



**TC03613**

**Appeal number: TC/2013/04711**

*VAT – Default surcharges – Late returns and payments – whether reasonable excuse- No – Section 71 VATA 1994 – Appeal refused.*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**LYNX COMMS LTD**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE KENNETH MURE, QC  
MR S A RAE, LLB, WS**

**Sitting in public at George House, 126 George Street, Edinburgh on Monday  
31 March 2013**

**Mr B Litster, Managing Director, for the Appellant**

**Mrs E McIntyre, Officer of HMRC, for the Respondents**

## DECISION

### Introduction

1. This is an appeal against several surcharges for late Returns and payments of  
5 VAT. Originally surcharges were imposed in respect of six periods. In the course of  
negotiations one was withdrawn (for 06/11) in view of exceptional disruption caused  
by two family bereavements. In the course of the hearing Mrs McIntyre withdrew the  
surcharges for a further period, viz 09/12. Thus only four surcharges remain for our  
consideration viz for the periods 03/11, 12/11, 03/12 and 06/12. The delays and  
10 surcharge amounts are set out at p18-19 of the bundle. While the Return for 03/11  
was timeous, all others were late. The payments in each case were late. The  
surcharges total £3,172.94.

### Evidence

2. We heard evidence from one witness, Mr Litster, the sole director of the  
15 Appellant company. He explained that it was a modest family business, operated  
from his house, and without independent premises. His sister is part-time company  
secretary. The company has usually about six employees. They – and Mr Litster too  
– are the technical staff: they are field engineers installing and wiring IT systems.  
The company acts usually as a sub-contractor to larger concerns in the industry. It is  
20 dependent financially on its customers making prompt payment, and failures by two  
major companies led to the Appellant's financial difficulties. Mr Litster and his sister  
have withdrawn only modest salaries.

3. Mr Litster explained that because of two major customers going into  
administration, his company suffered a severe financial setback, affecting its trading  
25 from 2010. The Appellant had entered a creditors' voluntary agreement with one  
customer in respect of indebtedness in the region of £56,000. A payment of £0.47 in  
the pound was expected. In the event only £16,000 was recovered, leaving an  
outstanding and irrecoverable balance of about £40,000. Also the Appellant had  
lodged another claim for £40,000 against the estate of another customer which had  
30 gone into administration. Nothing has been received to date and there has been no  
indication of any prospect of payment.

4. Quite apart from these cash-flow difficulties affecting the Appellant company,  
Mr Litster explained how the death of his father early in 2013 had distracted him and  
the family from their normal activities. Mr Litster manages the business of the  
35 Appellant company (albeit with some help from his sister) and takes all major  
decisions.

5. Mr Litster explained how his father, who lived in Spain, suffered brain damage  
following on an accident in about October 2012. He required to be hospitalised.  
Mr Litster and his sister together with their step mother had to attend his father in  
40 hospital. Apparently the local hospital staff relied on family care being available.  
While Mr Litster could direct the business from abroad by emails, his absence  
complicated its general administration. He managed to repatriate his father by private  
air ambulance to Edinburgh in December 2012 at considerable cost. Unfortunately  
his father died in January 2013.

6. Mr Litster explained that he had faced a considerable struggle in funding wages for his staff. He did not criticise HMRC, but wished to have the opportunity to make a “fresh start”.

7. In view of this account Mrs McIntyre (correctly in the Tribunal’s view) withdrew the surcharge for 09/12. She did not have this detailed information earlier. In a limited cross-examination she confirmed that apart from period 03/11, for which the payment was late, both the Returns and payments were late in the remaining three cases. The cause was the Appellant company’s cash-flow problems which were attributable to late payments by its clients. It was established that the Appellant pays VAT in terms of the flat rate scheme and that on receipt of payments. (p11)

8. We found Mr Litster an entirely credible and genuine witness. We accepted without qualification his narrative of the events affecting the financial circumstances of his company during the relevant period all as set out in the preceding paragraphs. These accordingly form our **Findings in Fact**.

## 15 **The Law**

9. The issue raised is whether the Appellant has a *reasonable excuse* for the late payment for Period 03/11 and the late submission of Returns and payments for Periods 12/11, 03/12 and 06/12. These fall to be considered individually. *Reasonable excuse* is not defined exhaustively but an insufficiency of funds does not qualify: Section 71, VATA 1994. Reference may also be made to the decisions of the Upper Tribunal in *Total Technology (Engineering) Limited* [2012] UKUT 418 (TCC) and *Hok Ltd* [2012] UKUT 363 (TCC).

## **Submissions**

10. At the outset we heard generally from Mr Litster. After he concluded his evidence we invited Mrs McIntyre and, finally, Mr Litster to address us.

11. Mrs McIntyre referred to the four remaining Periods of default individually. She noted the involvement of HMRC’s debt management section in the Appellant’s tax affairs generally from the period 03/09 onwards with several earlier Surcharge Liability Notices issued. While difficulties had been occasioned by family deaths, HMRC had made due allowance for this by waiving surcharges referable to the particular times, including the surcharge for 09/12 waived in the course of the hearing. The problem faced by the Appellant company seemed to be an insufficiency of funds to meet all its pressing debts including VAT due. Apparently other debts had been met. That did not constitute a *reasonable excuse*. Mrs McIntyre noted the terms of Mr Litster’s letter of 18 April 2013 (p30-32) which addressed the Periods of default individually. The contents of that letter did not assist his stance, Mrs McIntyre submitted. The decisions in *Total Technology* and *Hok* did not assist the Appellant.

12. In his concluding remarks Mr Litster stressed the problems of his company in generating business. Staff in particular had to be paid promptly. Credit facilities from his bankers were somewhat restricted. He himself had had to work double-shifts, involving both physical work as a field engineer as well as duties of management and administration.

## Decision

13. We approved of Mrs McIntyre's decision to waive the surcharge for Period 09/12. As the evidence of Mr Litster's and his sister's care of their late father emerged, we accept that an exceptional difficulty arose in relation to the management  
5 of the business of the Appellant at that stage.

14. However, so far as the remaining Periods are concerned, we consider that the default surcharges should stand. For 03/11 payment only was late. The circumstances as disclosed in evidence and in correspondence, especially Mr Litster's letter of 18 April 2013 (p30-32), do not support a *reasonable excuse*. For 12/11,  
10 03/12 and 06/12 both the Returns and payments were late. Either eventuality would trigger a surcharge. Whatever cashflow difficulties the Appellant had, that would not excuse the late submission of the Return. We note that payments of VAT were made in terms of the flat rate scheme, and on the basis of cash receipts. Accordingly the company had sufficient funds to pay VAT due had it given that liability priority.  
15 There were, however, other pressing debts, in particular, employees' wages. Given the terms of Section 71 we do not consider that such cashflow difficulties constitute a *reasonable excuse*. We maintained that view notwithstanding the two major customer defaults which the business suffered.

15. While we have a degree of sympathy for Mr Litster, we consider that the  
20 arguments presented on behalf of HMRC are well-founded. Accordingly this appeal is refused and the four remaining surcharges are confirmed.

16. 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  
25 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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**KENNETH MURE QC  
TRIBUNAL JUDGE**

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**RELEASE DATE: 19 May 2014**