



TC03957

Appeal number: TC/2014/00513

VALUE ADDED TAX – default surcharge – late payment – complicated history leading to confusion for trader – no reasonable excuse for default – comments on format of HMRC letters, but conduct of HMRC not within jurisdiction of the Tribunal – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

EVOLVE PARTNERSHIP LTD

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE JOHN CLARK
MR DAVID BATTEN**

Sitting in public at Southampton on 7 August 2014

David Brierley for the Appellant

**Martin Priest, Officer of HM Revenue and Customs, Appeals and Reviews, for
the Respondents**

DECISION

- 5 1. Evolve Partnership appeals against a VAT default surcharge for the period 04/12.

The background facts

- 10 2. The evidence consisted of a bundle of documents. Mr Brierley gave information in the course of presenting the case for Evolve Partnership; where appropriate, we have treated such information as part of the evidence. From the evidence we find the following background facts.

- 15 3. Evolve Partnership's business depends on the UK economy remaining buoyant. For the period from 2010 to 2012 the severe economic conditions made trading conditions difficult, with corresponding financial difficulties for the business. At one point the accountants advising Evolve Partnership advised the shareholders to put it into administration. This advice was not accepted, as those involved with the company disagreed; administration would also have had implications for those with stakes in the business.

4. Over the period from 04/10 to 04/12 there were various defaults as a result of late payments of VAT. (We analyse below the history of defaults.)

- 20 5. On 16 March 2012 the Respondents ("HMRC") issued a surcharge for the period 01/12. The surcharge was at the rate of 15 per cent; the amount was £2,101.29.

- 25 6. Mr Brierley wrote to HMRC on 23 April 2012, commenting that the surcharge had been issued despite Evolve Partnership having entered into an agreement to settle all outstanding VAT liabilities by the end of April 2012; to date, Evolve Partnership had complied with that agreement.

7. On 28 May 2012 HMRC's Review Officer wrote to Mr Brierley to inform him that HMRC had agreed to cancel the default for the period 01/12.

8. On 15 June 2012 HMRC issued a surcharge for the period 04/12. The surcharge was at the rate of 15 per cent; the amount was £2,595.25.

- 30 9. Mr Brierley wrote to HMRC on 5 July 2012 to appeal against the latter surcharge, on the basis that all outstanding payments had been made. He accepted that the business was in default for a proportion of the VAT payment, but pointed out that every day customers of Evolve Partnership were in default on its terms and conditions because they did not pay within the agreed timescale.

- 35 10. On 20 August 2012 a Review Officer of HMRC responded. HMRC did not consider that there was a reasonable excuse for the default. Insufficiency of funds was specifically precluded from being a reasonable excuse. The only concession which HMRC were able to give was if a time to pay arrangement was made before the due

date. This did not appear to be the case in this instance. As a result, the default had to be maintained.

11. On 14 September 2012 HMRC issued a default surcharge notice for the period 07/12 in the sum of £389.28. Mr Brierley wrote to HMRC on 5 October 2012 requesting the withdrawal of this notice, on the grounds that the original surcharge notice for £2,595.25 was the subject of an appeal, for which the business had not received the decision until 20 August 2012. He accepted that the original surcharge was now due, and arrangements for payment would be made by the end of October 2012.

12. HMRC's Review Officer replied on 19 November 2012; HMRC agreed to cancel the default surcharge for the period 07/12.

13. A letter from Mr Brierley to HMRC dated 21 December 2012 refers to a letter from HMRC dated 19 December 2012. No copy of that letter from HMRC was included in the evidence. Mr Brierley's letter was as follows:

“Further to your letter dated 19th December please could you confirm that you have removed the Surcharge Liability Notice for the full amount of £2984.53.”

Mr Brierley wrote again to HMRC on 16 January 2013, enclosing a copy of that letter and stating that no response had been received.

14. On 29 January 2013 a Review Officer for HMRC replied to the 21 December letter. Part of the heading to the reply was “Default Surcharge Liability 10/12”. The officer stated:

“I refer to your letter of 21.12.12 in which you request review of the default surcharge issued to you for the above period.

Following my reconsideration of the Default, I have on this occasion withdrawn the notice.

Your surcharge period expiry date is 30.04.13 and remains in force for 4 VAT periods following your last default.

...”

