



**TC01564**

**Appeal number: TC/2011/03715**

*VAT default surcharge – request for a Time To Pay arrangement under S.108 Finance Act 2009 – arrangement agreed after protracted delay – dispute as to period(s) for which arrangement was to relate - whether arrangement included disputed period or operated retrospectively from date of request*

**FIRST-TIER TRIBUNAL**

**TAX**

**LEVI SOLICITORS LLP**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: MICHAEL S CONNELL (TRIBUNAL JUDGE)**

**Sitting in public at Leeds on 4th August 2010**

**Mr Jonathan Grant and Mr James McDaid of Grants Chartered Accountants for the Appellant**

**Mrs Newham officer of HM Revenue and Customs, for the Respondents**

## DECISION

### The Appeal

1. The Appellant appeals against default surcharges raised in respect of the 01/09,  
5 and 10/09 quarters as set out below.

01/09	5% of £87,197.61	£4,359.88
04/09	withdrawn	
10/09	10% of £47,378.10	<u>£4,737.81</u>
		<u><b>£9,097.69</b></u>

2. The appeal originally included the VAT Default Surcharge raised in respect of 04/09 but the surcharge was withdrawn by HMRC on the basis that the 04/09 period was covered by a Time To Pay Arrangement ('TTPA').

### 10 Appellant's Contention

3. It is contended that the Appellant first approached the Business Payment Support Service ('BPSS') of HMRC on 27 January 2009 to agree a TTPA. After initially refusing the Appellant's proposals, a TTPA was finally agreed on 6 January 2010. HMRC accept that the tax due in the VAT periods 01/09 and 04/09 are included in the  
15 TTPA but says that the VAT default surcharges raised in the interim in respect of those periods remain payable. HMRC does not accept that the tax due in the VAT period to 10/09 was included in the TTPA.

4. The Appellant contends that VAT Default Surcharges raised for the periods 01/09 and 10/09 in the period before the TTPA was eventually confirmed should have been  
20 discharged once the TTPA was agreed. The Appellant contends that, from the time of its first contact with the BPSS on 27 January 2009 until the TTPA was agreed on 6 January 2010, it was engaged in a single continuous process which should include all the quarters falling within that period. It argues that any VAT that fell due for payment during the period 27/01/09 to 06/01/10 should be part of that agreement and  
25 therefore fall within s108 Finance Act 2009.

### HMRC's Contention

5. HMRC contends that s108 is worded in such a way that the trader has to contact HMRC on each occasion prior to the date of payment for each quarter to arrange and obtain agreement for a further TTPA. As the Appellant did not comply with statute,  
30 HMRC contend that the surcharges are due in respect of the quarters 01/09 and 10/09.

Relevant legislation

6. Finance act 2009 s108

*'S108 Suspension of penalties during currency of agreement for deferred payment*

*(1) This section applies if –*

5 *(a) a person (“P”) fails to pay an amount of tax falling within the Table in subsection (5) when it becomes due and payable,*

*(b) P makes a request to an officer of Revenue and Customs that payment of the amount of tax be deferred, and*

10 *(c) an officer of Revenue and Customs agrees that payment of that amount may be deferred for a period (“the deferral period”)*

*108(2) P is not liable to a penalty for failing to pay the amount mentioned in subsection (1) if –*

*(a) the penalty falls within the Table, and*

15 *(b) P would (apart from this subsection) become liable to it between the date on which P makes the request and the end of the deferral period.*

*108(3) But if –*

*(a) P breaks the agreement (see subsection (4)), and*

*(b) an officer of Revenue and Customs serves on P a notice specifying any penalty to which P would become liable apart from subsection (2),*

20 *P becomes liable, at the date of the notice, to that penalty.*

*108(4) P breaks an agreement if –*

*(a) P fails to pay the amount of tax in question when the deferral period ends, or*

*(b) the deferral is subject to P complying with a condition (including a condition that part of the amount be paid during the deferral period) and P fails to comply with it.*

25 7. Accordingly, a default surcharge is not to be imposed where VAT is not paid by the due date where a trader makes a request to HMRC that the payment is deferred (s.108 (1)(b)), the request is made before the due date of the return and payment, (s108(2)(b)) and HMRC agree that the amount may be deferred (s108(1)(c)). It will be noted that that is no necessity for HMRC to agree the deferment before the due date of  
30 the return and payment.

