



TC03371

Appeal number: TC/2014/00122

DEFAULT SURCHARGE – the appellant was familiar with the regime – had asked for time to pay on previous occasions – had thought time to pay would not be granted for period 04/13 – insufficiency of funds not a reasonable excuse – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

BLUE WHALE LOGISTICS LTD

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE DAVID S PORTER
MR JOHN B ADRAIN**

Sitting in public at Priory Court, Birmingham on 20 February 2014

Mr John Sutton, a Director, for the Appellant

No one appearing for the Respondents.

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DECISION

1. We were advised that the representative for the Respondents would not be attending as he was doubled booked and was attending the tribunal in Lincoln. As there had been no attempt to provide a substitute and the Appellant was represented we decided to proceed with the hearing under Rule 33 of The Tribunal Procedure (First-tier) (Tax Chamber) Rules 2009 since the Respondents had been notified of the hearing and failed to attend. It was in the interest of justice to proceed with the hearing.

10 **The law**

2. Section 59A of the Value Added Tax Act 1994 provides:

(a) for the purposes of this section a taxable person shall be regarded as in default in respect of any prescribed accounting period if the period is one in respect of which he is required, by virtue of an order under section 28, to make any payments on account of VAT and either:-

15 (a) a payment which he is so required to make in respect of that period has not been received in full by the Commissioners by the day in which it became due or

(b) he would, but for section 59(1A), be in default in respect of that period for the purposes of section 59.

20 59A (8). If a person who, apart from this subsection, would be liable to a surcharge under sub-section (4) ... satisfies the Commissioners or, on appeal, the tribunal-

(a) in the case of a default that is material for the purposes of the surcharge and falls within subsection (1) (a) above-

25 (i) that the payment on account of VAT was dispatched at such a time and in such a manner that it was reasonable to expect that it would be received by the Commissioners by the day on which it became due , or

30 (ii) that there is a reasonable excuse for the payment not having been so dispatched

or (b)

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).

40 3. Section 71 For the purposes 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 facts

5 4 .Mr Sutton advised us that he had started a transport business in 2007, which had
turned over £250,000 in its first year and had steadily grown throughout the recession.
It was now turning over £1,250,000 and employing some 16 people. Its major
customer was "Elliot's". Elliot's supplied displays and otherwise to large events and
was required by the Appellant to pay its accounts within 30 days. It invariably took
10 over 60 days and as it represented 50 percent of the Appellant's business this had a
severe effect on cash flow.

5. As a result of the cash flow difficulties, Mr Sutton had reluctantly decided to
arrange for invoice financing with Lloyd's Bank. He had advised HMRC that he was
setting this up with a view to paying the VAT due on 7 June 2013 on time.
15 Unfortunately, Lloyd's were not familiar with 'cash accounting' and took longer than
expected to install the system. In fact it was not fully functional until the end of
August.

6. In a letter addressed to HMRC, but undated, Mr Sutton advised that, in relation to
the period 04/13, the return was submitted on time and that a part payment of
20 £5,973.07 had been paid on 12 June 2013 and that the balance of £10,000 was cleared
on 9 July 2013, a month before the invoice financing was operative.

7. Mr Sutton frankly confirmed that his bookkeeper would have been with him to-
day had she not been ill. His bookkeeper had not attempted to ask for a time to pay as
she believed that as the Appellant had fallen behind with its last time to pay
25 arrangement none would be forthcoming on this occasion.

8. Mr Sutton confirmed that he had been able to pay the £10,000 because Elliot's
had paid some of its accounts earlier than he had expected. We noted that the
surcharge was at 15 percent and Mr Sutton confirmed that the Appellant had been in
the regime for some time and that he was familiar with the scheme. He also confirmed
30 that the Appellant relied on sub-contractors and it was essential that these sub-
contractors were paid on time if the business was to remain viable. He had therefore
had no alternative than to use the VAT, which had been collected, to assist in those
payments. He confirmed that the Appellant was up to date with its VAT payments,
save for the outstanding surcharge of £3,076.49 the subject of this appeal.

The decision

8. .We have considered the law and the facts and we have decided that the Appellant
does not have a reasonable excuse for its failure to pay the 04/13 VAT on time
because of an insufficiency of funds. Section 71(1) of the Value Added Tax Act 1994
specifically states that "an insufficiency of funds to pay any VAT due is not a
40 reasonable excuse". We explained to Mr Sutton that an "insufficiency of funds' can
amount to a reasonable excuse, where the lack of funds arises from circumstances out

of the Appellant's control. (See *Customs and Excise v Steptoe* (1992) STC 757). We decided that as the Appellant had paid the second instalment of the VAT due on the 9 July 2013, payment had been made in the usual course of business and that the cash flow difficulties were not sufficiently outside of the Appellant's control for *Steptoe* to apply.

9. 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**

RELEASE DATE: 28 February 2014

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