15. On 27 February 2013 a Collector from HMRC's Liverpool office wrote to Mrs Brierley:

“I am writing with regards [*sic*] your telephone conversation with out [*sic*] contact centre on 25th February 2013 about the 04/12 default surcharge.

Our records show you appealed this default surcharge for 04/12 return but the appeal was rejected. The default surcharge for 04.12 therefore remains outstanding.

The default surcharges for 01/12, 07/12 and 10/12 have been withdrawn.

I enclose copies of the letters sent to you advising 04/12 surcharge appeal had been rejected and also enclose copies of the letters advising of the surcharges which have been removed.

...

5 16. Mr Brierley replied on 11 March 2013, commenting:

10 “On 21st December 2012 (copy attached) I wrote to your office in Southend on Sea requesting confirmation that the surcharge liability Notice for the amount of £2,984.53 had been removed. The response I received dated 29th January 2013 suggests that “following my **reconsideration** of the default, I have on this occasion withdrawn the notice”

Therefore, it is my understanding that there are no outstanding sums due to HMRC.”

17. On 14 March 2013 the HMRC Collector responded:

15 “I have enclosed the letter which advises the surcharges that have been cancelled. As you can see from that letter the surcharge for P4/12 has not been removed. Therefore this remains on file and shows current arrears of £2595.25 which needs immediate payment to avoid any further recovery action.”

20 18. Mr Brierley replied on 5 April 2013, disagreeing and re-emphasising the extract from the HMRC letter dated 21 December 2012; his understanding was that there was no further payment to be made.

25 19. Following a conversation with HMRC, Mr Brierley wrote to HMRC’s Appeals and Reviews office on 23 April 2013. He referred to the HMRC letter dated 29 January 2013 (see above), and to the history of the matter. He requested that HMRC should reconsider the position and uphold the appeal against all outstanding surcharges.

20. HMRC’s response dated 19 May 2013, from their Belfast Appeals and Review office, included the following paragraphs:

30 “I must advise you that I am unable to accept your letter as a ‘blanket appeal’. If HMRC are to review any surcharge, each period will be considered individually, as we need to establish the exact reason for each default and determine whether here is a reasonable excuse.

35 If you would like to request a review of any of the above defaults that has been levied against you, you will need to specify the periods and provide specific reasons and evidence if relevant to show why payments were not submitted in time for those periods.”

40 21. Mr Brierley replied on 4 July 2013; HMRC’s letter had been received on 18 June 2013. He explained that he was very confused by the contents of the letter; he had been arguing that his previous correspondence requested that the outstanding surcharge of £2,984.53 had been removed, and that HMRC’s response dated 29 January 2013 stated that it would be, and yet the business continued to receive

reminders. He asked again for HMRC's confirmation that the outstanding surcharge had been withdrawn.

22. On 3 September 2013 HMRC's Local Compliance Appeals and Reviews Glasgow office replied, referring to the default surcharge liabilities for 04/12 (£2,595.25) and 04/13 (£398.28).

23. In respect of 04/12, the Review Officer explained that an internal review had been conducted on receipt of Mr Brierley's letter received on 10 July 2012. The outcome was to uphold the Surcharge Liability Notice Extension and surcharge assessment for the 04/12 VAT period. HMRC had informed him of this in the review conclusion letter dated 20 August 2012. Now that the review had been completed, the business had the right to appeal to Her Majesty's Courts and Tribunals Service ("HMC&TS") against the decision.

24. In respect of period 04/13, the Review Officer explained that surcharge notices for £389.28 had been issued to Evolve Partnership for the periods 07/12, 10/12, 01/13 and 04/13, as part of its payment for these periods had been allocated against the outstanding surcharge notice of £2,595.25. As the returns and payments for the periods 07/12, 10/12 and 01/13 were received on time, HMRC had removed these notices. Again, as the return and payment for the period 04/13 were received on time, HMRC had cancelled the default notice for the 04/13 period; the Review Officer was sending instructions for this Surcharge Liability Notice to be removed. The business was no longer in the surcharge regime.

25. On 24 September 2013 Mrs Brierley wrote to HMRC. She explained that the business had received a VAT Surcharge Liability Notice for 07/13, but that the payment had been made on 5 September 2013 by telephone banking; the bank had informed her that this would normally be received the same day, but certainly no later than the next day, which would have been within the time allowed. On 23 December 2013 she wrote a similar letter to HMRC in respect of period 10/13; the payment had been made by telephone banking on 6 November 2013, and so would have reached HMRC by 7 November, the due date. No information as to HMRC's responses was included in the evidence.

