



TC03257

Appeal number: TC/2013/03838

VALUE ADDED TAX–default surcharge – cash flow difficulties – genuine mistake by appellant - ill-health – whether time to pay agreement – whether reasonable excuse – appeal allowed in part

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

PURPLE CHAMELEON LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE GUY BRANNAN
ROGER FREESTON**

Sitting in public at Byron House, Nottingham on 15 January 2014

Gary Gedney, Director, for the Appellant

David Wilson, presenting officer, for the Respondents

DECISION

Introduction

5 1. This is an appeal against two VAT default surcharges for the periods respectively 08/12 and 11/12.

The facts

2. The appellant is in the business of supplying horticultural ribbons and bows to supermarkets.

10 3. The appellant has been within the default surcharge regime from and including the period 01/11 and subsequent periods.

4. For the period 08/12 the due date for electronic payment and return submission was 7 October 2012. The return was received by HMRC on 1 October 2012 and the VAT payment was received on 23 October 2012.

15 5. In respect of the period 11/12 the due date for electronic payment and return submission was 7 January 2013. The return was received by HMRC on 18 January 2013 and payment was received on 21 January 2013.

20 6. Surcharges were imposed on the appellant at a rate of 2% for the period 04/11, at the rate of 5% for 05/11 and 08/11, at the rate of 10% for 11/11 and at the rate of 15% for 02/12, 05/12 and the two periods under appeal.

7. Throughout the periods under appeal the appellant's business suffered from cash-flow difficulties. We shall return to the reasons underlying these difficulties later in this decision.

25 8. In relation to the period 08/12, the appellant's director, Mr Gedney, telephoned HMRC on 27 September 2012 to discuss the appellant's VAT payments.

30 9. In his evidence, Mr Gedney stated that HMRC agreed on the telephone call that the VAT payment for 08/12 should be made in two instalments. Mr Gedney said that HMRC agreed that the appellant should pay 50% of the VAT outstanding on 19 October and the remaining 50% on 9 November. But it was clear from HMRC's Schedule of Defaults, which included the dates on which VAT was due and the dates on which it was paid, that those two instalments related to the tax due in respect of the period 05/12.

35 10. At the hearing (it was not included in the bundle of papers produced the hearing), Mr Wilson produced HMRC's record of the 27 September telephone conversation which read as follows:

5 "27/09/12 15.36 Recent Contact – Gary Gedney (Dir). TP called to adv he will pay £5000 780.54 x 15/10/12 then o/s bal £5780.54 2 – 3 weeks later, he assures 08/12 retn will be P I F [paid in full] on time. Didn't want to use a TTP as may need help at a later date prior to paymnt being late & to stop DS [default surcharge]. WLAS [warned about legal action and surcharges]."

10 11. Mr Gedney accepted that he had made a mistake. He had genuinely believed that the conversation had related to the period 08/12. We accept that his confusion was entirely genuine and honest. Nonetheless, it was clear from the figures and from HMRC's record of the conversation that HMRC had not agreed that the payment in respect of the period 08/12 should be made in two instalments.

12. In relation to the period 11/12 Mr Gedney said that the appellant's failure to pay on time related to the ongoing cash flow problems experienced by the business and asked for leniency in respect of the surcharge.

15 13. In the course of his evidence, Mr Gedney disclosed that for the six months prior to January 2012 he has suffered from serious ill-health which included an open heart operation. As a result of his absence from the business through ill-health sales made by the business declined. Mr Gedney was responsible for sales. The appellant mainly worked with supermarkets. Mr Gedney's absence through illness meant that the
20 appellant lost contracts with supermarkets and it took time to rebuild the business. At that time the appellant's business was very seasonal (e.g. Mother's Day and Christmas products) so that once a busy period was lost it took time for revenue to be restored. The effect of the loss of income was felt several months later.

25 14. The appellant's business operated with minimal working capital. Mr Gedney had incurred indebtedness in relation to a previous business which restricted his ability to inject capital into the appellant. Mr Gedney noted that the appellant's business was on the road to recovery, its business was less seasonal (albeit lower margin) and the appellant had recently made his biggest ever VAT payment.

30 15. Mr Gedney accepted Mr Wilson's contention that the reduction in income caused by his absence through ill-health would have meant that output tax would have been reduced but noted that this did not prevent cash flow problems occurring because the appellant's overheads continued to be incurred.

Discussion

35 16. We explained to Mr Gedney that we had no discretion in relation to VAT surcharges. Parliament had prescribed the surcharge regime and, in short, the appellant could only avoid a surcharge, if it had paid its VAT late in the circumstances of this case, if it could establish that it had a reasonable excuse for the late payment. Section 71 (1) VATA 1994 prevented insufficiency of funds constituting a reasonable excuse. Nonetheless, it was well-established by the
40 authorities (e.g. *Customs and Excise Commissioners v Steptoe* [1992] STC 757) that whilst insufficiency of funds was not itself a reasonable excuse, the underlying cause for an insufficiency of funds could be such an excuse.

17. The Grounds of Appeal indicated that Mr Gedney had agreed with HMRC that the VAT payment in respect of 08/12 should be paid in two instalments. As we have seen, Mr Gedney made a simple but honest mistake. The agreement related to the earlier VAT payment and not to 08/12. In order for a genuine and honest belief to constitute a reasonable excuse, the taxpayer must be acting reasonably in holding that belief (see, for example, *Coales v Revenue and Customs Commissioners* [2012] UKFTT 47). In this case, it was clear that Mr Gedney (and therefore the appellant) could not reasonably have concluded that HMRC had agreed for the VAT payments for 08/12 to be paid by instalments. His mistake, therefore, could not constitute a reasonable excuse.

18. As regards the period 11/12, Mr Gedney simply asked for leniency on the basis that the appellant's was suffering from cash-flow difficulties. As we have explained, the legislation relating to VAT default surcharges does not give this Tribunal discretion to reduce eliminate surcharges on the grounds of leniency, but only on the basis that there is a reasonable excuse.

19. One new factor that did emerge at the hearing was Mr Gedney's illness in the six months up to January 2012. This did not form part of the appellant's Grounds of Appeal. Mr Wilson very fairly did not object to Mr Gedney's evidence in relation to his illness being put forward. When dealing with a self-represented appellant the Tribunal's procedure must be flexible bearing in mind the overriding objective of the Tribunal's Rules to deal with appeals fairly and justly.

20. Although Mr Gedney did not put forward independent medical evidence relating to his illness, we accept his evidence that he suffered serious ill-health for the six months up to January 2012 and that this ill-health prevented him from working in the appellant's business. Mr Gedney seemed to us transparently honest man and we saw no reason to doubt his evidence. Furthermore, we also accept Mr Gedney's evidence that he was the main business-generator of the Appellant's business. We further accept that his absence from the business meant that the appellant's income decreased in later periods.

21. After careful reflection, we consider that Mr Gedney's ill-health resulted in the appellant suffering significant cash-flow difficulties in relation to the period 08/12. We did not, however, consider that Mr Gedney had satisfied us that his ill-health in the six months prior to January 2012 resulted in cash-flow difficulties for the appellant's business in the period 11/12 – it seemed to us that by this stage Mr Gedney's ill-health was too remote.

22. We therefore conclude that in relation to the period 08/12 the appellant had a reasonable excuse for its late payment of VAT and the surcharge for that period should be cancelled. In relation to the period 11/12 we have decided that the appellant did not have a reasonable excuse for its late payment and in respect of that period the surcharge is confirmed.

23. 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

5 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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**GUY BRANNAN
TRIBUNAL JUDGE**

RELEASE DATE: 24 January 2014

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