



TC04074

Appeal number: TC/2012/05876

Value added tax – default surcharge – reasonable excuse – time to pay agreements – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

JASON MICHAEL LEDGER

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE MALACHY CORNWELL-KELLY
MR MICHAEL SHARP FCA**

**Sitting in public at Ashford House, County Shopping Centre, Ashford
on 22 May and 8 October 2014**

Mr John Whiting of Philip Gambril & Co Ltd for the taxpayer

Ms Rita Pavely of HM Revenue and Customs for the Crown

DECISION

Introduction

1 This appeal concerns a default surcharges for the periods 11/08, 02/09, 05/09,
5 08/09, 11/09, 02/10, 05/10 and 08/10. The total charged is £8,399.13.

Facts

2 Mr Ledger trades under the style of Lewis Carpets. The business began in Ramsgate
in 1992 or 1993 as a partnership between Mr Jason Ledger and his father Colin; Jason
managed the shop side of the business, while Colin concentrated on administration
10 and finance, and the business expanded into Canterbury. Cashflow was good and
there was no overdraft facility needed. On 11 August 2007 Mr Colin Ledger died and
Jason's brother Graham Ledger was appointed executor.

3 Mr Jason Ledger had two brothers and two sisters, and there were thus in all five
beneficiaries entitled to the estate. There followed an unhappy dispute between the
15 two brothers, Mr Graham Ledger acting for himself and the other beneficiaries, as to
how much the business was in debt to the estate of the late Colin Ledger; it took a full
four years to resolve and in July 2011 it was finally settled by arbitration. The estate
had originally claimed some £100,000 from the business and was awarded £80,000 in
the result.

20 4 On 8 April 2010, a time to pay agreement was made between the appellant and the
Revenue pursuant to section 108(2) of the Finance Act 2009. Regrettably, neither the
appellant nor the Revenue, despite five months' adjournment of the appeal, can
produce the agreement itself and all we have seen is a template used by the Revenue
on which such agreements are based.

25 5 Ms Pavely assured us that it is was, and is, the Revenue's policy that such an
agreement can only be made before a payment of tax becomes due, in order to provide
for its payment by instalments instead of at once; a time to pay agreement, which is in
the discretion of the Revenue in the first place, is said not to be available at all in
30 respect of tax payments which have become due and have been missed. Published
official material with the papers confirmed this position.

6 Surprisingly against this background, a letter dated 23 April 2012 to Mr Ledger
from the Revenue, confirming that the surcharges would remain in force, states:

I note from our records that a Time to Pay agreement was set up on 8 April 2010
for the debt on file at the time. The Time to Pay agreement has been dealt with
35 under the non-qualifying agreement criteria, which resulted in a financial
surcharges being applied. As the return for the period 02/10 had not been received
at the time of the request it was not included in the agreement. The Time to Pay
arranged did not automatically extended to cover subsequent returns. Time to pay
for any further VAT returns should have been requested and agreed separately.

40 7 This letter does not refer to a letter dated 16 April 2010 which Mr Jason Ledger had
written two years before and which slightly post-dates the time to pay agreement. The
letter begins by recalling Mr Colin Ledger's death in August 2007 and continues:

I found myself struggling to come to terms with my father's passing away and taking control of the affairs of the business, I have also had to take family matters in hand. I now feel I am getting back on track and after a few difficult years there does indeed seem to be a light at the end of the tunnel.

5 We have been paying our VAT a quarter behind every period and in doing so have accrued a number of surcharges. My partner Laura Pierce has been in constant contact with staff at your office and they have suggested that we submit an appeal letter which we did do approximately one year ago when the surcharges were around £345. As we had no correspondence in reply to our appeal letter we carried
10 on trading and paying our VAT a quarter behind thinking we were not accruing any further surcharges until recently.

We have written several letters over the last month or so asking what action we should take about monies owed and have made several phonecalls. We were asked to contact Andrew Copeland but no success and were unable to leave messages on
15 his answering machine. A recent phonecall with Miss Wild at debt management pointed us in the direction to write this letter hoping you will appreciate that we have not buried our heads in the sand as they say but have made every effort to resolve this issue.

