



**TC01929**

**Appeal number: TC/2011/06509**

*VAT – Default surcharge – Reasonable excuse – Appeal allowed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**BANHAM PATENT LOCKS LTD**

**Appellant**

**- and -**

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

**TRIBUNAL:    JUDGE CHRISTOPHER STAKER  
                  MR IAN ABRAMS**

**Sitting in public in London on 8 December 2011**

**Mr Tom Ward and Ms Beata Rees-Williams of the Appellant**

**Mr Philip Sheppherd and Ms Lynne Ratnett for the Respondents**

## DECISION

### Introduction

1. This is an appeal against the imposition of a default surcharges under s.59 of the Value Added Tax Act 1994 (the “Act”) on late payment of VAT for a number of periods between 1 July 2006 and 31 December 2008. The periods in question are conveniently numbered as default numbers 1-9 in a document entitled “Schedule of defaults” produced by HMRC for the hearing. These default numbers are used for purposes of reference below. References below to a default number should be understood as referring to what is claimed by HMRC to have been a default.

2. At the hearing of the appeal on 8 December 2011, the representative of HMRC conceded that the Appellant had a reasonable excuse in respect of a number of the defaults to which the appeal related (periods 1, 2 3 and one of the payments for default 4).

3. In relation to default 6, the Tribunal issued a direction that the Appellant could file with the Tribunal and serve on HMRC any further evidence in relation to the date of posting of its VAT return for that period. The Appellant subsequently filed proof of posting, and in a letter to the Tribunal dated 4 January 2012, HMRC conceded that the Appellant should not be liable to a surcharge for that period.

4. What remain for decision are one of the payments for default 4, and defaults 5 and 7-9.

### The relevant legislation

5. Section 59 of the Act states in relevant part as follows:

(1) ... 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—

...

(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.

...

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

(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.

...

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

(a) is in default in respect of a prescribed accounting period ending within the surcharge period specified in (or extended by) that notice, and

10 (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.

15 (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—

20 (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;

25 (c) in relation to the third such period, the specified percentage is 10 per cent;

...

30 (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—

(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

35 (b) there is a reasonable excuse for the return or VAT not having been so despatched,

40 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).

...

6. Section 71(1) of the Act states in relevant part as follows:

- (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; and
  - (b) where reliance is placed on any other person to perform any task, neither the fact of that reliance nor any dilatoriness or inaccuracy on the part of the person relied upon is a reasonable excuse.

### **The evidence and submissions of the parties, and the Tribunal's findings**

#### 10 *Generally*

7. The Tribunal had before it a documents bundle, a witness statement of Mr Ward with attached documents, and the case file. At the hearing, Mr Ward gave evidence on behalf of the Appellant, and was cross examined. Submissions were made on behalf of each of the parties.

15 8. It was common ground that for each quarter, the Appellant was required to make monthly payments. The first two payments for each quarter were payments on account, and the third payment was a balancing payments. The amount of the payments on account to be made each month was determined annually by HMRC and communicated to the Appellant by letter. Examples of such letters were in the documents bundle at pages 47 (dated 31 January 2006, relating to VAT periods 20 06/2006 to 03/2007) and 64 (dated 29 February 2008, relating to VAT periods 06/2008 to 03/2009). Such letters are referred to below as the "payment schedule". The balancing payment required as the third payment for each quarter would be determined by the amount of VAT due to be paid for the quarter as indicated in the Appellant's VAT return for that quarter.

9. In relation to each of the defaults in dispute which are considered below, the Appellant's case is that it had a reasonable excuse for the late payment of the VAT. The burden of proof in each instance is on the Appellant to establish a reasonable excuse throughout the period of default.

30 10. It is convenient to deal with each of the defaults separately.

#### *Default 4*

11. Default 4 relates to the first of the payments on account for VAT period 06/07 (1 April 2007 to 30 June 2007). The amount of the balancing payment was £84,431, due to be paid by 31 May 2007.

35 12. Mr Ward produced evidence of a letter to the Appellant's bank dated 14 February 2007, giving instructions for 8 balancing payments to be made in the sum of £84,431. This letter provides for the making of all of the balancing payments set out in the payments schedule dated 31 January 2007. The instruction to the bank provided that the first such payment was to be made on 26 May 2007, well in advance of the 31 40 May 2007 deadline. The instructions also provided for all of the other balancing payments to be made well in advance of the deadline.

