HMRC computer worked, so did not realise that such open-ended arrangements were never granted.

80. Our provisional finding was thus that Mr Middleton's genuine belief provided a reasonable excuse for the company's default until such time as the company was put on notice that this belief was incorrect.

The period ending July 2009

81. HMRC say they sent a form V160 to the company when it did not pay all of its VAT for the period ending July 2009 by the due date. The company denies receipt of this form. On the balance of probabilities we find that the form was actually delivered, but for the reasons set out below, we consider that its import was not understood by the company, such that Mr Middleton does not remember receiving it.

82. The V160 defines a default as not paying the VAT shown on the return by the due date. It does not define "the due date". It would in our view be reasonable for a

recipient who genuinely believed his company had a TTP, to think that the reference was to the original due date. There is also no mention of TTP arrangements, other than the oblique reference at the end to "a surcharge being paid for defaulting".

83. We may well have taken a different view had the Notice said "if you have a TTP arrangement, you will only have received this Notice because our records show you have not kept to the terms of that arrangement. If you disagree, you can write to us within 30 days."

84. We thus find that although the V160 was delivered to the company, it was still reasonable for the company to rely on Mr Middleton's understanding of his meeting with Mr Clarkson.

The period ending October 2009

85. When the company failed to pay the VAT due for the quarter ending October 2009 by the due date, HMRC say that they sent the company a form V161. The company denies receipt.

86. We again find that although on the balance of probabilities the form was received by the company, it was nevertheless reasonable of Mr Middleton not to have realised that receipt of the V161 meant that the HMRC computer had no record of a TTP agreement.

87. His existing belief that the company had a TTP agreement would have been supported by the following:

(1) the failure to charge a penalty, even though the system prescribed a 2% surcharge of £1,077.30 (2% of the VAT due of £53,865); and

(2) the fact that the Notice says "the Commissioners do not propose to charge you a surcharge on this occasion" – which concurred with his expectation that the TTP arrangement prevented penalties from accruing.

The first surcharge

88. For the period ending January 2010, Mr Middleton's belief that he had a TTP agreement would have been further bolstered by HMRC's failure to send any default notice at all, despite the payments being made in three instalments.

89. When the first surcharge was issued in relation to the period ending 30 April 2010 it came as a surprise to Mr Middleton.

90. Our provisional finding was thus that the company had a reasonable excuse for the first surcharge, in respect of the period ending April 2010. Up to that point, there was nothing which displaced Mr Middleton's reasonable belief that the company had a TTP agreement.

The second surcharge

91. After the company received the first surcharge, Mr Middleton called HMRC. HMRC's record of this call states that Mr Middleton was told that "he has to make a separate TTP agreement for each return" and that he was then transferred to Debt Management. We do not have HMRC's account of the conversation with Debt Management.

92. We do, however, have Mr Middleton's record. He says he "made various phone calls" - which is consistent with HMRC's record of the call being transferred. He made a detailed note of his final call, including the name of the person to whom he spoke, and the fact that she would "look into the matter, although it was not in her remit to do so."

93. On the basis of that evidence, we find that HMRC said that they would "look into" the surcharge and Mr Middleton's belief that he had a TTP arrangement. Neither party says that any call back was made to Mr Middleton, to explain that there was no such arrangement.

94. We thus asked ourselves whether it was reasonable for Mr Middleton not to take the initiative and call HMRC back before arranging for the company to make a further monthly payments for the next period. In particular, would someone who "seriously intends to honour their tax liabilities and obligations", as the Tribunal put it in *B&J Shopfitting Services*, have made such a call before the due date for that return?

95. In our view, a taxpayer who "seriously intended to honour his tax liabilities and obligations" and who has:

(1) already received a 5% penalty for late payment (indicating that at two previous defaults have occurred);

(2) been explicitly told by HMRC that "he has to make a separate TTP agreement for each return"; and

(3) who has not received any further assurances from HMRC during the period from 21 June (when he made the call) and 7 September (the due date),

would have called HMRC again to confirm the position and not simply paid the next quarter's VAT on a monthly basis.

96. Our provisional finding was thus that Mr Middleton's belief in the TTP arrangement does not provide the company with a reasonable excuse for the late payment for the period ending 31 July 2010.

97. We considered whether Mr Middleton's illness provided such an excuse, but noted that, although he had suffered from chronic ill health for some time, the acute episodes were after the due date. So too was the collapse into administration of the company's customer.

The third surcharge

98. When the company received the surcharge for the period ending 31 July 2010, Mr Middleton again called HMRC. He was told in unambiguous terms by Ms Butler that TTP arrangements are not "for ever" and advised that he should appeal the first two assessments.

99. There is no room for doubt that at this point Mr Middleton knew HMRC had no record of a TTP agreement allowing him to pay monthly. He has been explicitly told that this is position, and he does not, as a question of fact, make three monthly payments, but two.

100. The question before the Tribunal is whether, absent this reasonable belief, the company has any other reasonable excuse for the late payment.

101. We considered whether Mr Middleton's poor health constituted such an excuse, and, while we had sympathy with his illness, we found that it did not. He was hospitalised in October 2010, and the payment was not due until 7 December 2010. Responsibility for timely VAT payment could and could and should have been delegated to another of the company's 35 staff.

