



**TC01534**

**Appeal number TC/2011/02376**

*VAT – default surcharges – reasonable excuse – bank refusing to allow overdraft facility- appeal allowed in part*

*Penalties – schedule 24 Finance Act 2007- Appeal dismissed*

**FIRST-TIER TRIBUNAL**

**TAX**

**LITTLEMOSS PRESERVATION LTD**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: LADY MITTING (JUDGE)**

**Sitting in public in Manchester 10 October 2011**

**Steven Ledger and Walter Dixon representatives for the Appellant**

**Tim Fieldsend, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

## DECISION

1. The Appellant ('Littlemoss') was appealing against default surcharges for the periods 01/09 to 04/10 inclusive and against penalty determinations made pursuant to Schedule 24 Finance Act 2007 for the periods 04/09 to 04/10 inclusive.

2. No oral evidence was called but Littlemoss's case was put by its sole director and accountant Mr Steven Ledger and its manager Mr Walter Dixon and the Commissioners' case by Mr Tim Fieldsend.

3. Littlemoss registered for VAT in March 2008 and it trades in property repairs and refurbishments. Its first two returns for periods 04/08 and 07/08 were rendered with payment on time. Payment and returns for the next 7 quarters from 10/08 to 04/10 were all rendered between 2 and 7 months late. Since then all returns and payments have been made on time.

4. The default surcharges are in the following amounts:

- i. 01/09 – Surcharge Liability Notice only
- ii 04/09 – Surcharge Liability Notice Extension (SLNE) only
- iii 07/09 – SLNE only
- iv 10/09 – SLNE plus financial penalty of £513.37
- v 01/10 – SLNE plus financial penalty of £836.29
- vi 04/10 – SLNE plus financial penalty of £1,118.88

The penalty determinations are in the following amounts:

- i. 04/09 - £106.00
- ii 07/09 - £193.00
- iii 10/09 - £358.00\*
- iv 01/10 - £285.00\*
- v 04/10 - £496.00\*

\*Restricted due to default surcharge.

5. The penalties charged under Schedule 24 arose because, for the 5 periods in question, the Commissioners had issued Centrally Issued Assessments but when the Returns were later submitted they showed the amounts assessed had all been lower than the true amounts but on no occasion had Littlemoss notified the Commissioners of this. Disclosure reductions were made by the Commissioners of 75% in relation to

periods 04/09 and 07/09; 40% in respect of 10/09 and 30% in periods 01/10 and 04/10.

5 6. In correspondence Littlemoss had claimed never to have received any of the Notices relating to either the default surcharges or the penalties but before the tribunal, the company accepted that all Notices had been received with the exception of the Penalty Calculation Summary dated 4 August 2010. I see no reason why this should not have been received. From the copy in the bundle, it is clear that it was sent out and it has never been returned as 'undelivered'. However, I think in fact it is immaterial as copies of all documents were sent out by the Commissioners to the company and Littlemoss has at no stage, and certainly not before the tribunal, 10 challenged the calculation of the penalties or the percentage reductions.

15 7. Mr Ledger and Mr Dixon explained in their submission that when the company was set up, they were in negotiation with their bankers, the National Westminster Bank, and had been promised a £10,000 overdraft facility. Nothing was ever committed to writing either by the Bank or by Littlemoss, Mr Dixon maintaining that he believed at the time that any promise given by a bank would be honoured. Initially trade was sufficient for all liabilities to be met and the overdraft facility was not needed and therefore never questioned. However in mid 2008, the company was particularly badly hit by the economic downturn and the reduction in the housing 20 market, contracts beginning to dry up. To meet the 10/08 VAT payment, access to the overdraft was needed but the bank, in the words of Mr Ledger, "releged on the verbal agreement" and in effect withdrew what the company had always taken to be a permanent facility. Over the next 6 to 12 months, the company was in constant touch with its Business Manager at the Bank who was always promising the facility would be forthcoming but never actually allowing it. Without the overdraft, Littlemoss 25 could not meet all its liabilities. Mr Littlemoss produced a chart setting out month by month, from set up to August 2010, the maximum and minimum balances in the company bank account. Clearly times were very hard and I have no reason to doubt the accuracy of the figures shown but in considering the ability of the company to make its VAT payments, the schedule is of limited use only. The maximum figures 30 shown for each month would have been sufficient to meet the VAT payments but as the schedule was not supported by bank statements I have no way of knowing what the balances would have been at the time when payments were due. Mr Ledger and Mr Dixon said that in effect this was immaterial because the company could not meet 35 all its liabilities and had it paid out the VAT it would have had to have ceased trading. As it was the company managed to work its way through the downturn and is now trading very profitably, having met all its past and current VAT commitments.

