



TC03224

Appeal number: TC/2013/01759

DEFAULT SURCHARGE - appeal against all surcharges from 06/06 to 12/12 on basis that appellant could only pay by installments due to difficulties from clients' late payments. – lack of funds was not a reasonable excuse – appeal dismissed.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ACCESS EMPLOYMENT LAW LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE DAVID S PORTER
SUSAN C STOTT**

Sitting in public at Alexandra House, Manchester on 23 September 2013

Miss Annette Jackson, solicitor and the managing director, for the Appellant

Mrs Lisa Fletcher, an officer of HMRC, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents.

DECISION

1. The Appellant, Access Employment Limited, having received a summary decision has requested a full decision under rule 35 (4) of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, which is this decision.

2. Miss Annette Jackson (Miss Jackson) solicitor and managing director for the Appellant (Access Employment) appealed against all the surcharges raised against Access Employment for the periods 06/06 to 12/12 on the basis that she had not had a full breakdown as to how the liability of £18,869.17 had arisen and that she had been paying her VAT liability whenever funds allowed. The outstanding liability was only the surcharges. The Respondents (HMRC) say that Access Employment has been in the default surcharge regime since 06/06 and has never paid any of the default surcharges raised. A lack of funds was not a reasonable excuse and the outstanding liability of £18,869.17 was due. The appeal should be dismissed.

3. Mrs Lisa Fletcher (Mrs Fletcher), an officer of HMRC appeared for HMRC and produced a bundle of documents for the Tribunal. Miss Annette Jackson, solicitor and managing director, appeared for Access Employment and produced a 26 page reply to HMRC's statement of case. She also produced to the Tribunal, and for the first time, a series of financial statements prepared in part by her accountant Gareth Maddock. Miss Jackson gave evidence on behalf of Access Employment.

The cases

4. We have been referred to the following cases:

- *J B Steptoe* (19920 STC 7x7)
- *The Commissioners for Her Majesty's Revenue and Customs v Total Technology (Engineering) Limited* FTC/88/2011

The Facts

5. Miss Jackson produced a detail statement and explained that the only matter in dispute was the non-payment of the surcharges as Access Employment was otherwise up to date with its VAT liabilities. She accepted, from the outset, that HMRC was legally entitled to impose penalties based on the default by a taxpayer to pay the VAT when it falls due. Her appeal was to waive or mitigate the penalties.

6. After she qualified in 2004 she explained that she had originally worked for a partnership. One of the partners retired and another had died. She decided to set up a limited company as she believed that a company was the future for the legal profession. Access Employment is a very small company and we note from her application in April 2004 when Access Employment registered for VAT that she thought the turnover would be of the order of £200,000. She has produced copies of the accounts for the years 2007, 2008, 2009, 2011 and 2012. From those accounts the turnover appears to have been of that order and her profit

minimal. Access Employment appears to have been insolvent through out the period although the position improved from (-£44,306) in 2008 to (-£2321) by 2011.

7. She admitted that she did not realise how difficult it was to run a business until she started. Her skills lay in the written word and oral communication. From the commencement of the business she relied on other people to undertake the tasks of billing, recovery of costs, enforcement of debt, book-keeping and accounting. We note that she had an accountant to produce the annual accounts and we were surprised that she does not appear to have asked him to keep a check on her VAT liability arising from the numerous surcharge notices that she has received during the periods set out below in paragraph 10.

8. She explained to us that she had decided to provide advice to individuals who had lost their jobs in circumstances where those individuals might have a claim against their employers. The advice included appearing before the Employment Tribunal from time to time. She explained that in many cases the clients failed to pay her, either because they were unemployed or that they lost their appeal before the Employment Tribunal and as a result had very little money. As a business policy, she had decided, that rather than suing those clients she would allow them time to pay. She considered that Access Employment was more likely to collect some payment in those circumstances. She suggested that as a stand alone employment law specialist, Access Employment is particularly vulnerable to the financial difficulties of its clients.

