



TC05387

Appeal number: TC/2015/5675

VALUE ADDED TAX – default surcharge – whether there is was reasonable excuse – for one period yes, for others no – appeal allowed in part

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MARLIN GLOBAL SERVICES LTD

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE AMANDA BROWN
SANDI O'NEILL**

**Sitting in public at Cambridge County Court, 197 East Road, Cambridge, CB1
1BA on 23 August 2016**

Mr Ticehurst, director of the Appellant

**Mr Anharul Qureshi, representing officer for HM Revenue and Customs, for the
Respondents**

DECISION

1. This appeal concerns default surcharges issued to Marlin Global Services Ltd (“the Appellant”) in respect of the late submission and payment of the Appellant’s VAT returns for the periods 08/08, 11/08, 02/09, 05/09, 08/09, 11/09, 02/10, 05/10, 08/10, 08/12, 11/12, 02/13. The rates of penalty chargeable in respect of each period rose from 2% to 15%. The total surcharge penalty assessed amounted to £6448.60.

Background

2. The Appellant is a pest control business which was established in 2007 by Mr Ticehurst. Prior to 2007 Mr Ticehurst had managed a successful logistics company; however, due to regulatory changes it had been increasingly difficult to run profitably and Mr Ticehurst wound it down. The Tribunal were informed it ceased trading owing no debts.

3. It is fair to say, by reference to the evidence the Tribunal heard from Mr Ticehurst that he and the business have been through a pretty turbulent 9 years since the pest control business was established.

4. The business was franchised initially from Prokill (the franchisor has subsequently been taken over). Mr Ticehurst believes that the information by reference to which he determined to purchase into the franchise was grossly misleading. He, together with other franchisees, has begun civil proceedings with regard to the mis-statements he believes led him to purchase the franchise.

5. The franchise operated such that Mr Ticehurst was responsible for identifying jobs through advertising, reputation and word of mouth. All materials for use on jobs so identified were required to be purchased from the franchisor. Once a job was complete Mr Ticehurst would report the job to the franchisor who then was responsible for invoicing customers on the Appellant’s behalf and for cash collection. Once per month the franchisor would pay the Appellant the net sum due to it (i.e. cash collected less materials purchased and other charges). The franchisor also provided the Appellant with a pile of papers including invoices. The volume of paperwork received was significant because the nature of the business was high volume but low value.

6. Mr Ticehurst explained that the franchise sales commitments were all but impossible to achieve despite working 18 hours per day 7 days per week. Mr Ticehurst claimed that relations with the franchisor were extremely difficult and, at times, intimidating because of the perceived threat that the franchise would be forfeit if the onerous targets were not met.

7. Mr Ticehurst told the Tribunal that in the early stages of the business he was so focused on delivering to the targets set that he did not give the attention he knew was required to the paperwork. He accepted that he had the information needed to complete the VAT returns and that he had received the net payments from the

franchisor but he was under such pressure and stress that he could not find the time to complete the VAT returns.

8. Mr Ticehurst borrowed against his personal property in order to fund the business.

5 9. In December 2010 due, Mr Ticehurst believes, to the stress associated with the business, he suffered a ruptured carotid artery which led to a series of mini strokes or TIAs and in January 2011 he was hospitalised. The road to recovery was slow and took 18 months but left him with tinnitus and anxiety.

10 10. In May 2013 Mr Ticehurst injured his leg. From the material provided to the Tribunal it appeared that a sharp metal object pierced his leg which led to two operations.

15 11. In October 2014 Mr Ticehurst suffered sudden and unexplained angioedema whereby various parts of his body swelled up. The Tribunal saw photographs of Mr Ticehurst's face. The condition apparently carried some extreme effects which would, in the Tribunal's view, have been very distressing.

12. All of the medical conditions were supported by doctors' letters.

13. In November 2012 the Appellant obtained confidential information about the franchisor's business. Mr Ticehurst said that he had struggled to meet the targets set under the franchise agreement from the start and that he believed that his inability to
20 meet them was, in large part due, to those targets having been set by reference to a hypothetical rather than real franchisee. He also believed that the franchisor was in breach of its commitments to franchisees regarding the geographical areas of operation allocated to each franchisee. Mr Ticehurst had access to confidential information of the franchisor, he obtained the information and shared it with other
25 franchisees. In doing so Mr Ticehurst was aware that he was in breach of the franchise agreement. The franchisor called Mr Ticehurst to a meeting. Mr Ticehurst described the meeting as highly intimidating. The Tribunal was shown a copy of an agreement Mr Ticehurst was told to sign if he wanted to continue as a franchisee. This document had not previously been disclosed to HMRC. Mr Ticehurst signed the
30 agreement and made the payment demanded of him under the agreement. This payment was £5,000 which represented a substantial sum in the context of the then average monthly net sales receipt from the franchisor.