13. The Appellant's case is that the bank simply did not act on this instruction. The evidence is that the payment due on 31 May 2007 was not made until 26 June 2007. Mr Ward's evidence was that the Appellant had previously had problems with its accounts manager at the bank, and had asked for a new accounts manager. When matters then did not improve, it took its business to another bank.

14. The Tribunal takes into account that this default was the first balancing payment due for that year. The evidence is that each of the subsequent balancing payments for that year were made on time. This is consistent with the Appellant taking active steps to resolve the problem.

15. On all of the evidence and circumstances of this case as a whole, the Tribunal is satisfied that there is a reasonable excuse for this default. It follows that the appeal is allowed in relation to this default.

#### *Default 5*

16. Default 4 relates to the balancing payment for VAT period 12/07 (1 October 2007 to 31 December 2007). The due date was 31 January 2008. Payment was not made until 7 February 2008.

17. Mr Ward produced evidence of a letter to the Appellant's bank dated 30 January 2008, giving instructions for this payment to be made by CHAPS. The letter indicates that it was sent by fax and by post. Mr Ward said in his evidence that the instruction should have been acted on the same day. The Appellant's case is again that the bank simply did not act on this instruction.

18. The Appellant had a similar problem in respect of the balancing payment for VAT period 06/07 (1 April 2007 to 30 June 2007). The Appellant sent a materially identical instruction to the bank dated 30 July 2007, for the balancing payment due on 31 July 2007. It was not paid until 1 August 2007. HMRC conceded that there was a reasonable excuse in relation to this default, admittedly in circumstances where payment was only a day late and only 10p less than the amount due.

19. On all of the evidence and circumstances of this case as a whole, the Tribunal is satisfied that there is a reasonable excuse for this default also. It follows that the appeal is allowed in relation to this default.

#### *Defaults 7-9*

##### *(a) The evidence and submissions of the parties*

20. Defaults 7-9 related to VAT periods 06/08 (1 April 2008 to 30 June 2008) to 12/08 (1 October 2008 to 31 December 2008).

21. The Appellant's case is as follows. The Appellant never received the payment schedule dated 28 February 2008 (referred to in paragraph 7 above). Previously, the Appellant had always received a payment schedule on 31 January of each year. In 2008, the date of the payment schedule was changed to the end of February. The Appellant's own calculations indicated that the amount of VAT that it was required to

pay had now fallen below the threshold for the requirement to make payments on account. In the circumstances, the Appellant concluded that it was no longer required to make VAT payments on account. Furthermore, the Appellant had overpaid VAT over the previous two years. Furthermore, on 29 February 2009, HMRC wrote to the Appellant stating that as the Appellant no longer fulfilled the criteria for inclusion in the payment on accounts regime, it had been withdrawn from that regime (page 94 of the bundle). The Appellant never received the default notices for VAT periods 06/08 (1 April 2008 to 30 June 2008) or 09/08 (1 July 2008 to 30 September 2008). It only received the default notice for period 12/08 (1 October 2008 to 31 December 2008). Indeed, HMRC have been unable to produce for the hearing a copy of the default notice in respect of VAT period 06/08 (1 April 2008 to 30 June 2008). Furthermore, the default notice in respect of the period of 09/08 (1 July 2008 to 30 September 2008) was not issued until 27 November 2008 (page 35 of the bundle).

22. In cross-examination it was put to Mr Ward that the Appellant never enquired of HMRC whether it had now fallen out of the payment on account regime, and that a letter of the Appellant to HMRC dated 17 June 2008 (pages 87-89 of the bundle) made no reference to the Appellant no longer being subject to payments on account. Mr Ward said that the Appellant company never had any financial difficulty in making payments on account on time, and that it simply had no commercial reasons not to make all payments by the applicable deadline. The letter dated 17 June 2008 dealt with other matters.

23. On behalf of HMRC it was submitted that the Appellant was within the payment on account regime in 2008, that a payment schedule dated 29 February 2008 is in the documents bundle, that it was addressed to the correct address, and that there is no reason to consider that it was not received. If it had not been received, it would be expected that the Appellant would have contacted HMRC to ascertain the position, since if the Appellant had fallen out of the payment on account regime, it would be expected that HMRC would also have sent a letter confirming this. Guidance is available on the HMRC website on the criteria for determining whether a company falls within the payment on account regime.