9. She produced to the Tribunal an email from Gareth Maddock which identified £15,221.69 of fees to be written off for the year to December 2012. Miss Jackson had decided to allow her clients to pay less than was due on their bills and the resultant write offs arose from that decision. As a result we do not accept that her lack of funds was beyond her control. She also produced a detail of monthly expenditure for the periods July 2011, July 2012 and August 2013. The expenses were rising and by August 2013 the expenditure was £11,740. We did not have details of the turnover for that year, but judging by the other accounts it must have been of the order of £175,000 which would produce an average monthly take of £14,583 leaving Access Employment with a profit of £2,843 each month or £34,116 for the year. The profit in 2009 had been £39,000. She has also produced details of the monthly invoices records for the periods as follows:-

Date	Vat due	Total bills Delivered + VAT
04/13	£2,842	£17,054
05/13	£2,725	£16,355
06/13	£1,961	£16,272
07/13	£3,058	£20,512
08/13	£2,168	£13,012
09/13	£1,119	£ 6,967

35 It should be noted that these amounts are for a period outside the periods the subject of this appeal and that the total of the bills delivered does not represent cash. They have been produced presumably to show how susceptible the business was to being in financial difficulties. We were told that Access Employment had two loans with Royal Bank of

Scotland of which £9000, repayable at the rate of £469.18 each month, was outstanding. It also had an overdraft facility of £10,000 which was fully utilised. The account was £5,000 in credit at the time of the hearing.

- 5 10. Miss Jackson has appealed all the surcharges and we have therefore set them out in some detail:

VAT period	Percentage rate	VAT due	Annual total	Surcharge
06/06	0%	£3,781.88		
03/07	2%	£4,009.17		
06/07	5%	£3,379.63		
09/07	10%	£5,148.56		£514.86
12/07	15%	£4,032.26	£20,351.50	£604.83
				(£1119.69)
03/08	15%	£4,545.77		£681.86
06/08	15%	£4,221.97	TTP applied too late	£633.29
09/08	15%	£13,469.28		£2,020.39
12/08	15%	£8,428.38	£30,665.40	£1,264.25
				(4599.79)
03/09	15%	£4,347.39		£656.15
06/09	15%	£5,499.53		£824.92
09/09	15%	£5,266.68		£790.00
12/09	15%	£6,947.79	£22,088.39	£1,042.16
				(£3,313.23)
03/10	15%	£6,262.20	Filed electronically	£939.33
06/10	15%	£5,449.14	Ditto	£817.37
09/10	15%	£7,894.97	Ditto	£1,184.24
12/10	15%	£6,625.23	£26,231.54	£993.78
				(£3,934.72)
03/11	15%	£7500.45		£1,125.06
06/11	15%	£4,822.55	TTP agreed	
09/11	15%	£9,316.92		£1,397.53
12/11 *	15%	£7,341.57	£28,981.49	£ 761.90
				(£3,284.49)
03/12 *	15%	£6,866.15		£ 742.95
06/12 *	15%	£7,420.67	TTP agreed	£ 5,88.10
09/12 *	15%	£8,485.80		£ 285.97,
12/12	15%	£6,669.42		£1,000.41
				(£2,617.43)
Totals		£157,760.36		£18869.35
			Balance at hearing	£18,898.17

The asterisks indicate that for these periods HMRC credited an amount from an installment paid by Access Employment to the wrong month effectively providing a credit against the liability. Mrs Fletcher indicated that HMRC were not minded to correct the error.

5 Time to pay arrangements had been agreed as indicated. Where the time to pay agreement had not been agreed it was because the application had been made after the due date.

11. Miss Jackson had written to HMRC on many occasions advising that she could pay her VAT by monthly installments of varying amounts. On 6 May 2008 she had offered to pay £1500 each month to cover Access Employment's average VAT liability of £5000 each quarter. In response HMRC had suggested that Access Employment should make enquires of the various schemes that might be available to it. By way of example, cash accounting, annual accounting, the flat rate scheme for small businesses or payment by an acceptable electronic method through a bank account rather than by cheque. Miss Jackson had rejected all of these options because she said she could not be certain that Access Employment would have had sufficient cash to honour the arrangements. On 30 March 2009, HMRC agreed installment payments for an outstanding debt of £13,971.86 at the rate of £2000. HMRC notified Access Employment on 4 September 2009 that the surcharges had not been paid and agreed a further set of installment payments. Similar amendments appear to have been made throughout the periods, but it is clear that as the surcharges had not been paid the only variance was likely to be an outstanding VAT liability for the outstanding period and the cumulative surcharges.

12. Miss Jackson had attempted to set up a separate account into which she could pay the VAT liability. Unfortunately, she set this up in a tax account and discovered some considerable time later that direct debits could not be paid out of a savings account. In any event she abandoned this idea as she could not generate enough free cash to fund it and continued with the direct debits. She had been in negotiations in November 2012 to sell her business. As a result she had cancelled the direct debit arrangement that she had managed to set up. Unfortunately, the sale fell through and she had not been able to re-set up the direct debit.

