



TC01974

Appeal number: TC/2011/09683

VAT – late payment – surcharge – time to pay arrangement with HMRC – Appellant believed that the time to pay arrangement lasted throughout the four VAT periods during which late payments were made – HMRC accepted that arrangement was in place but that it only related to an earlier period – appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

THE COPPERFIELDS RESTAURANT

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE J. BLEWITT

Sitting in public at Manchester on 11 April 2012

Mr Howard for the Appellant

Mr O'Grady, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal by the Appellant Company, no longer trading, through Mr Howard, a former partner in the Company.
2. By Notice of Appeal dated 7 November 2011 the Appellant appealed against surcharges totalling £4,539.84, comprised as follows:

VAT PERIOD	SURCHARGE %	AMOUNT (£)
02/09	10	1,086.74
05/09	15	1,238.77
08/09	15	1,009.04
11/09	15	1,205.29

Undisputed background facts

3. The Appellant first defaulted in VAT period 05/07; no surcharge was imposed as this was the first default. A further default occurred in VAT period 02/08 for which a surcharge liability notice was issued however no charge incurred by the Appellant as, at 2%, the surcharge fell below the *de minimus* limit of £250. A surcharge at 5% was imposed in respect of a default for the VAT period 05/08.
4. HMRC initially, and incorrectly, imposed a surcharge at 10% for the VAT period 11/08. However it was accepted by HMRC that prior to the payment date for that VAT period, the Appellant had made a time to pay arrangement with HMRC and consequently the surcharge was subsequently withdrawn.
5. As a result, the surcharge imposed for the default in VAT period 02/09 was reduced from the initially imposed 15% to 10%, and the surcharges imposed thereafter for the defaults in VAT period 05/09, 08/09 and 11/09 at 15%.
6. Mr Howard accepted that the defaults occurred as set out in HMRC's schedule contained within the bundle presented at the hearing and did not dispute that the surcharges were imposed in accordance with legislation.

Legislation

7. As there was no dispute between the parties as to the legislation applicable in this case, it is unnecessary to set it out in any detail. The VAT default surcharge is provided for by Section 59 of the Value Added Tax Act 1994.

8. Relevant to this appeal are the provisions found in Section 108 of the Finance Act 2009 which relate to time to pay agreements:

(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

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

10 *(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.

15 *(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.

20 *(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 9. It was accepted by HMRC that a time to pay agreement, which satisfied the conditions of S 108 of the 2009 Act, existed prior to the default in the VAT period 11/08.

Appeal

30 10. The grounds of appeal relied upon by the Appellant as set out in the Notice of Appeal dated 7 November 2011 and can be summarised as follows: HMRC’s decision is wrong as the Appellant was never made aware when the Time To Pay arrangement was made that it was only applicable to the first VAT period and that new agreements were required for subsequent periods. The Appellant contacted HMRC on a number

of separate occasions as cash flow problems continued, ultimately resulting in the closure of the business and the redundancies of 17 employees.

11. A letter from the Appellant to HMRC dated 17 June 2011 reiterated the grounds of appeal set out in the Notice of Appeal and added that, on each occasion subsequent to the Time To Pay arrangement being agreed, when the Appellant had telephoned HMRC they had been informed that surcharges would not be incurred under the arrangement. The Appellant acted on the advice given by HMRC representatives and feel misled that surcharges were subsequently imposed in the sum of £4,539.84.

Evidence and Submissions

12. Mr Howard confirmed in evidence to the Tribunal that he had kept in regular touch with HMRC over the default periods and that once the Time To Pay arrangement had been agreed with HMRC, the Appellant had adhered to it. Mr Howard stated that he had always spoken to the same department at HMRC (albeit different representatives) and had never been referred to the local debt management unit, consequently when he had called on 5 or 6 occasions, HMRC were aware of the agreement in place and had never advised him that the arrangement had expired.

13. HMRC submitted that the partners/directors of the Appellant Company had the ultimate responsibility for the timely submission of VAT returns and payments, which was not disputed by Mr Howard.