14. As a consequence of the difficulties faced by Mr Ticehurst his marriage broke down in late 2013 and divorce proceedings commenced in spring 2014.

35 15. From the point of registration the Appellant failed to render VAT returns. HMRC issued estimated VAT assessments which were all duly paid.

16. On 8 January 2013 the Appellant rendered its VAT returns for all periods from 11/07 through to 08/10. Returns for periods 11/10 through to 02/13 appear to have been rendered on 19 June 2014 (it is to be noted HMRC's schedule indicates that
40 08/12 was rendered on 19 June 2012 however this appears to have been a typographical error on the schedule). Period 05/13 was rendered on 1 July 2014.

Periods 08/13 – 02/14 were rendered on 9 July 2014 and 05/14 was rendered on 10 July 2014.

17. At the point that the Appellant bought his returns up to date, and by reference to those returns the debt owed by the Appellant to HMRC amounted to £83,284.89. The Appellant entered a time to pay agreement with HMRC. By the date of the hearing all debts had been cleared.

18. All returns since 08/14 were rendered and paid on time.

19. The Tribunal heard evidence and examined documentation concerning the Appellant's appointment of a bookkeeper. It appears from notes of a telephone call between HMRC and Mr Ticehurst on 2 May 2012 that Mr Ticehurst told HMRC he was, at that point working with a bookkeeper. Mr Ticehurst told the Tribunal he had not appointed a bookkeeper until sometime in 2013. The Tribunal finds it is highly likely that Mr Ticehurst either employed or had the intention to employ a bookkeeper in 2012 when he told HMRC that he had so employed one. Three years of returns were rendered in January 2013 and the Tribunal finds that was almost certainly with the assistance of a bookkeeper and hence she could not have been employed in 2013 given the volume of paperwork.

The default surcharge regime

20. The default surcharge regime is described by Judge Bishopp in *Energys Holdings* [2010] UKFTT 20 TC0335 ("*Energys*"):

"The first default gives rise to no penalty, but brings the trader within the regime; he is sent a surcharge liability notice which informs him that he has defaulted and warns him that a further default will lead to the imposition of a penalty. A second default within a year of the first leads to the imposition of a penalty of 2% of the net tax due. A further default within the following year results in a 5% penalty; the next, again if it occurs within the following year, to a 10% penalty, and any further default within a year of the last to a 15% penalty. A trader who does not default for a full year escapes the regime; if he defaults again after a year has gone by the process starts again. The fact that he has defaulted before is of no consequence."

21. The legislation for the default surcharge regime is found primarily in Section 59 Value Added Taxes Act 1994 ("VATA") those parts relevant in this appeal are set out below:

59 – The default surcharge

59(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
- (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.

5 59(1A) [not relevant]

59(2) Subject to subsections (9) and (10) below, subsection (4) below applies in any case where –

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

10 (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.

15 59(3) If a surcharge liability notice is served by reason of a default in respect of a prescribed account 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,
20 accordingly, for the purposes of this section, that existing period and its extension shall be regarded as a single surcharge period.

59(4) Subject to subsections (7) to (10) below, if a taxable person on whom a surcharge liability notice has been served-

25 (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,

30 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.

59(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-

35 (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;

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

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

59(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.

15 59(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 –

20 (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

(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 59(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.

...

22. Section 71(1) VATA provides:

“For the purposes of any provision of section 59 ... 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 a task, neither the fact of that reliance nor any deleteriousness or inaccuracy on the part of the person relied upon is a reasonable excuse.”

10 **Default surcharges issued to the Appellant**

23. The profile and amount of default surcharges issued are set out below together with an indication of the outcome of HMRC’s review of each surcharge:

Period	Rate	Amount	Review outcome
11/07	0%	£0	First default surcharge liability notice issued
02/08	2%	£0	Below £400 so not recoverable as a matter of policy
05/08	3%	£0	Below £400 so not recoverable as a matter of policy
08/08	10%	£217.83	Upheld
11/08	15%	£394.21	Upheld
02/09	15%	£410.19	Upheld
05/09	15%	£225.04	Upheld
08/09	15%	£389.26	Upheld
11/09	15%	£91.10	Upheld
02/10	15%	£535.37	Upheld
05/10	15%	£387.32	Upheld
08/10	15%	£620.18	Upheld
11/10	15%	£677.00	Withdrawn on grounds of illness
02/11	15%	£742.80	Withdrawn on grounds of illness