## Factual background

8. On 8 December 2008 the Appellant telephoned the Business Payment Support Line advising that due to cash flow problems the direct debit in place to pay their VAT for the quarter 10/08 in December could not be actioned and that they wished to  
5 pay the VAT due for the period 10/08 by three instalments. HMRC say this was accepted as a request for deferment prior to the date that the payment was due which, as it was a direct debit payment, would be 10 December 2008. Accordingly, in accordance with s108 Finance Act 2009, a default surcharge for the quarter 10/08 was not raised. The amount of VAT outstanding at that point was £82,658.46. On 24  
10 December 2008 the Appellant telephoned the HMRC Debt Management team to agree an amendment to the TTPA as it was felt that the debt could not be cleared until 28 February 2009. Deferment was agreed, subject to interim payments being made between January and February 2009 and payment in full by 28 February 2009.

9. The terms of the agreement were not met and no payments were made. The  
15 Appellant's financial problems continued and, on 28 January 2009 in a fax which followed a telephone conversation with HMRC, the Appellant's accountant recorded that it was "*agreed that VAT and PAYE owed by [the Appellant] will be put on hold until 9 February 2009 when we will submit a report to you with our client's proposals*".

20 10. HMRC's 'Info Log Entry' for 28 January 2009 states:

*'... Trader has requested TTP for both VAT and PAYE. The PAYE is the higher debt. The trader's rep is to submit TTP .... Hold any action until the docs are received and the TTP agreed/refused'*

11. HMRC's entry for 19th of March 2009 states:

25 *'.. Authority to speak to rep, Grants accountants.. Existing TTP for the VAT debt of £82,658.56 should have been paid by 28/02/09 and we have received no payments on this at all. I have explained that debt has now increased to £178,575.93 with 01/09 return and 10% DS..... this was originally a BPSL case'*

30 12. On 06 February 2009 the Appellant's accountants again spoke to HMRC asking for a further extension of time and on 10 February 2009, the time for putting forward payment proposals was extended to 17 February 2009.

35 13. HMRC say that at that point any deferment of payment was only in respect of outstanding VAT for the quarter 10/08. The end of the 01/09 period had not been reached. HMRC say that the discussions up to that point related only to an existing debt rather than any future debt. HMRC therefore say that they cannot accept that this was a request to defer the VAT due for the 01/09 period.

40 14. HMRC also say that the first mention of period 01/09 was during a telephone call between HMRC (Debt Management) and the Appellant's accountants on 19 March 2009 in discussions with the accountants relating to the outstanding VAT for the 01/09 quarter, which should have been paid by 07 March 2009. No payments had

been received and the debt had risen to £178,575.93 due to the non-payment of the 01/09 VAT liability and the default surcharge raised due to the non-payment. HMRC say that Debt Management gave the accountant until 23 March 2009 to fax through their TTPA proposals.

5 15. HMRC's Info Log Entry for 23/03/09 states:

*'Anthony Evans from DT rang.. He was checking returns o/s & debt. He will go back to Trader and ring with details. I have told Anthony that as long as current liabilities are kept up-to-date we will go with what he agrees with Trader. We will need to remove DS for 01/09 period when TTP agreed. FC Jones Halifax'*

10 16. Proposals were submitted by the accountants on 20 March 2009. They did not specify any particular amount of VAT debt but referred to the deferral of arrears and future arrears of PAYE/NIC and VAT. The proposal included payment over an extended period. The accountants had been asked to include the entire VAT debt of  
15 £178,575.93 in the TPP proposals. This is recorded in a letter from HMRC Appeals and Reviews dated 15th June 2011. HMRC's summary of the factual history states  
20 *'Given the VAT debts in question relate to VAT period 10/08 and 01/09, and the inclusion of 01/09 was specifically requested by HMRC, I consider these proposals do not relate to any other periods'*. HMRC say that this is a reference to the issue as to whether the 10/09 period had been included in the TTPA eventually agreed in January 2010 and that, prior to that stage, the Appellant had not requested deferment of the VAT due in 01/09.

25 17. HMRC therefore say that the request to defer payment of the VAT for the 01/09 period was made after the due and payable date (which at the latest would have been 7 March 2009) and that consequently the VAT default surcharge for that period should stand.

30 18. On 7 May 2009 HMRC's Debt Management notified the Appellant that it did not accept their proposals to pay off the VAT and PAYE debt because HMRC was not prepared to allow the Appellant to accrue further debts *'as this would increase the amount owing to HMRC and not reduce it'*. Debt Management said that an arrangement covering three years was too long. Counter-proposals were put to the Appellant's accountant with a view to the Appellant clearing the VAT arrears of £178,575.93 (10/08 and 01/09 quarters) within a period acceptable to HMRC.

35 19. The accountant responded to HMRC's saying that the Appellant was unable to comply with HMRC's counter-proposals on the basis that they were unrealistic and would simply compound its problems, potentially leading to a breakdown in the arrangement. The accountants advise that the Appellant was willing to commence payments of £10,000 per month to clear the arrears. This proposal was not accepted by HMRC.