8 The reference to surcharges "one year ago" amounting to £345 is difficult to tie
20 down. A year before Mr Ledger's letter was written would be around April 2009, at which point no financial penalty had been incurred, albeit that Mr Ledger had entered the surcharge regime with two defaults on 31 December 2008 and 31 March 2009. The first default to incur a financial penalty was on 30 June 2009, which resulted in a surcharge of £475.01. Nevertheless, it is clear that Mr Ledger had attempted some
25 time before April 2010 to reach some sort of arrangement with the Revenue and had apparently been ignored.

9 This appears to be confirmed by a Revenue log of a telephone call from Ms Pierce on 1 April 2010 which records "Caller advised they wanted to know what was happening with appeals" and Ms Pierce was recommended to speak to Mr Andrew Copeland. A further log on 8 April 2010 records that "Caller wanted to discuss time
30 to pay/their overdue VAT. Transferred through to debt management unit."

10 At the resumed hearing, Ms Pavely produced further evidence drawn from Revenue records which showed that on 8 April 2010 a time to pay agreement was made for £5,637.01. The agreement was not kept to, and by 24 August 2010 the
35 Revenue were recording that Mr Ledger was again in default. The entry is terse, and uses several acronyms (whose meaning is in square brackets):

TTP [time to pay] allowed by DMTC [debt management] on 08/04/10, just before the 02/10 TA [automated assessment] and DS [default surcharge] went on file and did not set up on DMA [debt management accounting] or capture their letter to EF
40 [electronic folder]. TTP is in default as 2 returns OS [outstanding] and action to bring them up to date has not been met, cannot set up TTP easily for the remaining instalments due to the extra debt.

11 By 8 April 2010, the total of the surcharges assessed had reached £2,637.01, but
whether that figure was included in the £5,637.01 for which the time to pay agreement
had been made we do not know – though it is clear from the default schedule that the
tax of £11,924.30 due for 02/10 was not paid until August that year, so the time to pay
5 agreement must have included non-surcharge arrears.

Legislation

12 The Value Added Tax Act 1994 provides:-

59 The default surcharge

10 (1) Subject to subsection (1A) below if, by the last day on which a taxable
person is required in accordance with regulations under this Act to furnish a
return for a prescribed accounting period—

(a) the Commissioners have not received that return, or

15 (b) the Commissioners have received that return but have not received the
amount of VAT shown on the return as payable by him in respect of that
period,

then that person shall be regarded for the purposes of this section as being in
default in respect of that period.

20 (1A) A person shall not be regarded for the purposes of this section as being
in default in respect of any prescribed accounting period if that period is one
in respect of which he is required by virtue of any order under section 28 to
make any payment on account of VAT.

(2) Subject to subsections (9) and (10) below, subsection (4) below applies
in any case where—

25 (a) a taxable person is in default in respect of a prescribed accounting period;
and

30 (b) the Commissioners serve notice on the taxable person (a “surcharge
liability notice”) specifying as a surcharge period for the purposes of this
section a period ending on the first anniversary of the last day of the period
referred to in paragraph (a) above and beginning, subject to subsection (3)
below, on the date of the notice.

35 (3) If a surcharge liability notice is served by reason of a default in respect of
a prescribed accounting period and that period ends at or before the expiry of
an existing surcharge period already notified to the taxable person
concerned, the surcharge period specified in that notice shall be expressed as
a continuation of the existing surcharge period and, accordingly, for the
purposes of this section, that existing period and its extension shall be
regarded as a single surcharge period.

(4) Subject to subsections (7) to (10) below, if a taxable person on whom a
surcharge liability notice has been served—

40 (a) is in default in respect of a prescribed accounting period ending within
the surcharge period specified in (or extended by) that notice, and

(b) has outstanding VAT for that prescribed accounting period,

45 he shall be liable to a surcharge equal to whichever is the greater of the
following, namely, the specified percentage of his outstanding VAT for that
prescribed accounting period and £30.

