



TC04761

Appeal number: TC/2015/03448

**Value Added Tax – Default Surcharge – whether reasonable excuse – No –
Appeal dismissed.**

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

	TS & B CONTRACTORS LTD	Appellant
	- and -	
	THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	Respondents

TRIBUNAL: JUDGE DR. K KHAN

The Tribunal determined this appeal on 13 September 2015 without a hearing under the provisions of rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 28 May 2015 and HMRC's Statement of Case 9 July 2015.

DECISION

Introduction

- 5 1. This is an appeal against a default surcharge for the periods 10/14 in December 2014 calculated at 2% of the tax owed and for the period 01/15 in the sum of £1,431.10 calculated at 5% of the tax owed. The Appellant has been in a default surcharge regime for the period 10/13.
- 10 2. The chart below shows the Schedule of defaults.

SCHEDULE OF DEFAULTS – Page 1

Appellant: TS & B CONTRACTORS LTD
 Tribunal Reference: TC/2015/03448
 VAT Registration Number: 119 1374 24

Def No	Period Period Dates	Due Date*	Amount Paid by Due date £	Amount Paid After Due Date £	Date payment received ⁺ method	Date Return Received	Tax Assessed Tax on Return	Surcharge Document issued	Surcharge issued date	Rate %	Amount £0.00
1	10/13 01/08/13– 31/10/13	30/11/13	0.00	7500.00 7608.92	10/12/14 03/01/15 2xFPS	06/12/14	----- 15108.92	V160	----- 13/12/13	----- FD	----- 0.00
2	04/14 01/02/14– 30/04/14	31/05/14	0.00	26771.32	10/06/14 FPS	06/06/14	----- 26771.32	V162 Removed by letter	----- 13/06/14 07/08/14	----- 2	----- 535.42
3	10/14 01/08/14– 31/10/14	30/11/14	0.00	23461.95	12/01/15 TPS	04/12/14	----- 23461.95	V162	----- 12/12/14	----- 2	----- 469.23
4	01/15 01/11/14– 31/01/15	28/02/15	0.00	28622.08	09/03/15 FPS	05/003/15	----- 28622.08	V162	----- 13/03/15	----- 5	----- 1431.10

*Where payment is made electronically the due date for payment is extended to seven days after the statutory due date. If the extended due date falls on a bank holiday or weekend payment must clear HMRC's bank account before then (except for Faster Payments which can be received on bank holidays and weekends).

Legislation, case law and Public Notices

3. (1) VAT 1994 Section 59
5 (2) VAT 1994 Section 71
(3) Finance Act 2009 Section 108
10 (4) Value Added Tax Regulations 1995, regulation 14
(5) Public Notice 700 The VAT Guide
(6) Public Notice 700/50 the Full Surcharge
15 (7) Public Notice 731
(8) Salevon Ltd 1989 STC 907
20 (9) Garnmoss Ltd t/a Parkham Builders [2011] UK FTT 315

Background facts

4. (1) The facts in this case are not in dispute.
25 (2) The fact of the default for periods 10/14 and 01/15 is acknowledged by the Appellant.
(3) The Appellant registered for VAT with effect from
30 22 August 2011 and carries on a business of building contractors.
(4) Throughout the defaults the Appellant has submitted the electronic returns by their respective due dates.
35 (5) For the period 10/14 electronic payments were received on 12 January 2015, being 36 days late.
(6) For the period 01/15 electronic payments were received on
40 9 March 2015, being two days late.

Appellant's submission

5. (1) The Appellant had insufficient funds to pay the VAT on the due date. The reason that the VAT was paid late for the period 10/14
45 is that one of their main clients had actually paid their invoices late.

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- (2) The Appellant submits that it did call prior to the payment date to inform HMRC of the situation and have provided bank statements to evidence that they made payments as soon as they thought they had enough funds to do so.
- (3) They say that they made payments for the period 01/15 was made on Monday 9 March 2015 which was the first working day after Saturday 07 March 2015 which was the due date.
- 10 (4) They further say that they are ethical and honest and try to meet all their financial commitments and their obligations under the Taxes Act.

HMRC's submissions

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6. They pointed to Section 21.3 of Notice 700 (The VAT Guide August 2013) which states that if the due date falls on a Bank Holiday or weekend then the payment must clear HMRC's bank account before then unless the Faster Payment Service is used. If the payment arrives late it may be liable for a surcharge for the late payment. They say that the Appellant should have heeded this guidance in making their payment.