26. On 22 January 2014 Evolve Partnership gave Notice of Appeal to HMC&TS. The appeal was allocated to the Standard category. As the Notice included an application for permission to appeal out of time, HMC&TS notified HMRC that if they objected to the application, they had to inform HMC&TS with reasons as soon as practicable, and in any event no later than when serving their Statement of Case; if they did not object, the Tribunal would consider that HMRC had consented.

27. On 28 February 2014 a Review Officer of HMRC wrote to Evolve Partnership. Following a review of the appeal prior to the hearing, the Review Officer had decided to cancel the default surcharge for the period 04/10, as the business had requested a Time to Pay arrangement before the due date. As a result, the default surcharges for the subsequent periods had been reduced, as shown on the revised Schedule of Defaults. The default surcharge of £2,595.25 for the period 04/12, the period subject

to the Notice of Appeal, had been reduced to £1,730.17, the rate being 10 per cent. The Surcharge Liability Notice Extension period had ended on 30 April 2013, and the business was no longer in the default surcharge regime.

Arguments for Evolve Partnership

5 28. Mr Brierley accepted that payment for the 04/12 period had been made late. He was aware that insufficiency of funds did not amount to a reasonable excuse. The previous appeals made by the business had been upheld, as for example in HMRC's letter dated 28 May 2012.

10 29. During 2011 the business had fallen behind with its VAT payments. There had been a shortfall; the figure had not been agreed. As mentioned in his letter to HMRC dated 29 February 2012, a sum in excess of £21,000 had been paid; this was the sum which the business had recorded as being outstanding. HMRC had informed him in a letter that the business was unable to apply for Time to Pay for the period. HMRC's letter dated 20 August 2012 had been inconsistent in referring to the possibility of
15 entering into a Time to Pay arrangement.

30. He argued that HMRC had been inconsistent in their approach; he referred to periods 07/11, 01/12 and 04/12.

20 31. He commented on the format of HMRC's letters. Some referred to the VAT period in question, whereas others referred to the amount of the surcharge; this was confusing. The amount of £2,984.53 mentioned in his letter dated 21 December 2012 in response to HMRC's letter dated 19 December 2012) included a surcharge on a surcharge. HMRC's reply dated 29 January 2013 reverted to a reference to a VAT period. The letter stated that the notice had been withdrawn; the question which he had asked had been whether the notice for the full amount of £2,984.53 had been
25 withdrawn.

32. HMRC had appeared to acquiesce, as they had reduced the penalty; this was the impression given to the business.

30 33. The appeal was based on the inconsistency in HMRC's treatment of Evolve Partnership. Mr Brierley emphasised that since the periods under consideration, the business had complied with the regulations. He submitted that it was not unreasonable for the Tribunal to allow the appeal.

Arguments for HMRC

35 34. Mr Priest submitted that much of what Mr Brierley had said related to matters of complaint against HMRC and did not affect the liability of Evolve Partnership to the surcharge.

35. Mr Priest summarised the relevant statutory provisions. The relevant questions were the following. Was the business in default? If not, the appeal should be allowed. If it was in default, the next question was whether payment had been despatched in

time and manner such that it was reasonable to expect it to arrive on time. If the latter test could not be satisfied, the next question was whether the business had a reasonable excuse for the default.

5 36. He referred to the Upper Tribunal's decision in *Revenue and Customs Commissioners v Total Technology (Engineering) Ltd* [2012] UKUT 418 (TCC) on the question of proportionality. On the question of mitigation, he emphasised that this was not available either to the Tribunal or to HMRC; surcharges must be upheld in full or discharged in full.

10 37. He reviewed in detail the history of the defaults, the surcharges imposed and amendments made to the surcharges; we cover this below.

38. In the correspondence HMRC had not found any reasonable excuse for late payment, other than the references to cash flow problems. Evolve Partnership had not shown any basis for reasonable excuse within the guidance in *Customs and Excise Commissioners v Steptoe* [1992] STC 757 (CA).

15 39. In relation to proportionality, taking into account *Total Technology*, there was no reason to say on the particular facts of Evolve Partnership's case that the surcharge under appeal was disproportionate.

40. Given the lack of reasonable excuse, and the fact that the surcharge was proportionate, HMRC invited the tribunal to dismiss the appeal.

