



TC01646

Appeal number: TC/11/05117

Value Added Tax – whether Appellant is liable for Default Surcharges – Yes. Whether agreement for payment by instalments waives the surcharge – No. Whether reasonable excuse for late returns and or late payment – No. Appeal dismissed.

FIRST-TIER TRIBUNAL

TAX

**KEITH BROWN ENGINEERING LIMITED
T/A GLENABER BROWN ENGINEERS**

Appellant

- and -

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

Respondents

**TRIBUNAL JUDGE: MR PETER SHEPPARD, F.C.I.S., F.C.I.B., ATII
MR KENNETH MURE, QC**

**Sitting in public at George House, 126 George Street, Edinburgh on Thursday
14 September 2011**

The Appellant did not appear and was not represented

Mrs Liz McIntyre, for the Respondents

DECISION

1. This is an appeal against three VAT Default Surcharges assessed on the Appellant by Her Majesty's Revenue & Customs (HMRC) in the sums of £998.93 being 5% of the tax due in the period ended 31 August 2010, £2,866.88 being 10% of the tax due in the period ended 30 November 2010 and £3,068.17 being 15% of the tax due in the period ending 28 February 2011. These total £6,933.98

2. Arrangements were made for the appeal to be heard at 2.00 p.m. on 14 September 2011 but on the day before the hearing the Appellant telephoned the Tribunal to advise that his case was to have been presented by his accountant. The accountant had now advised he could not attend and had advised the Appellant to withdraw. The Tribunal clerk pointed out to the Appellant that it would be an informal hearing and that he could represent himself. The Appellant said he would think about it overnight and advise the Tribunal in the morning. When the Tribunal had heard nothing by midday they telephoned the Appellant who advised he would not be attending. The Tribunal tried to contact the Respondents representative Mrs Liz McIntyre but was advised that she had already left the office to attend the hearing. The hearing therefore proceeded with the Appellant unrepresented.

Legislation

The legislation pertinent to this case is as follows:-

VAT Act 1994 Section 59

59.—The default surcharge

(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.

(1A)

(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

(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.

5 (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—

10 (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, 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.

15 (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—

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

25 (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

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

30 (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.

35 (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—

40 (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

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

5 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).

10 (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

15 (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.

(9).....

(10).....

20 (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.

Value Added Tax Act 1994 Section 71

71. Construction of sections 59 to 70.

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

(a) an insufficiency of funds to pay any VAT due is not a reasonable excuse;

30 (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.

Finance Act 2009 Section 108

108 Suspension of penalties during currency of agreement for deferred payment

(1) This section applies if—

35 (a) a person (“P”) fails to pay an amount of tax falling within the Table in subsection (5) when it becomes due and payable,

(b) P makes a request to an officer of Revenue and Customs that payment of the amount of tax be deferred, and

40 (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—

(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.

5 (3) But if—

(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.

10 (4) P breaks an agreement if—

(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.

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(5) The taxes and penalties referred to in subsections (1) and (2) are—

Tax	Penalty
Value added Tax	Surcharge under section 59(4) or 59A(4) of VATA 1994

3. The Respondents helpfully provided a schedule which gives details in tabular form of how the surcharges arose. The main points are set out below:-

20 (i) Return for 3 months ended 28 February 2010

The return and payment of £13,021.38 were due by 31 March 2010. Both were received by the Respondents 14 days late on 14 April 2010. This was the first occasion that delay had occurred so on 16 April 2010 the Respondents issued a
 25 Surcharge Liability Notice Form VAT 160 advising the Appellant of the default and warning the Appellant that similar delays in respect of future returns in the period ending 28 February 2011 may make them liable to a surcharge.

