



TC04198

Appeal number: TC/2014/03217

*VAT – default surcharge-problems with cash flow - no reasonable excuse –
appeal dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

PERMATT FORK LIFT TRUCKS LTD

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE BARBARA KING
MS ELIZABETH POLLARD**

Sitting in public at North Shields on 5 December 2014

The Appellant did not attend

Adrian Boal of HM Revenue and Customs, for the Respondents

DECISION

The issue

- 5 1. The original appeal by the appellant company (“Permatt”) had been against a surcharge of £6,637.26 levied at 15% for the period 01/14 as the amount of VAT due on 7 March 2014 was £44,248.45. A payment of £5,000 was received by HMRC on 7 March 2014 but only £490.87 of this was required to complete the payment due for the period 07/13. The remaining £4509.13 was allocated to the period 01/14 leaving
10 £39,739.32 still due. As a result HMRC have reduced the surcharge to £5,960.89.
2. Tribunal proceeded in the absence of the appellant. See paragraph 12 below.

The evidence

- 15 3. A schedule had been prepared by HMRC showing all occasions when the VAT has been paid late, over the period from 10/12 through to 01/14. Once an appellant is in a default regime any subsequent defaults within a specified period result in assessment to default surcharges at different percentage rates. By 01/14 Permatt was subject to a surcharge at the highest percentage -15%.
4. In their Notice of Appeal dated 6 June 2014 the Appellants stated as follows:-

20 “We felt that any appeal would be unsuccessful but after reviewing finances further, we felt the appeal was necessary”

25 The default surcharge applied is a vast amount of money to a business of this size. I understand that penalties should apply for late payment but the amount applied is unreasonable to a company that is already suffering cash flow problems. If you are unable to quash the surcharge in full, would it be possible to reduce it, this would help us afford to pay the outstanding bill in full and hopefully enable payment for the next quarter in full when due.”

- 30 5. The Tribunal took into account the notice of appeal and the earlier letters from Permatt, dated 21 March 2014 and 23 May 2014. These contained statements as follows:

“Due to the difficult economic climate we have struggled to keep up to date with our VAT payments but we are endeavouring to address this”

“...we are making regular payments when finances are available.”

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6. The Tribunal found that all the comments by Permatt were to the effect that they had cash flow problems generally due to the economic situation and that this had gone on for some time.

7. The legislation specifically states that an insufficiency of funds is not a reasonable excuse. It has, however, been held that a trader might have a reasonable excuse if the insufficiency were caused by an unforeseeable or inescapable event which, despite the exercise of reasonable forethought and due diligence, could not have been avoided.

8. The Tribunal accepts that the underlying cause of Permatt's defaults was cash flow problems. We also accept that Permatt has taken steps to try and pay its VAT 'after it is due' on several occasions. It had previously reached 'time to pay' agreements with HMRC in earlier VAT periods but in 2012 HMRC had then refused to give time to pay because the same reason for the delay was being given.

9. Permatt was continuing to trade and to collect VAT. In the year ended 28 February 2013 its turnover had increased to £2,076,574 and a further increase was indicated for the following year.

10. We find that a prudent tax payer would have addressed the issue of how it was going to pay its VAT sooner than it did. The defaults had occurred over an extended period of time. The directors should have regarded HMRC as an essential creditor and not just paid their VAT "...when finances were available." By doing so they have incurred default surcharges over a protracted period.

11. We find that the surcharges are not disproportionate. The Default Surcharge regime is laid down in legislation and has been held in *Total Technology (Engineering) Limited v HMRC* not to be inherently disproportionate.

Proceeding in the absence of the appellant

12. The overriding objective of the Tribunal Procedure (First-Tier Tribunal)(Tax Chamber) Rules 2009 is that cases should be dealt with fairly and justly having regard to a number of matters including the complexity of a case and the costs to all parties. Rule 33 provides that a Tribunal may proceed with a hearing in the absence of a party provided that the Tribunal is satisfied reasonable steps have been taken to notify the party of the hearing and that it is in the interests of justice to proceed with the hearing.

13. This appeal had previously been listed for 29 September 2014 but the hearing was postponed. On 30 September 2014 the Tribunal service notified the appellant company ("Permatt") of today's hearing by a letter sent to Permatt at the address supplied on their Notice of Appeal.

14. When Permatt did not attend today a telephone call was made to the number shown on the notice of appeal and a message was left.

15. The Tribunal found that reasonable steps had been taken to notify the appellant of the hearing and that it was in the interests of justice to proceed with the hearing in the absence of the appellant.

16. Part way through the hearing the Tribunal received a telephone message from a Mark Percy, a director of Permatt, stating that he was unaware of the hearing date and had intended to attend a hearing with legal representation.

5 17. The Tribunal considered whether to continue or to adjourn. We were told by the Tribunal clerk that Mark Percy said he had been aware of the hearing date on 29 September 2014. We consider that if he had sought legal representation before that hearing date we would have expected that a submission would have been made in response to the Statement of Case by HMRC which had, by then, been served on Permatt.

10 18. Permatt had had plenty of time to put forward any additional evidence which they wished to be taken into account. None had been received. Their letters and Notice of Appeal had been clearly written and gave rise to no confusion.

15 19. On balance we found that Permatt had been notified of today's hearing. No postal difficulties had been reported and previous correspondence from Permatt had been dealt with by another director. We found that a statement by Mark Percy that he was not aware of the hearing was not sufficient to show that the company had not been notified. We found that it was in the interests of justice to proceed with the hearing and to reach a decision.

20 20. The burden of proving that it has a reasonable excuse for its failure to meet its VAT obligations lies with Permatt and that burden has not been discharged.

21. The appeal is dismissed and the default surcharge of £5960.89 is confirmed.

25 22. 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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**BARBARA KING
TRIBUNAL JUDGE**

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RELEASE DATE: 18 December 2014