20 *Discussion and conclusions*

41. On the preliminary point concerning the application for permission to appeal out of time, no objection was recorded as having been raised by HMRC, and as indicated by HMC&TS, we consider that HMRC have consented to the late appeal.

25 42. In response to our questions, Mr Brierley confirmed that payments from the clients of the business were based on invoicing. This was always 18 days behind. Although a factoring agreement had subsequently been entered into, this had not been in place for the period 04/12. The business had a wide range of customers, with a lot of quite small ones; it was harder to collect outstanding amounts from these smaller customers.

30 43. We and Mr Brierley found Mr Priest's analysis of the history of the defaults very helpful. We attempt to summarise it in the following paragraphs.

35 44. The default in period 04/10 resulted in HMRC issuing a Surcharge Liability Notice ("SLN"); no surcharge was payable. When the appeal had been lodged with HMC&TS, HMRC had followed their standard practice of looking again at the surcharges; the reason for that practice was that it could turn out that a surcharge was not due. This further check had shown that a Time to Pay agreement had been agreed in relation to 04/10. Mr Priest produced a list of phone calls between Evolve Partnership and HMRC; this had not been included in the bundle. An entry in this list

recorded the agreement for 04/10. We agree with HMRC's conclusion that this affects the later surcharges; the SLN was withdrawn.

45. As Time to Pay agreements were made for periods 07/10 and 10/10, the next period to consider is 01/11. The default for this period had previously been shown as producing a 2 per cent surcharge liability; as the amount of the surcharge was less than £400, the minimum amount for which HMRC issue surcharges where lower percentage rates apply, no amount had been due. The result of withdrawing the SLN for 04/10 was that the applicable percentage for 01/11 became 0 per cent, and 01/11 became an SLN period. The VAT for period 01/11 was paid in five separate instalments, the first on 6 July 2011. We accept that no Time to Pay agreement was entered into in respect of 01/11; there is no record in the list provided by Mr Priest of any phone call relating to that period.

46. The VAT due for period 04/11 was due by 7 June 2011, but was paid by two instalments on 28 September and 28 October. Again, there is no record of any Time to Pay agreement in respect of that period. Mr Brierley produced to us a copy of a letter dated 17 May 2011 to Evolve Partnership from HMRC's Debt Management Unit; this stated:

“This letter is to give you notice that we expect you to pay on time and in full any future liabilities becoming due.”

Mr Brierley told us that he interpreted this letter as stating that no future Time to Pay agreements would be permitted. We accept that this led him not to seek any further agreement with HMRC, but we note from the HMRC phone summary list provided by Mr Priest that the following annotation was made on 18 May 2011;

“(Note: future TTP should only be agreed in exceptional circumstances – this must be agreed with your Front Line Manager.)”

47. The rate of surcharge for period 04/11 was originally 5 per cent; as a result of the removal of the SLN for 04/10, the rate became 2 per cent. As for both rates the amount of the surcharge was less than £400, no surcharge amount was payable as a result of the default in 04/11.

48. The VAT due for period 07/11 was due by 7 September 2011. It was paid in six instalments, the first on 28 October 2011 and the last on 30 April 2012. A Time to Pay agreement was requested on 9 September 2011. This was agreed by HMRC, but as Mr Priest indicated, the agreement could not affect the liability to surcharge, because the request was not made before the due date. The rate of surcharge was originally 10 per cent, but this was reduced to 5 per cent as a result of the removal of the SLN for period 04/10.

49. A default was recorded as having occurred for period 01/12, the rate of surcharge being 15 per cent. However, after Evolve Partnership had given Notice of Appeal to HMC&TS, HMRC had looked at this again and established that a Time to Pay agreement had been entered into in respect of that period. Mr Brierley had telephoned HMRC on 21 February 2012, which was before the due date for the return. Mr Priest commented that as Mr Brierley had phoned and pleaded his case, HMRC

had allowed a Time to Pay agreement for that period. As a result of the matter being reconsidered, the surcharge for 01/12 had been removed, as indicated in the Schedule of Defaults enclosed with HMRC's letter dated 28 February 2014. Mr Brierley commented in his reply that the correspondence had not made clear that the appeal
5 against the surcharge for 01/12 had been allowed due to the Time to Pay agreement.