13. Miss Jackson indicated that she had not been formally told by HMRC as to the amount outstanding until this appeal. She had asked for confirmation of the figures from time to time, but these had not been forthcoming. She had spoken to HMRC and she had been advised that £14,207.72 was outstanding at the end of 2011. She produced her calculation of the balance that she understood was outstanding, which revealed a debt of £3,669.42.

14. Her calculations are set out below:

Date of liability	Date due	Amount due	Date and payments	Balance due to HMRC (as advised £14,207.72)
01.01.12-31.03.12	End April	£6,866.15	Jan 2012 £2330.84	(11,876.88)

			Feb 2012 £2330.84	(£9546.04)
			Mar 2012 £2330.84	(£7215.20)
01.04.12-03.06.12	End July	£7420.67	April 2012£2330.84	(£14535.87)
			4 May 2012 £2330.84	(£13385.87)
			12 May 2012 £1500	(£11055.030)
			7 June 2012 £1500	(£9555.03)
			15 June £1500	(9957.72)
01.07.12-30.09.12	End October	£8485.80	2 July2012 £1500	(£16943.52)
			30 July 2012 £3500	(£13,443.52)
			30 August2012 £3500	(9943.52)
			1 October 2012 £3500	(£6443.32)
			30 October 2012 £3500	(£2943.52)
			116 January 2012 £1471.76	(£1471.76)
01.10.12 - 31.12.12	7 February 2012	£6669.42		(£8141.18)
			13 February 2013 £1471.76	(£6669.42)
			13 February 2013 £3000	(£3669.42)
			Add	(£6886.15)
			Outstanding on her figures	(£10,535.54)

15. We note from her figures that not only has she omitted to add in the VAT liability of £6,866.15 at the beginning of the schedule but also that the figures are not added up. We note from the correspondence, which she has supplied for the bundle, that she had been notified on several occasions of liabilities as follows:

	7 January 2009	£11,748.81
	10 March 2009	£13,971.86
	17 June 2009	£20,550.28
10	4 September 2009	£18,898.47
	16 September 2009	£16,398.47
	26 November 2010	£25,975.67
	3 December 2010	£11,973.65 (being a list of surcharges from 06/07 to 09/10)

15 It could hardly have been a surprise to her that the debt appeared to remain at the same level as she had not paid any of the surcharges. We consider that she should have kept a running total of the liabilities. If she was unable to do that she should have asked her accountant for assistance.

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Summing Up

16. Mrs Fletcher submitted that Access Employment had been in the default surcharge regime from 06/06 to 12/12. Miss Jackson had contacted HMRC from time to time so that a time to pay agreement could be reached. However, section 108 of the Finance Act 2008 requires the taxpayer to notify HMRC of an inability to pay before the due date. Where Miss Jackson had failed to do that, no time to pay agreement had been allowed. Miss Jackson must have known the amount of the surcharges outstanding as she has confirmed that her appeal relates only to the surcharges since her VAT was paid up to date. Access Employment have had on-going cash flow problems from its inception. Section 71(1) (a) of the Value Added Tax Act 1994 excludes an insufficiency of funds as a reasonable excuse. Such lack of funds can only become a reasonable excuse if they are unforeseen and outside the control of the taxpayer (see: *JB Steptoe*). As Access Employment has been short of funds for over 7 years Miss Jackson should have addressed this issue.

17. The rates of the surcharge liability are laid down by law. In *Total Technology (Engineering) Limited* the Upper Tribunal held that there was nothing in the VAT default surcharge which led them to the conclusion that its architecture is fatally flawed. Nor did the Upper Tribunal think that the penalty imposed on the appellant in that case (£4,260.26 paid one day late) to be disproportional. Access Employment has been in arrears with its VAT liability for over 6 years and two further surcharges have been incurred for the periods March 2013 and June 2013. In the circumstances Access Employment does not have a reasonable excuse for its failure to pay its VAT on time and the resultant surcharges and the appeal should be dismissed and the surcharge of £18,869.17 imposed.

18. Miss Jackson agreed that the surcharges had been correctly raised but that Access Employments has found itself in difficulties because of the failure of its clients to pay their fees on time. In a large partnership a shortfall of fees in one department would often be covered by fees in other departments. This was not available to Access Employment. Where money was due to Access Employment, she took a pragmatic view and preferred to be paid something rather than risk losing the entire amount. Access Employment has been penalised for paying late. Access Employment has paid all its VAT and adding the surcharge to the liability makes it even harder for Access Employment to keep up with its payments. HMRC has contacted Access Employment from time to time but merely identified the total amount outstanding and it had not attempted to show how the amounts were calculated. She had been told that £14,207.72 was outstanding and she had understood that that was the total amount that she owed. As a result, she had arranged the installment payments to clear the debt as set out in her statement (see paragraph 12 above).

