



TC01647

Appeal number: TC/11/04032

Value Added Tax – whether Appellant is liable for Default Surcharges – Yes. Whether agreement for payment by instalments waives the surcharge – No. Whether reasonable excuse for late returns and or late payment – No. Appeal dismissed.

FIRST-TIER TRIBUNAL

TAX

ROBERT JOHN MACPHERSON AND DONNA MACPHERSON
T/A ROBERT'S FLOORCOVERINGS **Appellant**

- and -

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

TRIBUNAL JUDGE: MR PETER SHEPPARD, F.C.I.S., F.C.I.B., ATII
MR KENNETH MURE, QC

Sitting in public at George House, 126 George Street, Edinburgh on Wednesday
14 September 2011

The Appellant did not appear and was not represented

Mrs Liz McIntyre, for the Respondents

DECISION

1. This is an appeal against two VAT Default Surcharges assessed on the Appellant by the Her Majesty's Revenue & Customs (HMRC) in the sums of £751.60 being 10% of the tax due in the period ending 30 September 2010 and £845.70 being 15% of the tax due in the period ending 31 December 2010. They total £1,597.30.

Legislation

The legislation pertinent to this case is as follows:-

VAT Act 1994 Section 59

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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—

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(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.

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(1A)

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

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(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.

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(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.

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

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(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 (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

15 (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.

25 (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—

30 (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,

35 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).

40 (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

45 (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).....

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(10).....

(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.

Value Added Tax Act 1994 Section 71

71. Construction of sections 59 to 70.

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(1) For the purpose 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 a reasonable excuse.

Finance Act 2009 Section 108

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108 Suspension of penalties during currency of agreement for deferred payment

(1) This section applies if—

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

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

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

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(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

(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.

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(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), P becomes liable, at the date of the notice, to that penalty.

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(4) P breaks an agreement if—

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

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(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.

(5) The taxes and penalties referred to in subsections (1) and (2) are—

Tax	Penalty
Value added Tax	Surcharge under Section 59(4) or 59A (4) of VATA 1994

2. The Respondents helpfully provided a schedule which gives details in tabular form of how the surcharges arose. The main points are set out below.

5 (i) Return for 3 months ending 31 December 2009

The return and payment of £5,147.65 were due by 31 January 2010. The return was received by the Respondents 2 days late on 2 February 2010 but payment was not received until 11 March 2010, 39 days late. This was the first occasion that
10 delay had occurred so on 12 February 2010 the Respondents issued a Surcharge Liability Notice Form VAT 160 advising the Appellant of the default and warning the Appellant that similar delays in respect of future returns in the period ending 31 December 2010 may make them liable to a surcharge.

15 (ii) Return for 3 months ending 31 March 2010

The return and payment of £7,353.78 were due by 30 April 2010. The return was received by the Respondents 15 days late on 15 May 2010 but payment was received later and in two amounts on 3 June and 10 June 2010. On 14 May 2010 having
20 not received a return the Respondents issued a Notice of Assessment of Tax Surcharge Liability Notice Extension form VAT 164. This had two effects, firstly it assessed tax due of £4,783.00. This being a further failure a surcharge of 2% of the tax due could have been levied by the Respondents i.e. £95.66.
25 However the Respondents operate a policy whereby they do not levy surcharges of under £400 unless the surcharge rate is 10% or more. Secondly, it extended the Surcharge liability period to 31 March 2011 and warned that a further default may attract a surcharge of 5% of the tax due.

30 (iii) Return for the period ending 30 June 2010

The return and payment of £5,737.21 were due by 31 July 2010. The Appellant had been placed on the automated return programme and had to submit all future returns electronically. The Respondents allow a further 7 days grace for submission and payment of returns for those submitting returns
35 electronically. The return was in fact received on time on 27 July 2010 but payment was not received until 28 August 2010 i.e. 21 days late after taking into account the 7 days grace. On 13 August 2010 the Respondents issued a Surcharge

5 Liability Notice Extension form VAT 161. This being a further failure a surcharge of 5% of the tax due could have been levied by the Respondents i.e. £286.86. However as this was under the £400 limit referred to above no surcharge was levied but the surcharge liability period was extended to 30 June 2011 and the document warned that a further default may attract a surcharge of 10% of the tax due.