50. The VAT for period 04/12, the period to which this appeal relates, was due by 7 June 2012. The tax was paid in three instalments, on 11, 21 and 26 June 2012. No Time to Pay agreement was entered into for that period; Mr Brierley stated at the hearing that this was because of the letter from HMRC dated 17 May 2011 indicating
10 that liabilities had to be paid in full.

51. The rate of surcharge originally applicable for period 04/12 was 15 per cent. As a result of the further consideration of the matter by HMRC following the Notice of Appeal, this was adjusted down to 10 per cent. The original amount of the surcharge was £2,595.25; the reduced amount was £1,730.17.

15 52. We agree with and accept Mr Priest's analysis of the history of Evolve Partnership's VAT and default surcharge liabilities. We also agree with his submissions as to the effects of Time to Pay agreements on liabilities to default surcharge. Under s 108 Finance Act 2009, a default surcharge is to be removed where
20 a Time to Pay agreement is entered into, provided that the agreement is reached before the due date for the VAT, and provided also that the trader complies with the terms of the agreement.

53. The history of the default surcharge liabilities has been somewhat complicated; this has not been helped by the varying ways in which matters have been referred to by HMRC in the correspondence, on which we comment further below.

25 54. The matter directly under appeal is the default surcharge liability for period 04/12, the amount of the surcharge now being £1,730.17. We are satisfied that the VAT for that period was paid late; Mr Brierley did not seek to argue that this was not the case. It is clear that no Time to Pay agreement was in force for that period. Although the reason for the delayed payment of the VAT was the cash flow
30 difficulties which the business was experiencing, s 71(1) Value Added Tax Act 1994 makes clear that insufficiency of funds to pay VAT is not a reasonable excuse. On the basis of Mr Brierley's replies to our questions, we agree with Mr Priest's submission that there is no basis for reasonable excuse within the guidance given by the Court of Appeal in *Stepto*. We do not consider the amount of the surcharge to be
35 disproportionate.

55. As a result, and as we announced at the hearing, we have no alternative but to dismiss the appeal.

56. However, we have some concerns about the way in which the matter has been dealt with by HMRC in the correspondence. It was for this reason that we decided that
40 we would issue a full reasoned decision in this case, rather than producing a summary decision as is often done for default surcharge appeals.

57. We agree with Mr Priest that much of the content of Mr Brierley’s submissions related to matters of complaint against HMRC and did not affect the liability of Evolve Partnership to the surcharge. We commented at the hearing that matters relating to the conduct of HRMC are not within the jurisdiction of the Tribunal.
- 5 However, various points made by Mr Brierley in the course of the correspondence and at the hearing raise more general questions as to the way in which HMRC deal with default surcharge matters in correspondence, particularly where there is a continuing history of defaults. We make the following suggestions in the hope that confusions such as those which have occurred in the present case may be avoided in future cases.
- 10 58. HMRC stated in their letter dated 19 May 2013 (paragraph [20] above) that they were unable to accept Mr Brierley’s letter as a ‘blanket appeal’, because each period had to be considered individually. There is a stark contrast between the position taken in that letter and the format of various other HMRC letters sent to Evolve Partnership over the period covered by the evidence in this appeal. In order for a trader to be able
- 15 to make sense of correspondence from HMRC, we regard it as essential for HMRC to deal with the VAT and default surcharge position for each VAT period separately. For that reason, we would recommend that the heading of each letter should specify the VAT period to which it relates, rather than referring to the amount of a surcharge. Further, reference to composite amounts due in respect of more than one period is
- 20 likely to be confusing to traders; for this reason, the amounts need to be split and stated separately by reference to the periods to which they relate. Where it is necessary to deal with a number of periods in one letter, we suggest that these should be referred to under separate sub-headings specifying the respective VAT periods concerned.
- 25 59. Mr Brierley’s case was largely based on the apparent inconsistencies of treatment shown by HMRC in the correspondence. The detailed review by Mr Priest of the history showed that those apparent inconsistencies were explained by the provision of more detailed explanation and analysis. We commented to Mr Brierley at the hearing that if the correspondence had set out the details more clearly, the matter
- 30 might well not have had to result in a hearing. It was unfortunate that the full explanation was not given until that stage. We hope that HMRC will consider our comments and suggestions with a view to reducing confusion in the minds of traders, and perhaps also reducing the number of disputes taken to appeal.

Right to apply for permission to appeal

- 35 60. 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
- 40 “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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**JOHN CLARK
TRIBUNAL JUDGE**

RELEASE DATE: 22 August 2014

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