50 (5) Subject to subsections (7) to (10) below, the specified percentage
referred to in subsection (4) above shall be determined in relation to a
prescribed accounting period by reference to the number of such periods in
respect of which the taxable person is in default during the surcharge period
and for which he has outstanding VAT, so that—

(a) in relation to the first such prescribed accounting period, the specified percentage is 2 per cent;

(b) in relation to the second such period, the specified percentage is 5 per cent;

5 (c) in relation to the third such period, the specified percentage is 10 per cent; and

(d) in relation to each such period after the third, the specified percentage is 15 per cent.

(6) For the purposes of subsections (4) and (5) above a person has outstanding VAT for a prescribed accounting period if some or all of the VAT for which he is liable in respect of that period has not been paid by the last day on which he is required (as mentioned in subsection (1) above) to make a return for that period; and the reference in subsection (4) above to a person's outstanding VAT for a prescribed accounting period is to so much of the VAT for which he is so liable as has not been paid by that day.

10 (7) If a person who, apart from this subsection, would be liable to a surcharge under subsection (4) above satisfies the Commissioners or, on appeal, a tribunal that, in the case of a default which is material to the surcharge—

15 (a) the return or, as the case may be, the VAT shown on the return was despatched at such a time and in such a manner that it was reasonable to expect that it would be received by the Commissioners within the appropriate time limit, or

20 (b) there is a reasonable excuse for the return or VAT not having been so despatched,

25 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).

30 (8) For the purposes of subsection (7) above, a default is material to a surcharge if—

(a) it is the default which, by virtue of subsection (4) above, gives rise to the surcharge; or

35 (b) it is a default which was taken into account in the service of the surcharge liability notice upon which the surcharge depends and the person concerned has not previously been liable to a surcharge in respect of a prescribed accounting period ending within the surcharge period specified in or extended by that notice.

40 (9) In any case where—

(a) the conduct by virtue of which a person is in default in respect of a prescribed accounting period is also conduct falling within section 69(1), and

(b) by reason of that conduct, the person concerned is assessed to a penalty under that section,

45 the default shall be left out of account for the purposes of subsections (2) to (5) above.

(10) If the Commissioners, after consultation with the Treasury, so direct, a default in respect of a prescribed accounting period specified in the direction shall be left out of account for the purposes of subsections (2) to (5) above.

50 (11) For the purposes of this section references to a thing's being done by any day include references to its being done on that day.

71 *Construction of sections 59 to 70*

(1) For the purpose of any provision of sections 59 to 70 which refers to a reasonable excuse for any conduct—

- 5 (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.

10 (2) In relation to a prescribed accounting period, any reference in sections 59 to 69 to credit for input tax includes a reference to any sum which, in a return for that period, is claimed as a deduction from VAT due.

13 Section 108 of the Finance Act 2009 provides for time to pay agreements:

15 *Suspension of penalties during currency of agreement for deferred payment*

108(1) This section applies if—

- (a) a person (“P”) fails to pay an amount of tax falling within the Table in subsection (5) when it becomes due and payable,
20 (b) P makes a request to an officer of Revenue and Customs that payment of the amount of tax be deferred, and
(c) an officer of Revenue and Customs agrees that payment of that amount may be deferred for a period (“the deferral period”).

(2) P is not liable to a penalty for failing to pay the amount mentioned in subsection (1) if—

- 25 (a) the penalty falls within the Table, and
(b) P would (apart from this subsection) become liable to it between the date on which P makes the request and the end of the deferral period.

(3) But if—

- 30 (a) P breaks the agreement (see subsection (4)), and
(b) an officer of Revenue and Customs serves on P a notice specifying any penalty to which P would become liable apart from subsection (2),
P becomes liable, at the date of the notice, to that penalty.

(4) P breaks an agreement if—

- 35 (a) P fails to pay the amount of tax in question when the deferral period ends, or
(b) the deferral is subject to P complying with a condition (including a condition that part of the amount be paid during the deferral period) and P fails to comply with it.