40 8. Mr Ledger, during the period in question, had 2 telephone conversations with HMRC – one in mid 2009 and one in February 2010. In each he explained the company's trading difficulties but was unable to enter into a 'time to pay' agreement because the company could not be sure it would be able to meet its obligations under such an agreement. The company could only pay as and when it could afford to, which is exactly what it did, rendering payment with the returns when sufficient monies were to hand. When asked why Littlemoss did not submit its returns on time 45 even though payment could not be made, Mr Ledger answered that from his

experience, the Commissioners were not interested in the Returns, only the money. He ignored the Centrally Issued Assessments, knowing that they would be revised when the Returns went in.

5 9. Mr Ledger contended that the company had a reasonable excuse for the non-submission and payment of its Returns. He cited the tribunal decision *Longstone Limited, Number 17132*. In this case, the Tribunal held that the withdrawal of a bank overdraft facility did constitute a reasonable excuse for non-submission of Returns for a limited period. It was Mr Ledger's submission that had the facility been forthcoming, all VAT liabilities could have been met but without it they could not.

10 10. There was no suggestion by Littlemoss that the company had been let down in payment of its invoices. The problem was the sluggishness of work coming in. Although there was no supporting evidence before the tribunal of the company's negotiations with the National Westminster, I see no reason to doubt the truthfulness of what I was told. Mr Ledger and Mr Dixon were clearly naïve at the time in not  
15 confirming that a facility was in place but I accept that they did at all times believe that it was in place if called upon and they would have no reason to doubt this during their first six months of trading when it was never needed. I can accept therefore that it would have come as a shock and have been totally unexpected that when needed the facility was not there. For the period 10/08, the Commissioners issued a help letter  
20 and the company was not put into the surcharge regime. I will also accept that in period 01/09 the company had a reasonable excuse for non payment of its VAT. However this is not a reason which can just continue open endedly to constitute a reasonable excuse. It would have been apparent within a few months that the bank were not going to grant an overdraft but thereafter the company continued to trade,  
25 receiving VAT from its customers but applying it elsewhere to enable it to continue to trade. The company's difficulties were the inevitable consequences of the economic downturn. In its dealings with the Commissioners, the company did nothing to help itself. Not only did it not submit its Returns, for which there can be no excuse whatsoever, but even when Centrally Issued Assessments came in, they were just  
30 ignored. The Commissioners have given percentage reductions in respect of each penalty. It was not argued that the percentages should be increased and I see no reason why they should be. The penalty assessments were properly raised and calculated and they should stand.

35 11. In summary therefore, in respect of the penalty assessments, I hold that they should stand as raised and the appeal is dismissed in its entirety. In relation to the default surcharges, I find that there was a reasonable excuse in the first period, 01/09 but not thereafter. This will have a small knock-on effect with regard to the remainder and no doubt the Commissioners will notify the Appellant thereof. I accept that Littlemoss may find it difficult to pay the entire sum due in one payment and I  
40 therefore suggest that it should contact the Commissioners to try and agree a payment schedule.

12. 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.

10

**TRIBUNAL JUDGE**

**RELEASE DATE: 26 October 2011**

15