(ii) Return for 3 months ended 31 May 2010

30 The return and payment of £19,159.29 were due by 30 June 2010. The Appellant had been placed on the automated return programme and had to submit all future returns electronically. The Respondents allow a further 7 days grace for submission and payment of returns for those submitting returns
 35 electronically. After allowing for this additional 7 days the return was received by the Respondents 61 days late on 6 September 2010 and payment was received by BACS the next day. On 15 July 2010 having not received a return the

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Respondents issued a Notice of Assessment of Tax Surcharge Liability Notice Extension form VAT 164. This had two effects firstly it assessed tax due of £15,360.00. This being a further failure a surcharge of 2% of the tax due could have been levied by the Respondents i.e. £307.20. However the Respondents operate a policy whereby they do not levy surcharges of under £400 unless the surcharge rate is 10% or more. Secondly it extended the Surcharge liability period to 31 May 2011 and warned that a further default may attract a surcharge of 5% of the tax due.

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(iii) Return for the period ended 31 August 2010

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The return and payment were due by 31 August 2010 or 7 September 2011 if the 7 days grace are added. No return has ever been received by the Respondents but the Appellant submits that payment was made as part of a payment of £28,668.82 made on 12 and 13 January 2011 which is commented on further below.

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Having not received a return or payment on 15 October 2010 the Respondents issued a Notice of Assessment of Tax and Surcharge Liability Notice Extension form VAT 166. Firstly this assessed a total of £20,981.93 made up of tax of £19,983 and a default surcharge of £998.93 being 5% of the tax due. Secondly it extended the surcharge period to 31 August 2011 and warned that further defaults may attract a surcharge calculated at 10% of the tax due.

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(iv) Return for the period ended 30 November 2010

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The return and payment of £28,668.82 were due by 7 January 2011 after adding the further 7 days grace for submission and payment of returns for those submitting returns electronically. The return was in fact received in time on 31 December 2010 and a part payment was received by BACS 6 days late on 13 January 2011. On 14 January 2011 the Respondents issued a Notice of Assessment of Surcharge, Surcharge Liability Notice Extension form VAT 162. Firstly this assessed a default surcharge of £2,866.88 being 10% of the tax due of £28,668.82 and secondly it extended the surcharge period to 30 November 2011 and warned that further defaults may attract a surcharge calculated at 15% of the tax due.

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(v) Return for the period ended 28 February 2011

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The return and payment of £20,454.53 were due by 7 April 2011 after adding the further 7 days grace for submission and payment of returns for those submitting returns electronically. The return was submitted electronically in time on 31 March 2011 but payment was received by BACS 26 days late on

5 3 May 2011. On 15 April 2011 the Respondents issued a Notice of Assessment of Surcharge, Surcharge Liability Notice Extension form VAT 162. Firstly this assessed a default surcharge of £3,068.17 being 15% of the tax due of £20,454.53 and secondly it extended the surcharge period to 28 February 2012 and warned that further defaults may attract a surcharge calculated at 15% of the tax due.

4. The Respondents provided copies of the VAT returns, Surcharge Liability Notices and Notices of Assessments referred to above.

10 5. On 4 October 2010 the Appellants faxed the Respondents offering an agreement regarding repayment of arrears of PAYE and VAT. Only £4.28 related to outstanding VAT. The Respondents replied by letter the same day agreeing to the proposals but including the following conditions:

- 15 • “Payment of £5,000.00 to HMRC on 8 October 2010.....
- Payment of circa £40,000.00 from the company’s Egyptian client must be made to HMRC in week commencing 11 October 2010.
- Balance of circa £20-£21,000 to be paid by 15 October 2010.
- 20 • All VAT returns must be submitted on time and any liabilities arising from the submission of any return must be paid in full by the due date. This will commence from the submission of the VAT return due by 31 December 2010.
- 25 • All current year (2010-2011) PAYE arrears months 1 to 5 inclusive, and VAT arrears are to be repaid at £5,000.00 per month, once the sums in the Petition are cleared”.

6. On 19 October 2010 the Appellant faxed the Respondents to vary the terms of the agreement so that the £40,000.00 from the Egyptian client would be paid to HMRC by 26 October 2010 and the Balance of £20-£21,000.00 would be paid on 20 October 2010. The Respondents agreed to this proposal but reminded the Appellant of the other conditions in the 4 October 2010 arrangement.