(iv) Return for the period ending 30 September 2010

10 The return and payment of £7,516.07 were due by 7 November 2010 after adding the further 7 days grace for submission and payment of returns for those submitting returns electronically. The return was in fact received in time on 22 October 2010 but payment was received late by CHAPS in 3 instalments £2,000 on 18 November 2010, £2,000 on 6 December 2010 and
15 £3,516.07 on 30 December 2010. The Respondents had tried to collect the tax under a direct debit arrangement but the debit had been returned unpaid. On 12 November 2010 the Respondents issued a Notice of Assessment of Surcharge, Surcharge Liability Notice Extension form VAT 162. Firstly
20 this assessed a default surcharge of £751.60 being 10% of the tax due of £7,516.07 and secondly, it extended the surcharge period to 30 September 2011 and warned that further defaults may attract a surcharge calculated at 15% of the tax due.

(v) Return for the period ending 31 December 2010.

25 The return and payment of £5,638.03 were due by 7 February 2011 after adding the further 7 days grace for submission and payment of returns for those submitting returns electronically. The return was received in time on 21 January 2011 but payment was received by 3 cheques on 24 February 2011,
30 10 March 2011 and 17 March 2011. The Respondents had tried to collect the tax under a direct debit arrangement but the debit had been returned unpaid. On 11 February 2011 the Respondents issued a Notice of Assessment of Surcharge, Surcharge Liability Notice Extension form VAT 162. Firstly
35 this assessed a default surcharge of £845.70 being 15% of the tax due of £5,638.03 and secondly, it extended the surcharge period to 31 December 2011 and warned that further defaults may attract a surcharge calculated at 15% of the tax due.

40 3. The Respondents provided copies of the VAT returns, Surcharge Liability Notices and Notices of Assessments referred to above.

4. On 3 May 2011 the Appellants requested a review of the default surcharges. This review was undertaken by the Respondents and the surcharges were confirmed in a letter dated 19 May 2011.

5. The Appellants therefore submitted an appeal against the surcharges. This was not done by using the standard appeal form but was in the form of a letter addressed to the Tribunal dated 25 May 2011. The letter reads:

5 “I would still like to appeal against your decision that I am liable for these surcharges.

10 According to your letter it states that a Time to Pay agreement must be requested before the due date of the period to which it relates. If this is the case then I was misinformed by a member of your staff when I phoned to arrange time to pay on 16 November 2010. I was not aware that a ‘time of pay’ arrangement was not an automatic rolling agreement so I can accept that as a mistake on my behalf but I was certainly advised on 16 November 2010 that the surcharge would be wiped if I stuck to my agreed payments (which I did).

15 Last year was one of my worst years for business because of the economic climate and I struggled to keep my doors open, that is why I couldn’t pay by the due date. I run a very small business with only 4 employees and I am pretty sure any small business as small as mine would struggle to pay surcharges of that amount”.

20 6. It is apparent from the letter that the Appellant has not understood that the First-tier Tax Tribunal is totally independent of HMRC but considers it to be another department of HMRC.

7. The Tribunal also received from the Appellants a further two page letter which is undated. It was received by the Tribunal on 4 Aug 2011. It included the following paragraphs:

25 “Between 16th and 18th November 2010, a telephone call was made by Mrs MacPherson who spoke to a male representative of H M Revenue and Customs since the 09/10 liability of £7,516.07 had not been paid by the due date and was not affordable in one lump sum. Mr MacPherson made a further call and spoke to a female representative. I was told that no surcharge would arise, providing outstanding VAT was paid up by the end of the next quarter which it duly was.

35 On 26th April 2011, HMRC Debt Management and Banking wrote to us to demand £1,597.30. Upon telephoning HM Revenue & Customs, it was discovered that this sum related to a 10% surcharge for 09/2010 and a 15% surcharge for 12/2010 VAT liabilities.

40 With regard to the 12/2010 surcharge, given the economic conditions , the liability for that period of £5,638.03 was not affordable due to cash flow difficulties but was paid by instalments by the end of the next quarter. £2,000 was paid on 28 February 2011, £2,000 on 14 March 2011 and the remaining balance of £1,638.03 was paid on 23 March 2011. Once again the payment pattern was identical to that of the 09/2010 instalment plan and we understood that the surcharge would not be due since an agreement had been reached to settle the liabilities by instalments”.

