



**TC02843**

**Appeal number: TC/2012/09631 & TC/2013/02273**

*VAT –default surcharge for late payment – reasonable excuse shown-appeal allowed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**QUARTZ ELECTRICAL & MECHANICAL SERVICES LIMITED      Appellant**

**- and -**

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

**TRIBUNAL: JUDGE BARBARA KING  
ROLAND PRESHO FCMA**

**Sitting in public at North Shields on 29 July 2013**

**James Gareth Orpen for the Appellant**

**Adrian Boal of HM Revenue and Customs, for the Respondents**

## DECISION

### The issue

1. There are two appeals before the Tribunal. Both concern the late payment of VAT. The first concerns a default surcharge of £2233.17 imposed for the period 06/12 and the second concerns a default surcharge of £4101.02 for the period 09/12.

### The legislation

2. Section 59 Value Added Tax Act 1994(VATA) sets out the provisions in relation to the default surcharge regime. Under s 59(1) a taxable person is regarded as being in default if he fails to make his VAT return for a VAT quarterly period by the due date for that quarter, or if he makes his return by the due date but does not pay by that date due the amount of VAT shown on the return as payable in respect of that period.

3. HMRC may serve a surcharge liability notice on the defaulting taxable person, which brings him within the default regime so that any subsequent defaults within a specified period result in assessment to default surcharges at the prescribed percentage rates. A new default, made within the surcharge liability period, gives rise to a default surcharge being charged. The first surcharge is made at 2%. The percentage increases to 5% for a second default within the period, 10% for a third and 15% for all subsequent defaults, within a specified period.

4. Section 59A VATA provides that taxable person who is otherwise liable to a default surcharge may nevertheless escape that liability if he can establish that he has a reasonable excuse for the late payment which gave rise to the default.

### Evidence.

5. A schedule had been prepared by the respondents (“HMRC”) showing all occasions when the VAT has been paid late by the appellants (“Quartz”), over the period from 06/11 through to 09/12. In each case the VAT return had been received by HMRC before the due date. In each period a part payment of VAT had been received by HMRC before the due date, followed by regular equal amounts and a final payment in full over the eight or nine weeks following the due date.

6. James Gareth Orpen, now the sole director of Quartz, gave oral evidence. Quartz had been in existence since 1996 and provided electrical and mechanical services to the construction industry.

7. Since 2009 Quartz has had cash flow problems which were mainly started by a claim for £300,000 which went to arbitration. £150,000 was awarded in the arbitration proceedings but eventually Quartz only received £50,000. Over this period Quartz has been unable to pay its VAT on time and has asked for and been granted several Time to pay agreements( TTPs).

8. Each quarter Mr Orpen telephoned HMRC and asked for time to pay over the nine weeks immediately following the due date. Quartz adhered to each of the TTPs to the extent that the VAT for that quarter was paid over the number of weeks agreed. Each TTP stated that all future debts should be paid on time. This was the only aspect with which Quartz did not comply. When the following quarter was due Mr Orpen again telephoned to ask for a TTP and this was granted on each occasion until 12/11 when a TTP was refused.
9. Since 2009 Quartz has taken steps to reduce its outlay and Mr Orpen believes that it is a viable company.
10. Mr Orpen accepts that Quartz had no entitlement to a TTP and the grant of a TTP was at the discretion of HMRC.
11. Mr Orpen believed that he was told that provided Quartz carried on paying the VAT due in the same way that it had been for the previous two years that no further action would be taken. He did not get any letter to confirm this but then received a surcharge at 2% for the period 03/12. He telephoned HMRC again and gave the same reasons as to why the payment was late, as he had given over the previous few years and HMRC agreed he could have a further TTP. This confirmed his belief that provided Quartz paid the VAT in instalments, as it had done so for several years, he would not receive a surcharge.
12. Since the surcharges imposed for the periods 06/12 and 09/12 which are the subject of this appeal, Mr Orpen has taken out a further mortgage on his house and he has lent money to Quartz which has enabled it to pay its VAT by the due date.

### **Discussion and findings**

13. We found Mr Orpen to be a credible witness. We find that he was trying to comply with all tax obligations and was doing everything he could to make regular payments to meet all the companies liabilities.
14. Despite the fact that TTPs were refused after 12/11 Mr Orpen believed that no surcharges would be imposed provided Quartz continued to pay the VAT due over the period of 10 weeks after the due date. This mistaken belief was reinforced by the fact that HMRC did grant a further TTP for the period 03/12 after a surcharge had initially been imposed. HMRC confirmed, in a letter dated 2 August 2012, that the default for 03/12 was cancelled, and this gave further reinforcement to Mr Orpen's belief that provided he adhered to the payment structure which he had been using for some time then Quartz would not be subjected to a surcharge, even though they were paying part of their due VAT, late in each period.
15. As soon as it was made clear to Mr Orpen that surcharges would be imposed for default, and no further TTPs would be granted, based on the same grounds of application, he made arrangements for a mortgage on his house and he is now in the process of making a new loan arrangement with a bank which he hopes will assist the cash flow at Quartz.

16. An insufficiency of funds does not amount to a reasonable excuse but in this case the reason for that insufficiency had been accepted by HMRC for some time as a reason to grant a TTP. We accept that the mistaken belief, held by Mr Orpen in the particular circumstances of this case, was reasonably held over the period involving both these appeals. We find that this amounts to a reasonable excuse for the periods 06/12 and 09/12 and that Quartz are not therefore liable to the surcharges for those periods.

17. The appeals are allowed.

18. 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.

**BARBARA KING  
TRIBUNAL JUDGE**

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**RELEASE DATE: 16 August 2013**