35 7. On 27 April 2011 the Appellants wrote to the Respondents acknowledging receipt of the Notice of Assessment of Surcharge, Surcharge Liability Notice Extension form VAT 162 dated 15 April 2011 which they had not received until that morning. The Appellants make certain observations which are discussed below. The Respondents took this as a request for a review of the default surcharges. This review was undertaken by the Respondents and the surcharges were confirmed in a letter dated 31 May 2011. The last paragraph of this letter reads

“If you still dispute this decision you have 30 days from the date of this letter in which to lodge an appeal to: First-tier Tribunal (Tax)....”

40 8. On 13 June 2011 the Appellants wrote a letter to the Tribunal.

5 Although the standard appeal form was not used the letter was taken as an appeal against the surcharges. It is apparent from the letter that the Appellant has not understood that the First-tier Tax Tribunal is totally independent of HMRC but considers it to be another department of HMRC.

9. The Tribunal reviewed correspondence between the Appellants and the Respondents. One subject covered was the matter of payments for the returns for the periods ended 08/2010; 11/2010; and 02/2011.

10. The payments for tax due were:

10 08/2010 £19,983 as assessed by the Respondents in the absence of a VAT return.

There was also a surcharge of £998.93 due in relation to this period.

15 11/2010 £28,668.82 as stated on the VAT return submitted by the Appellant. There was also a surcharge of £2,866.68 due in relation to this period.

02/2011 £20,454.53 as stated on the VAT return submitted by the Appellant.

11. On 12 and 13 January 2011 the Respondents received two payments both for £14,334.41 these total £28,668.82 which can be seen as the precise amount of tax due for the period 11/2010. Because of the terms of the agreement of 4 October 2010 the Appellant made these payments as keeping to the terms of that agreement in respect of keeping his VAT returns up to date. This is what the Appellant thought it had paid as is evidenced by their letter to the Respondents dated 27 January 2011. In fact the amounts were 5 or 6 days late after allowing the 7 days grace for returns submitted electronically.

12. Because the amounts were received on different dates the total sum was not obvious to the Respondents and they applied the amounts to repay the oldest debts first. Thus the amounts were applied to repay the £19,983 tax and £998.93 surcharge due re the 08/2010 period leaving a balance of £7,686.89 which was taken as part payment for the 11/2010 period.

13. On 1 February 2011 the Appellant wrote a letter to the Respondents which contained the following:

35 “Thanks for your telephone call regarding the recent fax query I sent you last week. From our discussions you have confirmed that:

VAT Return to 31 August 2010 has been paid/cleared from the 2 off payments that were made in early January 2011;

40 VAT Return to 30 November 2010 (which we thought was initially paid by 2 payments on 10/11 January 2011) is to be added to the £5,000 per month that we are paying back under current agreement with HMRC. Can you confirm the value still outstanding for VAT because we paid £28,668.82 in January and I think there should be credit applied.”

14. The Tribunal has looked at both the alternative ways of applying the amounts received but in each case the amounts are received after the due date for payment for each period.

5 15. Correspondence between the Appellants and Respondents has been supplied to the Tribunal. This has been reviewed as has the letter of 13 June 2011 addressed to the Tribunal.

16. The Tribunal makes the following observations in respect of these letters:

10 (1) In respect of the return for the period ended 02/10 the Appellant makes no comment as to the reasons for the delay in submission of both the return and payment.

(2) In respect of the return for the period ended 05/10 the Appellant makes no comment as to the reasons for the delay in submission of both the return and payment.

15 (3) In respect of the return for the period ended 08/10 the Appellant considers that payment was part of the agreed arrangements of 4 and 19 October 2010. However no VAT return for the period has been submitted. It was not part of the agreement that it should not be submitted.