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7. The full surcharge regime seeks to ensure businesses pay their VAT on time and the system imposes a financial penalty on traders who are persistently late paying their VAT. HMRC have a statutory responsibility to ensure that tax due is not retained and used as working capital and paid after the due date. HMRC say that the taxpayers had cash flow problems which were neither new nor sudden. The Appellant had benefited from Time to Pay agreements for periods 07/12, 01/13, 07/13 and 07/14. Times to Pay agreements were agreed, prior to the due dates, being within the provisions of Section 108(2) and as such no surcharge was imposed. Section 108 Finance Act 2009 which specifies that there is no liability to default surcharge for a period where contact is made with HMRC prior to the due date in order to arrange a payment deferment and this is agreed by HMRC.

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8. HMRC's record shows that the Appellant telephoned the Business Payment Service on 5 December 20/14 to request a deferment of payment. Time to Pay was not agreed on the grounds that are persistent late payers.

9. HMRC contends that the Appellant has a history of cash flow problems exacerbated by the same factors and it could not really be said to be outside the normal course of the Appellants business. They further say that it is a reasonable expectation that a prudent business would put the necessary precautions in place to ensure they meet their legal obligations to submit VAT returns and payment by the due date.

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10. The Appellant's bank statements indicate that there were sufficient funds in their bank account on 12 December 2014 and yet they choose not to make payments until 12 January 2015. The Respondents contend that it is reasonable to expect a reasonable and competent business person, mindful of their obligations to VAT and in the same or similar circumstances, to have made payments as soon as the funds became available. They say that there is no reasonable excuse.

11. HMRC also say that the taxpayers could have used a Cash Accounting Scheme to help their cash flow where the Scheme allows a trader to account for VAT on the basis of payments received and made rather than tax invoices issued and received. They say that since the Appellant knew they had cash flow problems the Cash Accounting Scheme would have been a very good arrangement to have put in place. The HMRC therefore rejected the taxpayer's grounds for a reasonable excuse.

15 The Appellant requested a review for the 07/13 period on the grounds of insufficient funds. However, it is specifically provided under Section 71(1) (a) the VATA 1994 that an insufficiency of funds does not provide a reasonable excuse. They drew reference to the case of Salevon Case where Nolan LJ pointed out that if the VAT is used as working capital rather than kept separately for payment to HMRC then it would be hard "to persuade the Commissioners or the Tribunal that there is a reasonable excuse".

12. For the period 01/15 the Respondents contend that the due date falling on a weekend is a foreseeable event and they would have expected the taxpayer to put in place prior to the event arrangements to ensure that their legal obligations were met. For this reason they say that the default did not occur as a result of something which is entirely out of their control.

13. This explained that the Appellant had failed to take into account the due date fell on a weekend that this was not a genuine mistake as was pointed out in the case of Garmoss Ltd [2012].

14. For these reasons the default surcharge of £1,431.10 for the period 01/15 as well as the default surcharge of £469.23 for the period 10/14 should be upheld.

Conclusion

15. Dealing first with an insufficiency of funds, this can never of itself be a reasonable excuse. If the conditions of their business produce cash flow problems then they should approach HMRC to make financial arrangements to ensure that a Time to Pay arrangement is in place.

16. In looking at a shortage of funds the Tribunal must look to see whether the trader could reasonably have foreseen the insufficiency of funds or were they faced with a sudden cash crisis. It is clear in this case that the trader could

have foreseen the cash flow difficulties. The second question which must be asked is did the trader receive enough money before the end of the period to pay the VAT due. The taxpayer says that for the period 10/14 one of their main clients had paid late and therefore there was an insufficiency of funds. In such a case, it is possible for the taxpayer to make a part-payment of the VAT due but this was not done in this case. The Tribunal then looked to see what steps were taken to overcome the difficulties the trader experienced with their cash flow. It has been pointed out by HMRC that the taxpayer entered into Time to Pay arrangements because they were persistent late payers. However the Time to Pay arrangements were not extended to the present period due to the fact that a taxpayer had not taken steps to remedy their cash flow position. Further, as pointed out, the Cash Accounting Scheme which would have allowed the trader to pay on the basis of payments received could have been put in place but this was not done and the taxpayer continued to experience financial difficulties and to incur the full surcharges.

17. In the circumstances therefore there is no reasonable excuse due to an insufficiency of funds.

18. For the period 01/15 the due date fell on a weekend therefore the payment was made late. While the tribunal is sympathetic to the Appellant in this situation, it is an entirely foreseeable situation and there can be no reasonable excuse where arrangements were not put in place to make the payments by the due date.

19. For these reasons the appeal is dismissed and the penalties are confirmed.

This document contains full findings of facts and reasons for the decision. Anybody dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to rule 39 of the Tribunal Procedures (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.

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K KHAN

**TRIBUNAL JUDGE
RELEASE DATE: 26 NOVEMBER 2015**