5 “We would like to underline that given the economic downturn, our small business’s cash flow has struggled, employee numbers have reduced and time taken to recover our debts has been pushed to the limit, hence the reasons for having to delay the payment of our VAT liabilities. Our VAT liabilities for the period 03/2011 were paid on time and we believe that our VAT history until September 2010, was satisfactory.”

8. The Tribunal makes the following observations in respect of these letters:

10 (1) The Appellant makes no challenge to the dates HMRC states the returns and payments were made and so the Tribunal has proceeded on the basis that the Appellant accepts that the returns and payments were made late. Some of the statements made in the Appellant’s letters in respect of the periods 09/2010 and 12/2010 confirm this. No challenge was made by the Appellants to the amounts of tax due on returns and the calculations of tax due. Similarly no challenge was made by the Appellants to the calculation of the amount of the surcharges or to the rates used.

9. The Tribunal has therefore proceeded on the basis that the grounds of appeal must therefore be that the Appellants consider that they had reasonable excuse for the failures to both submit returns and pay the tax due on time.

20 10. The Appellants appear to consider their record prior to September 2010 was satisfactory yet they had received 3 Surcharge Liability notices in respect of the three previous returns for the periods of 12/2009, 03/2010 and 06/2010. These each advised of a failure and warned of the possibility of surcharges in the event of further failure. The Appellant makes no specific comment of relevance to these three defaults but makes the general statement “last year was one of the worst for business”.

30 11. In respect of the return for the period ending 30 September 2010 the Appellants telephoned HMRC on 16 November 2010 requesting Time to Pay. This was when they realised the direct debit had failed and was already 9 days after the due date for payment so the liability to a surcharge of 10% of the tax had already occurred. Although HMRC agreed to accept payments by instalments the legislation provides that a default has occurred and surcharges are therefore due. It appears that the Appellants may have misunderstood what HMRC said to them in the telephone conversation. The Appellants contend that HMRC said that “the surcharge would be wiped”. The log entries provided by HMRC include brief abbreviated summaries of telephone conversations on 16 and 18 November 2010. The summary re the latter date notes a payment promise by Mr MacPherson to make payments by instalments as follows £2,000 on 18 November 2010; £2,000 on 25 November 2010 and £4,267.67 on 2 December 2010. The Tribunal observes that the latter instalment is made up of the balance due on the return of £3,516.07 plus £751.60 being the amount of the surcharge. In the event the final instalment paid on 30 December 2010 did not include the surcharge. Section 108(2)(b) of the Finance Act 2009 allows HMRC to waive imposition of a default surcharge for a period where contact is made with HMRC prior to the due date. At the time contact was made the return and payment were already late so there was already a liability to the surcharge. In such circumstances the clause does not apply.

12. In respect of the return for the period 12/2010 the Appellants letter states that the delay in payment was due to cash flow difficulties. The Appellants were also under the false impression that the Time to Pay arrangement was an automatic rolling agreement. The Tribunal was provided with no evidence to explain why the
5 Appellants had this impression and indeed in their letter of 25 May the Appellants accept this as a mistake on their part. The Appellants made no contact with the Respondents regarding Time to Pay arrangements for the period 12/2010 so no waiver of the surcharge is possible.

13. In respect of the surcharges the Appellants give no explanation as to why they
10 only discovered them as a result of the telephone conversation on 26 April 2011 as Notices of Assessment of Surcharge dated 12 November 2010 and 11 February 2011 had been sent to them.

14. It is clear that the reason for the failures to make payments on time was due to cash flow difficulties. The VAT Act 1994 s.71(1)(a) states “an insufficiency of funds to pay any VAT due is not a reasonable excuse”. The Appellants give no explanation
15 as to why there was an insufficiency of funds other than the general comments regarding the economic downturn and time taken to recover debts. Time to pay arrangements were not made early enough for the waiver to operate in period 09/2010 and no Time to Pay arrangements were made for period 12/2010. In the
20 circumstances the Tribunal finds that the Appellants had no reasonable excuse for the delays and dismisses the appeal.

15. 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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**PETER SHEPPARD, F.C.I.S., F.C.I.B., ATII,
TRIBUNAL JUDGE**

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RELEASE DATE: 9 DECEMBER 2011.