20 (4) In respect of the return for the period ended 11/10 the Appellant makes no comment as to the reasons for the delay in submission of both the return and payment. As set out above there was confusion as to the application of amounts paid to the Respondents but these culminated in a letter from the Appellant to the Respondents dated 1 February 2011 requesting that the balance due be included in the time to pay agreement.

25 (5) In respect of the return for the period ended 02/11 the Appellant wrote to the Respondents on 27 April 2011 in response to the Notice of assessment dated 15 April 2011 which he had received that morning. The letter included the following paragraph:

30 “I have taken immediate action on receipt of this demand for outstanding monies and penalty, by initially taking disciplinary action with the individual responsible for all HMRC VAT returns. I have also taken responsibility for all these matters personally now and would ask that you direct all communication direct to myself to avoid any future delays.”

35 (6) In a letter to the Respondents dated 27 January 2011 the Appellant mentions that he has been off work with a back injury for the last 2 weeks. No further details are given by the Appellant on this as to the nature of the injury and whether more time off work was necessary. No medical certificates were submitted by the Appellant to verify this. No other reason for the delay was put forward.

40 (7) Letters from the Respondents to the Appellant dated 11 May 2011 and 2 June 2011 suggested that the amount due of £20,454.53 had not been paid. In a letter dated 28 July 2011 the Respondents confirmed that

payment had in fact been received on 27 April 2011 as the Appellant had indicated.

17. Other than the points set out above the Appellant has not challenged the dates HMRC state the returns and payments were made and so the Tribunal has proceeded
5 on the basis that the Appellant accepts that the returns and payments were made late.

18. No challenge was made by the Appellants to the amounts of tax due on the returns and the calculations of tax due. Similarly no challenge was made by the Appellants to the calculation of the amount of the surcharges or to the rates used.

19. The Tribunal has therefore proceeded on the basis that the grounds of appeal must
10 therefore be that the Appellants consider that they had reasonable excuse for the failures to submit returns and to pay on time.

20. It is clear that the reason for the failures to make payments on time for all the returns was due to cash flow difficulties. The VAT Act 1994 Section 71(1)(a) states
15 “an insufficiency of funds to pay any VAT due is not a reasonable excuse”. In respect of the 02/2011 return two further points arise. Firstly Section 71(1)(b) states that reliance on another is not a reasonable excuse. Secondly the Appellant may have had reasonable excuse for the delay in this period due to his back injury but as he had
20 decided not to attend the hearing the Tribunal was unable to ascertain for how long the Appellant was incapacitated and to what extent the injury affected his ability to complete the VAT return and make payment. As it is clear that he was relying on another to complete the return (see 16.5 above) and in the absence of other supporting evidence the Tribunal cannot accept this as a reasonable excuse.

21. The Appellants have given no other explanation as to why there was a delay in submitting returns and making payments.

22. Section 108(2)(b) of the Finance Act 2009 allows HMRC to waive imposition of a
25 default surcharge for a period where contact is made with HMRC prior to the due date in order to arrange Time to Pay. In respect of the period ended 08/2010 contact was made by the Appellant on 4 October 2010 so potentially the clause could apply if one takes into consideration the 7 days grace for submission of the return electronically.
30 Unfortunately the VAT return has never been submitted and in such circumstances the clause does not apply. In respect of the return for the period 02/2011 there is some confusion in the correspondence over whether the agreement of 4 October 2010 applied to the 08/2010 return or to the 02/2011 return. If it applied to the latter then it is unclear why in their letter of 1 February 2011 the Appellant requested the balance
35 outstanding be included in the time to pay agreement. As the request for time to pay the balance of the 02/11 VAT return was made after the due date for payment of 7 January 2011 the Section 108 waiver cannot apply.

23. In the circumstances the Tribunal finds that the Appellants had no reasonable excuse for the delays and dismisses the appeal.

40 24. 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

5 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.

10 **PETER SHEPPARD, F.C.I.S., F.C.I.B., ATII**
TRIBUNAL JUDGE

RELEASE DATE: 9 DECEMBER 2011

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