05/11	15%	£958.39	Withdrawn on grounds of illness
08/11	15%	£1163.09	Withdrawn on grounds of illness
11/11	0%	£0	Withdrawal of 4 periods causes a reset of surcharge liability period – period counts as a first period default
02/12	2%	£0	Not collected liability as below £400
05/12	5%	£0	Not collected as liability below £400
08/12	10%	£750.52	Upheld
11/12	15%	£1333.03	Upheld
02/13	15%	£1094.55	Upheld
05/13	15%	£1170.11	Withdrawn on grounds of illness
08/13	15%	£1243.18	Withdrawn on grounds of illness at the hearing
11/13	15%	£1477.28	Withdrawn on grounds of illness
02/14	15%	£1283.66	Withdrawn on grounds of illness
05/14	15%	£1315.71	Withdrawn on grounds of impact of divorce at the hearing

24. On the basis of the above the duty of the Tribunal was to consider the imposition of penalties for periods 08/08 – 08/10 and 08/12 – 02/13.

25. The Appellant had prepared a time line which indicated the periods during which it was considered that the following matters had had an adverse effect on Mr Ticehurst and the business:

- Franchise conflict – all periods
- Stress – all periods
- Strokes – 11/10 – 08/12
- Anxiety – 11/10 – 11/14
- Tinnitus – 11/10 and continuing
- Leg injury – 05/13 and 08/13

- Angiodema – 08/13 – 05/14
- Divorce – 02/14 and continuing

Reasonable excuse

5 26. No case law was referred to by either party in relation to factors capable of constituting a reasonable excuse.

27. There is, however, significant case law on reasonable excuse. From which it is clear that the Tribunal must consider all of the relevant facts and determine whether the taxpayer acted as a reasonably conscientious business person would have done.

10 28. As Judge Medd articulated in *The Clean Car Company Ltd v CEC [1991] VTTR 234*:

15 “the test of whether there is a reasonable excuse is an objective one. In my judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself in at the relevant time, a reasonable thing to do?”

20 29. The Appellant contends that it has a reasonable excuse for all defaults in respect of which HMRC have maintained the surcharges.

25 30. For periods 08/08 to 08/10 Mr Ticehurst cites only the pressures of business and the difficulties in getting the franchise business off the ground in the face of what he considered to be unachievable sales targets set by the franchisor. Mr Ticehurst explicitly did not claim lack of funds as a basis for non submission and payment of the returns.

30 31. The Tribunal notes that Mr Ticehurst was an experienced business man who had operated an initially successful and reasonably substantial business. In answer to a question from the Tribunal he accepted that he was well aware of his responsibilities to render returns but that he simply did not have enough hours in the day to do so. Whilst the Tribunal sympathises with the pressure which Mr Ticehurst felt he was under that does not amount to a reasonable excuse. He had all the information provided to him, in however an inaccessible form, and he had received payment from the franchisor in relation to the jobs upon which he had worked. In essence he had collected the sums payable as output tax from customers but did not make the time or employ someone to calculate and complete his returns and make payment to HMRC. That cannot constitute a reasonable excuse and in relation to these periods the appeal is dismissed.

35 32. As indicated above HMRC have accepted the reasonable excuse defence in respect of the first 12 months in which Mr Ticehurst suffered the ruptured carotid

artery and consequential TIAs, the two periods affected by his leg injury and also in respect of the period covered by the angioedema. They have also allowed a reasonable excuse for the period associated with his marital breakdown. For all other periods HMRC contend that no reasonable excuse has been established.

5 33. Bearing in mind the guidance of Judge Medd it is clear that even where a business operates effectively under the sole direction and guidance of a director, the prolonged illness of that director would cause a reasonably conscientious business to seek to put in place adequate contingency plans in order to ensure that ongoing business obligations are met.

10 34. On examination of the evidence available from Mr Ticehurst's doctors, the correspondence between the parties, and by reference to the oral evidence given by Mr Ticehurst, it appears that the period of illness following his carotid artery was a period of up to 18 months from December 2010 (i.e. covering the due date for submission of the 11/10 return through to some time in period 05/12). The evidence
15 regarding the period of illness was set out in a letter from Mr Ticehurst dated 18 May 2015 and included a letter from his neurologist. The Tribunal was not provided with a copy of this letter (though the Tribunal was given a letter dated 3 May 2016 which confirmed Mr Ticehurst's illness but not the full period in which he suffered symptoms.) HMRC, by letter dated 15 June 2015 accepted reasonable excuse in
20 connection with this illness for periods 11/10 – 08/11 but provided no explanation at all as to why the 18 month period claimed by Mr Ticehurst was curtailed.