40 20. Following further correspondence between HMRC and the Appellant's accountant, a TTPA proposal was submitted by the accountant on 15 December 2009,

and accepted by HMRC on 6 January 2010. The VAT arrears figure on this letter included all outstanding quarters up to and including the quarter 10/09.

21. HMRC commenced receiving payments in respect of that agreement from the Appellant by cheque on 2 February 2010.

5 HMRC's Submission

22. HMRC say that the original request to defer payment on 27 January 2009 was only in respect of the quarter 10/08 and that therefore it cannot be accepted that this was a request for deferment of the VAT due to be paid in the 01/09 quarter. At that point in time the amount of VAT due was not known. HMRC also say that the TTP  
10 request was made at that time as a consequence of the Appellant not adhering to the previous agreement relating to 10/08.

23. HMRC submits that the first mention of 'future debts' was made in the letter from the Appellant's accountant dated 20 March 2009 which was refused by HMRC and that, even if it was accepted that this letter was a request to defer payment for the  
15 01/09 quarter, it would have been too late to fall within s108 parameters for a suspension.

24. HMRC therefore contend that the provisions of s108 are quite specific in that a trader must make a request to HMRC before the payment is due, that payment for the amount of VAT be deferred and that HMRC must agree that the payment can be  
20 deferred for a period.

25. HMRC contends that, on the available evidence, it cannot reasonably be said that a request to defer payment for that period 01/09 was made before the due date of the return for that period (7 March 2009). All its records and conversations prior to that date indicate the point at issue was amounts outstanding for periods prior to 01/09.  
25 That being the case, HMRC say that the subsequently agreed deferment did not fall within the scope of s108(2)(b) Finance Act 2009 and that consequently the surcharge should be maintained.

26. HMRC say that in accordance with s108 there must be a specific request to defer a particular payment; otherwise it would be impossible to determine if a request was  
30 made before the date on which a penalty liability arises. The alternative is that, if a taxpayer is negotiating time to pay on any outstanding VAT debt, no surcharges will become due in respect of future return liabilities arising during the course of any negotiation. This, HMRC argues, cannot be seen as the appropriate interpretation of the deferred payment relaxations, as it would mean that a taxpayer in this situation  
35 could choose not to pay any VAT until the agreement was accepted and not be penalised for the non-payment of late payment of their VAT. At the very least HMRC should be notified of the particular period to which proposals were intended to cover.

27. HMRC also contend that the Appellant does not have a reasonable excuse for the late payment of their VAT as S 71 VATA 1994 does not accept insufficiency of funds  
40 as a reasonable excuse. HMRC contend that case law has shown that reasonable excuse is where an event has happened that was unforeseen to the Appellant or

beyond their control such as a major customer defaulting. The Appellant does not in any event advance this argument.

28. HMRC asks the Tribunal to find that –

1. in respect of the default surcharge raised in respect of the quarter 01/09 s108 does not apply and the surcharge of £4,359.88 is due
2. in respect of the default surcharge raised in respect of the quarter 10/09 s108 does not apply and the surcharge of £4,737.81 is due.

The Appellant submissions

29. The Appellant maintains that an agreement was reached between their accountants and HMRC on 28 January 2009 to the effect that the VAT and PAYE owed to HMRC by the Appellant would be put on hold until they had submitted a report with their client's proposals, which would be not later than until 07 February 2009. The Appellant says that their application for a deferral clearly included the VAT liability for the period then ending, that is 01/09. On 6 February 2009 the accountants faxed a letter to HMRC asking that they telephone to further discuss matters and, in the letter, they indicate that the Appellant was looking for a further extension of time in which to provide a 'meaningful proposition'. HMRC responded on 10 February 2009 asking the accountants to ensure that the report containing the Appellant's proposals reached them by 17 February 2009. The accountants responded by fax on 16 February 2009 to the effect that they were in the process of preparing a detailed report which would be 'finalised by the end of February 2009'.

30. The Appellant's VAT return for the quarter ended 01/09 was e-filed with HMRC on 19th February 2009 and its TTP proposals were submitted on 20 March 2009, which included an offer to supply detailed financial projections. HMRC issued a corporate debt questionnaire which was completed and returned on 9 April 2009. The completed questionnaire shows that arrears amounting to £169,856.18 as at 31st March 2009 (which included the VAT due for the quarter 10/08 amounting to £82,658.57 and the VAT due for the quarter ended 01/09 amounting to £87197.61).