102. We also considered whether the failure of the company's customer in September constituted a reasonable excuse. Although an insufficiency of funds is precluded from being a reasonable excuse by TMA s 59C(10), the courts have held that the reason for the insufficiency can constitute such an excuse (*Customs & Excise Commissioners v Salevon* (1989) STC 907 per Nolan LJ and *Customs & Excise Commissioners v Steptoe* [1992] STC 757).at 770p per Donaldson MR).

103. The *Steptoe* approach requires the Tribunal to take for comparison a person in a similar situation to that of the actual taxpayer who is relying on the reasonable excuse defence. The Tribunal must then ask itself - with that comparable person in mind - whether, notwithstanding that person's exercise of reasonable foresight and of due diligence and a proper regard for the fact that the tax would become payable on the particular dates, those factors would not have avoided the insufficiency of funds which led to the failures.

104. We did not consider that this test had been met. The company knew of the customer's failure in September 2010, and Mr Middleton injected funds into the company to tide it over. We were not presented with any evidence to show that this funding could not have been arranged in time for the VAT payment to have been made, in full, on the due date.

105. We thus found that there was no reasonable excuse for the late payment of VAT for the period ending October 2010.

Decision

106. On the basis of the evidence before us, our provisional decision (without considering any possible evidence which might be added by Mr Clarkson) was that

the company had a reasonable excuse for the periods ending July 2009, October 2009 and April 2010, but not for the periods ending July 2010 and October 2010.

107. We then considered whether we should adjourn the hearing so as to allow HMRC to consider whether to call Mr Clarkson. We made our decision in the light of Rule 2 of the Tribunal Procedure (First Tier Tribunal) (Tax Chamber) Rules 2009. This states that the overriding objective of the Rules is that the Tribunal should "deal with cases fairly and justly".

108. Our starting point was that HMRC had been prevented from calling Mr Clarkson largely as a result of the company's failure to make the relevant information available, and this was clearly unfair to HMRC. We did note, however, that Mr Clarkson had apparently also not contacted the Appeals and Reviews Unit, even though he was aware of the Tribunal hearing date and the issue in dispute. We also took into account that we had been provided with Miss Hill's note of telephone conversation with Mr Clarkson, which was prejudicial to the company.

109. The key question was whether Mr Clarkson's absence prevented the Tribunal from dealing with the case fairly and justly. We also took into account that Rule 2(c) required us to "avoid delay, so far as compatible with proper consideration of the issues" and that Mr Fiddy had objected to the adjournment because of the continuing stress on Mr Middleton, who was in poor health.

110. We decided against adjournment for the following reasons:

(1) Even if Mr Clarkson were to give the strongest possible evidence in support of HMRC's case - to the effect that he had not granted the company an open-ended TTP agreement, the strength of Mr Middleton's oral evidence, and the other supporting factors discussed above, means that we are in no doubt that Mr Middleton *believed* he had such an agreement, and that his belief was reasonable. We would thus have come to the same decision in relation to the periods for which we found this reasonable excuse to be operative.

(2) Taking the opposite possibility, that Mr Clarkson accepted, under cross-examination, that he had given such a promise to the company, we may have found that there was, as a question of fact, such an agreement. Our provisional decision in the company's favour for the first three periods would be confirmed, albeit on the basis of a different factual matrix. However, given Miss Hill's summary of her conversation with Mr Clarkson, we thought this outcome unlikely.

(3) Mr Clarkson's evidence would not have changed our decision in relation to the periods ending July or October 2010.

(4) We considered that we were able to give "proper consideration to the issues" on the basis of the evidence before us so as to deal with the issue fairly and justly, and the further delay which an adjournment would require was not necessary or proportionate.

111. Our Decision is therefore that:

(1) there was no default for the periods ending July 2009, October 2009 or April 2010 because the company had a reasonable excuse;

(2) the penalty of £1,048.12 for the period ending April 2010 is discharged;

(3) there was a default for the periods ending July 2010, but as this is the first penalty, it is nil. The penalty of £3,691.49 is thus discharged;

(4) there was a second default for the period ending October 2010. The rate for the second default is 2%. The penalty of £7,803.82 is thus discharged but replaced by a penalty of £1,040.50, being 2% of the £52,025.48 which was due to be paid on 7 December.

112. We particularly commend Mrs Walker for her helpful and professional approach to the evidential and procedural issues raised in the course of this hearing.

113. 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.

Anne Redston

TRIBUNAL PRESIDING MEMBER
RELEASE DATE: 11 NOVEMBER 2011

The Value Added Tax Act 1994
S59 Default Surcharge

59 The default surcharge

(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,

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

(1A) A person shall not be regarded for the purposes of this section as being in default in respect of any prescribed accounting period if that period is one in respect of which he is required by virtue of any order under section 28 to make any payment on account of VAT.

(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

(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.

(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—

(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.

(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.

(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

(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).

(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.

(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) 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.

S71 Construction of sections 59 to 70

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

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

(b) where reliance is place 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.

(2) …..