



**TC01812**

**Appeal number TC 2011/03930**

**VAT – DEFAULT SURCHARGE – *Appellant failed to submit its VAT return on time– did the Appellant have a reasonable excuse – No – Appeal dismissed***

**FIRST-TIER TRIBUNAL**

**TAX**

**B & B TREE SPECIALISTS**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: Michael Tildesley OBE**

**Sitting in public at Tribunals Service (SSCSA), Ground Floor, Trend House, 10a  
Newport Road, Lincoln LN1 3DF on 4 January 2012**

**Barry Bavin trading as B & B Tree Specialists for the Appellant**

**Mrs Nadine Newham, Presenting Officer and Miss Joanna Bartup for HMRC**

**© CROWN COPYRIGHT 2012**

## DECISION

### The Appeal

1. The Appellant appealed against the following surcharge assessments:

Date of assessment.	Period	Due Date	Amount Paid (£) by due date	Tax on return (£)	Surcharge (£)
16.1. 2009	11/08	31.12.08	0.00	4,261.53	Surcharge liability notice
22.6. 2011	05/09	30.6.09	1,824.56	5,473.68	0.00 (2% below de minimus limit)
22.6.2011	08/09	30.9.09	1,624.89	6,466.58	0.00 (5% below de minimus limit)
22.6.2011	11/09	31.12.09	1,834.43	5,503.29	366.88 (10%)
16.4.2010	02/10	31.3.10	0.00	4,406.29	660.94 (15%)
15.10.10	08/10	30.9.10	0.00	11,892.59	1,783.88 (15%)
14.1.11	11/10	31.12.10	0.00	5,804.68	870.70 (15%)
18.4.11	02/11	31.3.11	0.00	7,476.53	1,121.47
<b>Total</b>					<b>4,803.87</b>

5 2. The Appellant began to experience cash flow difficulties in December 2008 as a result of a downturn in the economy and those difficulties have persisted to the present day. The Appellant accepted in evidence that there were no specific reasons, such as an increase in bad debts, for the cash flow problems. As a result of these difficulties the Appellant decided to pay the VAT due in instalments by sending a series of post-dated cheques covering the amount owed with his VAT return.

10 3. On 22 January 2009 the Appellant contacted an HMRC Officer at the Chesterfield Office to advise HMRC of his intentions to settle the VAT debt by the use of post-dated cheques. The Appellant continued with this arrangement until the 02/10 period when he was advised that he must make electronic payments and returns. After the 02/10 period the Appellant attempted to pay the subsequent quarters by post-dated cheques but these were returned to him.

4. The Appellant asserted that he had reasonable excuse for not making the VAT payments by the due date. The Appellant stated that he had kept in constant contact with HMRC regarding the cash flow difficulties. The Appellant considered that he had been given conflicting information by the Officers dealing with his enquiries. The Appellant pointed out that no single Officer had charge of his case. The Appellant believed that he had agreed an arrangement with HMRC to pay his VAT by instalments which was now being denied by HMRC. The Appellant was doing his very best to meet his VAT obligations but his efforts were thwarted by the contradictory advice supplied by HMRC.

10 **Reasons**

5. Section 59 of the VAT Act 1994 requires the Appellant to furnish VAT returns and pay the outstanding VAT within one month of the relevant accounting period. The Appellant failed to pay the VAT owing by the due date for the accounting periods identified in the table in paragraph 1 above with the result that he has incurred surcharges to the total value of £4,803.87.

6. The Appellant can avoid the default surcharges if he can satisfy the Tribunal on balance of probabilities that he had a reasonable excuse for not furnishing the VAT returns on time. A defence of reasonable excuse is strictly construed by the legislation. Insufficiency of funds and reliance on the default of others cannot in law constitute a reasonable excuse. In order to establish a reasonable excuse the Appellant has to show that he exercised reasonable foresight and due diligence and having a proper regard for the fact that VAT would become due on a particular date.

7. Section 108 of the Finance Act 2009 enables the suspension of a default surcharge if an agreement is reached with an Officer of HMRC for deferring the amount of VAT due. In such circumstances the surcharge only becomes payable if the person fails to pay the amount of VAT due by the end of the deferral period or he breaks a condition of the agreement.

8. The Tribunal finds the following facts in connection with the Appellant's failure to pay the VAT due by the said dates:

30 (1) The Appellant was unable to meet his VAT obligations on time because of cash flow difficulties. There was no specific reason for these difficulties which were due to the downturn in the overall economy.

35 (2) The Appellant had contacted HMRC by telephone on various occasions during the past two years regarding his inability to pay the VAT due on time. There was no evidence that the Appellant had reached an agreement with HMRC to defer payment of VAT.

40 (3) On 29 April 2010 HMRC's National Advice Centre told the Appellant that he had to have a payment option plan in place before the due date of the VAT return to avoid the imposition of a default surcharge. HMRC also supplied the Appellant with a copy of Notice 700/50 which advised persons having difficulties with meeting their VAT obligations to contact The Business Payment Support

Service (telephone number supplied) with a view to reaching an arrangement to pay by installments. The Appellant was unable to recall whether he had read Notice 700/50.

5 (4) The record of the Appellant's telephone conversation with the National Advice Centre on 1 July 2010 showed that he was told to contact The Business Payment Support Service about a time to pay arrangement. There was no evidence that the Appellant made subsequent contact with The Business Payment Support Service.

10 (5) The Tribunal's overall view of the Appellant's telephone conversations with HMRC was that he kept insisting that he had a payment plan in place without properly listening to the advice given to him by the various Officers contacted. The consequence of the Appellant's failure to listen properly was that he never acted upon the advice given and reached an agreement with HMRC for deferral of his VAT payments.

15 (6) There was no evidence that the Appellant was misled by HMRC.

9. The Tribunal decided on the evidence that the Appellant was not blatantly disregarding his responsibilities to meet his VAT obligations. The Tribunal accepts that the Appellant believed he was doing his best to keep his business afloat in difficult financial circumstances. The Appellant, however, was reacting to events rather than taking considered action to deal with the situation created by the cash flow difficulties. The Appellant's actions were not those of a prudent business person exercising reasonable foresight and due diligence and having a proper regard for the fact that VAT would become due on a particular date. The Appellant did not heed the advice of HMRC to reach an agreement with The Business Payment Support Service regarding deferral of his VAT payments. Instead he decided unilaterally to pay by instalments whenever he was faced with a payment demand in the mistaken belief that an agreement had been made with HMRC.

10. The Appellant was unable to cite specific reasons for his cash flow difficulties. In those circumstances insufficiency of funds does not constitute in law a reasonable excuse.

11. The Tribunal is, therefore, satisfied that the Appellant had not reached an agreement with HMRC regarding the deferral of his VAT payments and that he had no reasonable excuse for not making the returns by the due date. The Tribunal dismisses the Appeal and confirms the surcharge assessments to the total value of £4,803.87. The Tribunal notes that Mrs Newham undertook to use her best endeavours to put the Appellant in contact with the correct department to deal with his VAT problems.

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.

5

10

**TRIBUNAL JUDGE**  
**RELEASE DATE: 8 February 2012**