35. On balance the Tribunal considers that in light of the guidance given by Judge Medd the 12 month period allowed by HMRC as constituting a reasonable excuse is fair. Whilst the Tribunal recognises that Mr Ticehurst says that the period during
25 which he suffered extended to 18 months that time is not explicitly corroborated by the doctors' letters. Further, it would appear that by the time 12 months had past the condition had at the very least become a chronic rather than an acute one. A condition that Mr Ticehurst should have recognised as long term and for which he should have made accommodation in giving his statutory VAT obligations their
30 appropriate importance.

36. As indicated above the consequence of having permitted four periods of reasonable excuse was that there were then three periods during which no surcharge was levied. 08/12 represents the first period for which the Appellant is liable to a penalty. Mr Ticehurst claims he should be entitled to be relieved for this period
35 because it represents the final period of his illness. However, that fails to recognise that the periods 11/11, 02/12 and 05/12 were not excused but were just not subject to a surcharge. For the reasons set out in paragraph 34 above the Tribunal considers that as his illness had become chronic Mr Ticehurst should have made alternative arrangements for the preparation, submission and payment of his VAT returns and no
40 reasonable excuse is established. The appeal regarding 08/12 is therefore dismissed.

37. As regards period 11/12 the Tribunal has considered the impact on Mr Ticehurst of the meeting with the franchisor in November 2012. The impression Mr Ticehurst gave of the meeting was that it was intimidating and that he felt a very real threat to his business. He contended that the franchisor had wide powers to terminate the

franchise agreement. He said that he had struggled to meet the targets under the franchise agreement which he believed had been set at values which no franchisee could ever attain, thereby putting him under unreasonable pressure and a constant threat of the agreement being terminated. The Tribunal understands that he accessed and used the confidential material as an act of desperation but knew in doing so he made himself even more vulnerable to a termination of the franchise agreement. This Tribunal makes no decision on the appropriateness of the decisions made by Mr Ticehurst vis a vis the obtaining and use of the confidential information.

38. However, the Tribunal takes note of the following factors:
- (1) the meeting followed a substantial period of serious illness;
 - (2) Mr Ticehurst had a growing belief that he had been misled about the business potential from the outset;
 - (3) there was additional stress associated with having borrowed heavily in order to fund the business and he feared he may lose the franchise;
 - (4) Mr Ticehurst felt that the meeting itself was intimidating;
 - (5) Mr Ticehurst was made to sign an agreement requiring him to make a substantial payment to the franchisor;
 - (6) the meeting happened and the requirement to pay the sum to the franchisor occurred towards the end of the prescribed accounting period and hence close to the due date for submission; and
 - (7) HMRC's approach to the stress of Mr Ticehurst's illnesses and divorce.

39. The Tribunal considers that the circumstances in period 11/12 were an accumulation of so many different factors that, on balance, it is appropriate to conclude that together they were exceptional; whilst each on its own may have been anticipated the confluence of them could not. The Tribunal concludes that these most unique of situations constitute a reasonable excuse for that period only. It appears to the Tribunal that the conclusion is consistent with the otherwise flexible approach taken by HMRC in relation to the other periods for which they were prepared to see a reasonable excuse. The appeal for period 11/12 is therefore allowed.

40.

41. No reasonable excuse for period 02/13 was actively advanced and the Tribunal finds none to have been established. The appeal for 02/13 is therefore also dismissed.

Summary of conclusions

Period		Appeal
08/08	£217.83	Dismissed

11/08	£394.21	Dismissed
02/09	£410.19	Dismissed
05/09	£225.04	Dismissed
08/09	£389.26	Dismissed
11/09	£91.10	Dismissed
02/10	£535.37	Dismissed
05/10	£387.32	Dismissed
08/10	£620.18	Dismissed
08/12	£750.52	Dismissed
11/12	£1333.03	Allowed on the basis of the intimidating meeting with Franchisor
02/13	£1094.55	Dismissed

42. Total defaults payable following the Tribunal's conclusions is £5115.57

43. 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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**AMANDA BROWN
TRIBUNAL JUDGE**

RELEASE DATE: 27 SEPTEMBER 2016

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