31. The Appellant refers to the fact that, when its accountants first approached HMRC's BPSS on 27 January 2009, there followed a request by HMRC for a business report and the completion of a corporate questionnaire but that it was not until 7 May 2009 that HMRC refused the Appellant's proposals for a TPPA. Eventually, following representations to the Board of HMRC and its Solicitor's Office, an arrangement was finally agreed following the submission of revised proposals.

32. The Appellant says that, from the time of first contact with HMRC on 27 January 2009 until the TPP arrangement was finally agreed on 6 January 2010, it was engaged in a single continuous process and that consequently all VAT periods falling within that period are outside the ambit of VAT default surcharges. The Appellant submits that to argue otherwise would be outside the spirit and intent of the principles underlying the Time To Pay Arrangement Scheme.

33. The Appellant submits it cannot have been envisaged under the scheme relating to time to pay arrangements that such arrangements would be agreed at the point of first contact with HMRC because HMRC's business payment support service states that '*in larger payment debts and those that are more complicated we may have longer more detailed discussions before finalising payment arrangements*'. The Appellant therefore submits it is reasonable to assume that in those cases involving more complex or substantial amounts of VAT, there will inevitably be a time lag between the point of first contact with HMRC and the date when final agreement is reached on a TTPA.

10 Conclusions

34. HMRC's offer on 28.01.09 to defer further action until 09.02.09 and subsequent extensions were subject to the Appellant submitting acceptable TTP proposals. HMRC therefore indicated its willingness to consider deferment conditional upon acceptance of those proposals. These were received in December 2009 and agreed in January 2010. The VAT payable may not have been known at the time of the provisional agreement but the Appellant's VAT return was filed on 19.02.09 well before the due date. Also, the TTP proposals which included VAT for 01/09 were submitted on 20 March 2009. This was of course after the return and the payment date of 07.03.09 but that was because the proposals had been in course of preparation and had to include the VAT for 01/09. There is a requirement that the request for a TTP a must be made before the due date for the return payment under s108(2)(b) but no similar provision relating to the period within which the TTP arrangement must be agreed. Otherwise, as the Appellant says, HMRC could protract negotiations and thereby potentially cause the trader to incur additional surcharges which would otherwise be excluded under the time to pay arrangement scheme.

35. On the facts, the Tribunal accepts that on 28 January 2009 there was an agreement by HMRC to defer further action regarding VAT (and PAYE) owed by the Appellant and that the agreement was intended to include both the VAT then outstanding and the VAT for the quarter 01/09. The Tribunal does not accept however that there was a continuous single process from that time until the TTP was agreed, that had the effect of suspending the application of a surcharge for any period in which a payment fell due during the course of negotiations.

36. The Appellant had made a request to HMRC implicitly or otherwise to defer the VAT payable for the period 01/09. HMRC's Info Log entries show that HMRC was aware that proposals would be put to the Business Payment Support Unit requesting time to pay and that this was in part dependent upon the Appellant agreeing facilities with its bankers. Its VAT return had been e-filed on 19.02.09, that is, prior to the due date for filing on 07.03.09. There was clearly a continuous dialogue between the Appellant's accountants and HMRC from 28.01.09 up to submission of the Appellant's VAT Return for 01/09 on 19.02.09. It is therefore inherently improbable that the Appellant did not intend to include the 01/09 VAT in the deferral application,, Indeed the 01/09 quarter which was included in the proposals at HMRC's request and submitted on 20 March 2009.

5 Significantly, HMRC's Info Log Entries clearly confirm HMRC's acknowledgement that it would be necessary to remove the default surcharge raised for the period 01/09 once the TTP had been agreed. The deferral agreement was provisional upon acceptance by HMRC of the proposals contained in the TTP. Had the proposals not been agreed the late payment of VAT would remain subject to a default surcharge.

10 37. It is irrelevant that, as at 29.01.09, being the time of the request for a TTP, the VAT for the 01/09 quarter was not known. The request was made almost at the end of the VAT quarter and the VAT due could have been readily estimated. s108(1)(c) does not contain a time limit within which HMRC must agree a deferral request and therefore the delay in reaching agreement did not preclude the Appellant from claiming the benefit of s108 (2).

37. The Appellant therefore met the requirements of s108(2)(b) Finance Act 2009 in respect of the VAT due for the quarter ended 01/09 and the surcharge imposed for that period amounting to £4,737.81 should be discharged accordingly.

15 38. The Appellant accepts that a surcharge is due for the quarter ended 10/09 which they agree was not part of the TTPA. However, the quantum of the penalty due for that quarter will reduce to £2,368.90, representing a 5% default surcharge.

20 39. 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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30 **TRIBUNAL JUDGE**  
**RELEASE DATE: 10 November 2011**

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