40 (5) The taxes and penalties referred to in subsections (1) and (2) [include]—
Value added tax – surcharges under section 59(4) and 59A(4) of VATA 1994

(6) If the agreement mentioned in subsection (1)(c) is varied at any time by a further agreement between P and an officer of Revenue and Customs, this section applies from that time to the agreement as varied.

45 (11) This section has effect where the agreement mentioned in subsection (1)(c) is made on or after 24 November 2008.

Submissions and conclusions

14 Mr Whiting submitted that this was a case covered by the decision of the Court of Appeal in *CEC v Steptoe* [1992] STC 757 that an underlying cause of an inability to pay may be admitted as a reasonable excuse, notwithstanding the prohibition in section 71. Clearly, the stress of a family dispute about Mr Colin Ledger's inheritance, involving as it did legal proceedings and arbitration, played a part in generating the defaults. It is notable however that the chain of defaults begins in early 2010, well after Mr Colin Ledger's death, and that whatever impact that sad event had had on matters must by then have ceased. Moreover, there is no evidence that the family dispute had a financial impact upon the business at this stage, and any other impact that it may have had is a matter for speculation.

15 Next, Mr Whiting cited the tribunal's decision in *Copperfield Restaurant v RCC* [2012] UKFTT 286 in which the appellant had a time to pay agreement with the Revenue and believed it to be open ended timewise, so that it remained in force suspending the surcharge regime until it should be terminated. As here, there was no evidence of exactly what the agreement provided and there was, unlike in this case, no evidence of the agreement not being complied with.

16 For the Revenue, Ms Pavely drew our attention to the decision of the tribunal in *Olive Business Solutions Limited v RCC* [2013] UKFTT 569 in which all concerned accepted, without discussion, that time to pay agreements under section 108 must be made with respect to tax debts that have not yet been incurred, rather than for existing ones. We do not demure from that decision and, as we have noted, it cannot be established whether or not the time to pay agreement in the present case involved existing surcharge debts. But according to the Revenue's own records it certainly involved existing tax debts of some kind, and its conclusion appears therefore to be at odds with the orthodox view Ms Pavely pressed upon us.

17 At all events, this is not a case in which it can be claimed that the time to pay agreement had the effect of suspending any of the surcharges relevant, because it was not in the event adhered to. Attention must therefore turn to the appellant's claim, which has not been challenged or contradicted by the Revenue, that he had sought as he says to "appeal" about a year before April 2010 and that nothing had emerged by way of response.

18 There is no record of the "appeal", but when it was dealt with in April 2010 it was treated as a request for a time to pay agreement, and it is reasonable therefore to infer that that is what it was when it was made. The default schedule shows that on 17 July 2009 a surcharge of £427.45 was assessed (later amended to £475.01), which may or may not be what Mr Ledger was referring to in his letter of 16 April 2010; but it was of approximately the same amount and it was the first financially effective bite of the surcharge regime. The probability is therefore that that was indeed the point at which Mr Ledger tried to take control of the situation and requested a time to pay agreement.

19 The agreement apparently concluded on 8 April 2010 has every sign of being a hasty attempt to make good an oversight in dealing with Mr Ledger’s earlier “appeal”, and we conclude that the probability is that had matters been dealt with timeously a time to pay agreement suspending the surcharge regime would have been made when it was requested. But however the matter is viewed, and we express sympathy with the taxpayer in this case, we cannot see a causal connection between the Revenue’s failure to act on Mr Ledger’s “appeal” and the defaults which actually occurred thereafter.

20 Regrettably, therefore, the appeal before us must fail. The case however throws up matters of concern as to how it has been handled by the Revenue and Mr Ledger may wish to take advice on whether he should seek a review of it by the Revenue Adjudicator.

Further appeal rights

21 This document contains the 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 no 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.

MALACHY CORNWELL-KELLY
TRIBUNAL JUDGE

RELEASE DATE: 15 October 2014