



**TC03535**

**Appeal number: TC/2014/00164**

*VALUE ADDED TAX – default surcharge – whether there was a reasonable excuse for late payment – no – appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**WREKIN LANDSCAPES LTD**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE JOANNA LYONS**

**The Tribunal determined the appeal on 04 April 2014 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 06 January 2014 and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 10 February 2014.**

## DECISION

### The Appeal

- 5 1. This is an appeal against a default penalty surcharge of £756.10, imposed for the late payment of VAT for the three month period ending 31 May 2013.
2. Mrs Julie Bates appeals on behalf of the company.

### The issue

3. Mrs Bates appeals on the grounds that there was a reasonable excuse for late payment due to an insufficiency of funds. This is disputed by HMRC.

### 10 The law

#### *Reasonable excuse*

4. Section 59 (7) Value Added Tax Act 1994 (“VATA”) provides:

15 " If a person who, apart from this subsection, would be liable to a surcharge...satisfies ..a tribunal that, in the case of a default which is material to the surcharge

(a) ... 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

20 (b) there is a reasonable excuse for the ... 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..

- 25 5. The legislation does not define the term “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]*.

#### *Insufficiency of funds*

6. Section 71 VATA provides that:

30 “an insufficiency of funds to pay any VAT due is not a reasonable excuse”

7. In the case of *Customs and Excise commissioners v Steptoe [1992] STC 757* Court of Appeal held that an insufficiency of funds cannot, of itself, constitute a reasonable excuse but that the Tribunal was obliged to consider whether the reasons

for an insufficiency of funds, or the underlying cause of a default, might do so. Lord Donaldson MR indicated :-

5                    “if the exercise of reasonable foresight and of due diligence and a proper regard for the fact that the tax would become due on a particular date would not have avoided the insufficiency of funds which led to the default, then the taxpayer may well have a reasonable excuse for non-payment”

*Burden of proof*

10            8.    HMRC has the burden of proving that the penalty has been incurred. The company has the burden of proving that there was a reasonable excuse. *Jussila v Finland (73053/01) [2006] ECHR 996.*

**The agreed facts**

*The default history*

15            9.    The HMRC website contains the following information under the heading “if you think you won’t be able to pay in full and on time”

20                    “you should consider if there is anything that you can do to raise the money to make the payment. You may consider , approaching your bank, looking through your outgoings, approaching your creditors; if after considering these options you are still unable to pay you should contact HRMC....HMRC may be able to allow you time to pay”

10.    The default history was not contested and can be summarised as follows:

25            (1)    Period 08/11 – default one – electronic payment was due on 07 October 2011 and was paid on 12 October 2011. No penalty was incurred but a surcharge liability notice was issued.

            (2)    Period 11/11 - default two - electronic payment was due on 07 January 2012 and was paid on 16 January 2012. A surcharge of 2 % was applied. However, because this was less than £400, HMRC did not issue a penalty surcharge but extended the surcharge liability notice for a further 12 months.

30            (3)    Period 08/12 - default three - electronic payment was due on 07 October 2012 and was paid on 20 October 2012. A surcharge of 5 % was applied. Again this was less than £400 and HMRC did not issue a penalty surcharge but extended the surcharge liability notice for a further 12 months.

35            (4)    Period 11/12 - default four - electronic payment was due on 07 January 2013 and was paid on 22 January 2013. A surcharge of 10 % was applied amounting to £269.68

*The current default*

11. For the period 05/13 the return was submitted on time. The VAT payable amounted to £5,040.70. Electronic payment was due on 07 July 2013 and the VAT was paid by the faster payments service on 17 July 2013. As this was the fifth default  
5 surcharge within the surcharge liability period a surcharge of 15 % was applied in the sum of £756.10

*The financial position*

12. Mrs Bates has provided bank statements for the relevant period showing credit balances of £5,776.83 and £5,572.39 on 06 and 08 July respectively.
- 10 13. On 07 January 2014 Mrs Bates informed HMRC that she had undertaken an NHS contract for July 2013 for which payment had been unexpectedly delayed until November 2013.

**The arguments**

*The appellant's case*

- 15 14. Mrs Bates states that she was unable to pay the VAT due to an insufficiency of funds. She accepts that there was a credit balance in her bank account but states that these funds were allocated to the payment of staff wages. She states that cash flow was affected by the delayed NHS payment.

*The respondent's case*

- 20 15. HMRC do not accept that there was an insufficiency of funds as the VAT due was less than the credit balance available in the company's bank account. In the event that insufficient funds were available Mrs Bates could have sought a time to pay arrangement before due date in accordance with the advice given on their website.

**Reasons for decision**

25 *Reasonable excuse*

16. I accept that company experienced cash flow problems on the due date and that the available funds were allocated to the payment of wages. However in the event of an insufficiency of funds it would have been reasonable for the company to have requested a time to pay arrangement in accordance with the advice given on the  
30 HMRC website (above). There is no evidence to suggest that any such request was made. In addition there is no evidence to suggest that Mrs Bates contacted her bank to agree an overdraft facility.

17. I accept that the NHS payment was unexpectedly delayed. However the NHS contract appears to have been undertaken in July, after the due date. In these  
35 circumstances it was not reasonable for the company to take this payment into account in meeting their VAT liability for the period ending 31 May.

18. For these reasons I do not find there to be a reasonable excuse for the late payment due to an insufficiency of funds.

**Decision**

19. There was no reasonable excuse for the late payment of VAT.

5 20. The appeal against the VAT penalty surcharge of £756.10, is dismissed.

**Rights of appeal**

21. 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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**JOANNA LYONS  
TRIBUNAL JUDGE**

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**RELEASE DATE: 28 April 2014**

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