19. When she paid the installment cheques she had not appreciated that they were, in the first instance, applied against the earlier outstanding liability. If HMRC had made that fact clear she would have been able to correct the direct debit payments. Whilst she accepted that HMRC must create circumstances which place pressure on taxpayers to pay the due tax on time, the imposition of default penalties, in circumstances where a business only has limited resources, creates a situation where inevitably small businesses reach a dead end. This is what had happened to Access Employment at the beginning of 2013. Access Employment had always been prepared to pay by direct debit, but it appeared that HMRC could only accept

such payments if they were made under one of its schemes. None of the proposed schemes were suitable to Access Employment.

20. Miss Jackson insisted that she understood the liability was £14,207.72 and, as revealed by her statement, (see paragraph 13 above) she had made arrangements to pay that off by direct debit. If she had known that figure was incorrect she would have made different arrangements. As it is it is unlikely that Access Employment will be able to pay off the liability, she asked that the Tribunal showed some indulgence by mitigating the penalty otherwise Access Employment would have to go into liquidation.

21. The assurances that Miss Jackson had given to HMRC over the years, as evidenced by her various letters offering installment payments, was that as soon as Access Employment had the money the VAT would be paid. The company could do no more. Had HMRC supported Access Employment over the years and provided detailed information with regard to its VAT account and how it should address the issues involved, Miss Jackson felt that it would have been able to maintain the arrangements. As all Access Employment's VAT has been met, this appeal merely concerns the penalties, Miss Jackson considered that in all the circumstances the appeal should be allowed.

The Decision

22. We have considered the evidence and the facts and we dismiss the appeal. The payment of VAT has been set down in statute and is complied with by the majority of taxpayers. As a result, the terms of the legislation must be complied with by Access Employment. The Upper Tribunal in *Total Technology* has confirmed that the scheme is acceptable and not disproportional. The scheme allows individual taxpayers to use the VAT collected in their own businesses for effectively a period of 4 months. That is the three month collection period and subsequently up to the due date. The VAT so collected is effectively 'free' money which a business can use for the period prior to collection.

23. It would appear that Miss Jackson is minded to be very reasonable with her clients by accepting that if they cannot pay her in full Access Employment would settle for the best that the client could do. Whilst it is open for her to be altruistic, it would not be possible to run a tax collection system on that basis. If every taxpayer indicated that they would pay HMRC as and when they were in funds very little VAT would be collected. To counter that, as Miss Jackson has conceded, the legislation has created a surcharge regime.

24. A first default notice is sent to the business advising that it has not paid its VAT on time and that it must therefore do so for the next 12 months otherwise there will be a surcharge on the next default. On the next default a surcharge arises calculated on 2% of the tax unpaid. As a concession, HMRC do not raise a surcharge if the amount is less than £400 a system that in part fulfils Miss Jackson's requirement of reasonableness. The business does remain in the regime for another twelve months but the time begins to run from this default. On the next defaults the percentage raise by 5%, 10% and 15%. Miss Jackson has been in the 15% default since the period 12/07. It is clear that the default surcharge has not been a deterrent and that Access Employment have been content to borrow money from HMRC and to use it to assist in running the business.

25. Miss Jackson has told us that Access Employment had an overdraft facility of £10,000 which was always used. Access Employment will have been paying interest to the bank on the loan and it is not that unreasonable to expect it to pay interest to HMRC. HMRC's interest is set at a high level to encourage taxpayers to find an alternative source of funding. If the Royal Bank of Scotland's base rate in the earlier periods was 4% and it was charging Access Employment 5% over that base rate then it would have had to pay 9% for the loan. As a result on an outstanding liability of £157,760.36 (see paragraph 10) the interest charge would have amounted to £14,198.43. There is no reason why HMRC should allow Access Employment the use of the VAT for no charge. Access Employment needed to keep its own records for VAT purposes so that it knew how much money it owed to HMRC. It appears that Miss Jackson was fully aware that Access Employment had not paid any of the surcharges. She appears to have been aware of the amount outstanding to the bank. In the circumstances we do not accept that Access Employment had a reasonable excuse for its failure to pay its VAT on time and we dismiss the appeal.

26. 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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**DAVID S PORTER
TRIBUNAL JUDGE**

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RELEASE DATE: 15 January 2014