



TC04102

Appeal number: TC/2014/01682

*VAT – default surcharge – late payments – whether reasonable excuse – No
– Sections 59 & 71 VATA 1994 – Appeal dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

LINNPIN LTD

Appellant

- and -

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

**TRIBUNAL: JUDGE KENNETH MURE, QC
MR IAN MALCOLM BSc, BA, JP**

Sitting in public at Eagle Buildings, Glasgow on Monday 13 October 2014

Mr S McDonald, Director of Appellant company, for the Appellant

Mrs E McIntyre, Officer of HMRC, for the Respondents

DECISION

1. This appeal relates to two default surcharges incurred as a result of late payment
5 of VAT, viz £7,070 for the period 07/13 and £3,436.05 for the period 10/13.

2. Helpfully Mrs McIntyre set out the stance of HMRC at the outset. She referred
us to the Schedule of Defaults and Payment Schedule at p20-22 of the Bundle. There
had been a first default in the period 07/12 and hence the Appellant company came
within the default regime. There were three further defaults in the next three quarters.
10 While the Returns were in time, payments of VAT were not, and accordingly liability
to surcharges was incurred.

3. In 07/13, the first period which is the subject of appeal, payment of the balance
of VAT due, £47,133.39 was not made until 10 October 2013, and a 15% surcharge
resulted given that this was the fifth default. This amounted to £7,070.

15 4. In 10/13, the other period included in the appeal, payment of the balance of
VAT due, £22,907, was not made until 9 December 2013, when an instalment of
£15,000 was paid, and 6 January 2014 when the remaining amount outstanding of
£7,907 was paid. Again a 15% surcharge was incurred, which amounted to
£3,436.05.

20 5. Mrs McIntyre explained that no approach had been made by the Appellant
company for a “time to pay” arrangement in terms of Section 108 FA 2009. This was
“cash” business, with the VAT due being received immediately at the point of sale, as
contrasted with a business in which payment of the tax followed (perhaps appreciably
later) the issuing of an invoice. In correspondence on behalf of the Appellant it
25 seemed to be suggested that payment of suppliers had been given priority. That,
Mrs McIntyre considered, was not best practice.

6. The correspondence did not disclose a “reasonable excuse” in the context of
Section 71 VATA, she submitted. In this context she noted the decisions of the Upper
Tribunal in *Hok* [2012] UKUT 363 (TCC) and *Total Technology Engineering Limited*
30 [2012] UKUT 418 (TCC). Penalties are not disproportionate, she submitted, and for a
reasonable excuse something exceptional, and which could not reasonably have been
anticipated, was required.

7. Accordingly Mrs McIntyre invited us to dismiss the appeal.

8. On behalf of the Appellant company Mr McDonald, its Director, urged us to
35 consider the particular financial and trading factors affecting his company’s business
and the public house and restaurant sector generally. He did not dispute the amounts
and dates set out in the Schedule of Defaults.

9. Mr McDonald explained that his company owns two public houses/restaurants.
It has received a number of awards for its catering standards. It has faced financial
40 difficulties, however, which arose from the general recession affecting the UK, and
certain adverse local factors additionally. Mr McDonald explained that over recent
years the number of public houses trading in Scotland had reduced substantially.
Sales of beer had declined too. Also, while purchases of drink in public houses had
diminished, sales in supermarkets had increased. Similarly businesses in close

proximity had closed, but the Appellant company had not acquired extra customer sales as a result.

10. Mr McDonald acknowledged that his business has faced cash-flow problems. He had to pay suppliers to keep his premises stocked. He has wages of 25 full-time and additional part-time employees to pay. He himself works for extended hours, and he has made considerable efforts in providing entertainment in his premises. He explained that he now focusses on providing food and catering for families.

11. For these reasons, Mr McDonald asked us to allow the appeal. (We observe that Mr McDonald's evidence of fact was not disputed, and we accept his account as entirely credible.)

12. We consider that Mrs McIntyre's stance is well-founded. HMRC's calculations and particularly the details in the Schedule of Defaults are not challenged. The circumstances which pertain do not disclose any exceptional factor which might give rise to a *reasonable excuse* in the context of the relevant legislation. Section 71(1)(a), we note, specifically excludes an insufficiency of funds as being a *reasonable excuse* for late payment. We accept that at the material time Mr McDonald faced serious trading difficulties and cash-flow problems. However, his business is a "cash" one. The VAT due is collected immediately on sale and should be allocated in respect of the company's liabilities to HMRC. The decisions in *Hok* and *Total Technology* offer no assistance to the Appellant company in our view.

13. For these reasons we consider that the appeal must fail, and we confirm the penalties.

14. We noted – and welcomed – the suggestion by Mrs McIntyre that Mr McDonald even at this stage should explore with HMRC a possible financial solution to the company's present financial problems. We have considerable sympathy for Mr McDonald. The impression which we have is that he is making sterling efforts to maintain the company's two businesses and act as a caring and responsible local employer. It is thus with some sympathy that we feel compelled to issue this decision.

15. 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.

KENNETH MURE, QC
TRIBUNAL JUDGE

RELEASE DATE: 31 October 2014