14. HMRC accepted that a Time To Pay agreement was put in place for the period 11/08, however for the four subsequent periods under appeal, namely 02/09, 05/09, 08/09 and 11/09, no Time To Pay agreements were executed prior to the due date for each respective period.

15. HMRC included within its bundle logs of telephone calls between HMRC and the Appellant. It was submitted that there is a reference to the arrangement relating to the period 11/08 but nothing else within the logs to suggest that further agreements were executed. It was also submitted that an HMRC VAT Officer in Belfast, Mr John McCabe, had confirmed that the only arrangement in place was that relating to the period 11/08. As the arrangements are a concession relevant to specific periods and are not “rolling agreements”, the Appellant should have made new agreements with HMRC for each default period. Furthermore surcharge liability notices were issued for the default periods and the Appellant should have questioned why this was the case if the Time To Pay arrangement was in place.

Discussion

16. It is helpful at this point to refer to some of the telephone logs produced by HMRC which assisted me in reaching a decision in this case.

17. On 8 January 2009 reference is made to “*TTP AGREED*” which, it was agreed by all parties, referred to the arrangement made prior to the 11/08 period.

18. Thereafter there was a call on 6 February 2009 which states *“trdr called to advise that he has rec’d dnip when has a TTP, adv ttp has been agreed with the BPS but if a debt on file sometimes dnips do get passed through the system, trdr was not happy but he understood and that he will continue paying as agreed.”*
- 5 19. A call on 22 May 2009 was logged as follows: *“As above trader has received dnip but ttp agreed. Explained so long as ttp adhered to he can ignore the dnip”.*
20. On 13 November 2009 the log states *“General Enquiry...I advised that due to the fact there are three periods of debt pymt must be prompt.”*
- 10 21. On 18 January 2010 the log reads *“Spoke to Peter Howard...I pointed out that someone else had intervned and had sent out a demand and that they were the ones who would have to deal with his time to pay...”.*
- 15 22. Mr Howard presented as a genuine and credible witness and I accepted without hesitation that he had regularly been in contact with HMRC throughout the period during which the Company experienced financial difficulties in order to meet his liabilities in a timely manner.
23. It was accepted by HMRC that a Time To Pay arrangement had been agreed with HMRC prior to the payment date for the period 08/11 but it was submitted that the Appellant should have renewed any such arrangement in order to avoid further defaults.
- 20 24. In my view, the logs of the telephone calls between the Appellant and HMRC were misleading to the Appellant; he had dealt with the same department on numerous occasions and at no point was he informed that the arrangement was no longer in place; to the contrary the logs indicate that the Time To Pay arrangement (“TTP”) was recorded on HMRC’s system and continued throughout the periods of default. Neither party could assist as to what a “dnip” referred to, although Mr 25 Howard believed it was likely to be the surcharge liability notices, which it appeared from the logs prompted the Appellant to call HMRC out of concern. He was advised that as long as the Time To Pay arrangement was adhered to, he could ignore the notice which reinforces my view that HMRC accepted (or misled the Appellant by 30 failing to advise him otherwise) that the arrangement was still in place.
25. Mr Howard was unable to recall the exact details of the Time To Pay arrangement and examining the record of payment dates did not assist. HMRC produced no evidence as to what the arrangement was and therefore no evidence that it had been breached which would have rendered the Appellant liable to surcharges.
- 35 26. The onus is on HMRC to prove the defaults, which in this case would have arisen by the Appellant breaking the agreement of failing to pay the tax due before the expiry of the deferral period. I found as a fact that the Time To Pay agreement continued throughout the periods of default and that there was no evidence before me upon which I could be satisfied that the Appellant had broken the agreement. In those 40 circumstances I could not be satisfied that HMRC has discharged the onus of proof upon it.

27. Alternatively, I found as a fact that HMRC had misled the Appellant by indicating that a Time To Pay arrangement remained in place throughout the periods of default and therefore the Appellant had a reasonable excuse for the defaults.

Decision

5 28. The appeal is allowed and the surcharges totalling £4,539.84 are discharged.

29. 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
10 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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TRIBUNAL JUDGE

RELEASE DATE: 20 April 2012

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