*(b) The Tribunal's findings*

24. The question whether there is a reasonable excuse must be determined on the circumstances of the case as a whole.

25. The Tribunal notes that in each of these VAT quarters, the Appellant made payment in full of the VAT due for that quarter by the deadline for the balancing payment in respect of that quarter. That is entirely consistent with the Appellant proceeding on the assumption that it had fallen out of the payment on account regime.

26. The Tribunal is satisfied on the evidence, as Mr Ward said in evidence, that the Appellant never had any financial difficulty in making payments on account on time, and that it simply had no commercial reasons not to make all payments by the applicable deadline. That is entirely consistent with the Appellant being genuinely unaware that it was subject to the payment on account regime.

27. HMRC has been unable to produce for the hearing a copy of the default notice in respect of VAT period 06/08 (1 April 2008 to 30 June 2008). Mr Ward gave evidence that the Appellant never received it. On the evidence as a whole, the Tribunal is satisfied on a balance of probabilities that it was never sent.

5 28. Mr Ward gave evidence that the Appellant also never received the payment  
schedule dated 29 February 2008, or the default notice 09/08 (1 July 2008 to 30  
September 2008). The Tribunal found Mr Ward to be a credible witness. In view of  
the evident difficulty surrounding the default notice in respect of VAT period 06/08,  
and having regard to the other matters above, the Tribunal is persuaded on a balance  
10 of probabilities that there was some technical problem with the issuing of notices to  
the Appellant at that time, and that the Appellant did not receive them.

15 29. Mr Ward said that in the circumstances, and based on his own calculations, he  
considered that the Appellant had fallen out of the payment on account regime. The  
Tribunal accepts on the evidence that Mr Ward did not simply assume this to be the  
case as a result of not having received a payment schedule for the year. His evidence,  
which the Tribunal finds credible, is that he actively calculated that the Appellant had  
now fallen below the threshold of the payment on account regime. A particularly  
significant aspect of this case is that in the following year, on 5 May 2009, HMRC did  
20 in fact notify the Appellant that it had now fallen out of the payment on account  
regime. From this the Tribunal concludes that, even if Mr Ward was erroneous in his  
calculation and conclusion that the company now fell out the regime, it was an  
understandable and reasonable conclusion for him to have come to. In the  
circumstances, the Tribunal does not consider that he is deprived of a reasonable  
excuse by his failure actively to contact HMRC to clarify the position.

25 30. Mr Ward accepted that the Appellant received the default notice for period 12/08.  
However, this default notice was only issued on 27 November 2008. It may not have  
been received by the Appellant before 28 November 2008, which was the second last  
of the payments on account to which this appeal relates. It might be argued that this  
penalty notice should have put the Appellant on notice that it was still subject to the  
30 payment on account regime, such that the Appellant must have had notice of this on  
31 December 2008, the due date for the last of the payments on account to which this  
appeal relates. However, this argument was not pressed by HMRC as a discrete  
argument, and Mr Ward therefore did not have an opportunity to deal with it  
expressly. The evidence before the Tribunal does not directly indicate when the 27  
35 November 2008 default notice was received by the Appellant, or what was the  
Appellant's reaction to it. The Tribunal is prepared to assume that if the Appellant  
quite reasonably considered that it was not subject to the default payment regime, a  
penalty notice of this nature would not necessarily immediately clarify any  
misapprehension. Indeed, the initial reaction to such a default notice might have been  
40 one of confusion. The Tribunal therefore cannot assume that the Appellant should  
have known of the requirement to pay a balancing payment by 31 December 2008, by  
reason alone of this default notice.

31. In all of the above circumstances, the Tribunal finds that the Appellant had a  
reasonable excuse in respect of all of the payments on account in this period, with

only the possible exception of the last payment on account due on 31 December 2008. However, for the reasons given above, the Tribunal finds that the reasonable excuse extends also to the last payment on account due on 31 December 2008.

32. It follows that the appeal is allowed in its entirety in relation to defaults 7-9.

5 **Conclusion**

33. The appeal is allowed.

34. 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.

15

**DR CHRISTOPHER STAKER**

**TRIBUNAL JUDGE**

20

**RELEASE DATE: 4 April 2012**