[2016] UKFTT 0818 (TC)

TC05543

Appeal number: TC/2015/06951

VALUE ADDED TAX – default surcharge – payments late – no reasonable excuse – no effective time to pay arrangements - surcharge liability notices not properly served – appeal allowed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

KUSTEN VORLAND LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE NIGEL POPPLEWELL
MRS NORAH CLARKE

Sitting in public at Cardiff on 14 November 2016

Mrs Parsons-Young, Director for the Appellant

Mrs Anne Rees, Officer HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is a VAT case. It concerns the default surcharge regime. The respondents have assessed the appellant to default surcharges ("surcharges" each a "surcharge") for five VAT periods (June 2013 to June 2014) in a total amount of £4996.48 (the "default periods").

2. The appellant does not believe it is liable to, nor should it pay the surcharges. It says this for a variety of reasons which we deal with later on in this decision.

3. We have come to the conclusion that the appellant is not liable to the surcharges. And so we allow the appeal.

Default surcharge regime

Overview

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

> "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."

The legislation

5. The legislation for the default surcharge regime is found primarily in Section 59 of the Value Added Tax Act 1994 ("VATA") the relevant parts of which 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.

59(1A) A person shall not be regarded for the purposes of this section as being in default in respect of any prescribed accounting period if that period is one in respect of which he is required by virtue of any order under section 28 to make any payment on account of VAT.

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

(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.

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, 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-

(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.

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-

(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

(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.

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 –

(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,

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).

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

(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.

59(9) In any case where –

(a) the conduct by virtue of which a person is in default in respect of a prescribed accounting period is also conduct falling within section 69(1), and

(b) by reason of that conduct, the person concerned is assessed to a penalty under that section,

the default shall be left out of account for the purposes of subsections (2) to (5) above……..

6. Section 71(1) VATA provides:

For the purposes of any provision of section 59 …. which refers to a reasonable excuse for any conduct:

(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 dilatoriness or inaccuracy on the part of the person relied upon is a reasonable excuse.

7. Section 108 Finance Act 2009 provides:

(1) This Section applies if-

(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

(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 end of the deferral period.

(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.

Service of surcharge liability notice

8. S59(2) of VATA, which is set out [5] above, makes it plain that a taxpayers liability to pay a surcharge arises only if "the Commissioners serve notice on the taxable person (a "surcharge liability notice") ..."

9. Furthermore S59(4) of VATA directs that a surcharge may only be visited on a taxable person "on whom a surcharge liability notice has been served ... ".

10. It seems clear therefore from the legislation that if no surcharge liability notice has been served on the Appellant, it cannot be liable for the surcharges for the default periods.

11. This principle was recognised in the High Court, in *Customs & Excise Commissioners v Medway Draughting & Technical Services Ltd; Customs & Excise Commissioners v Adplates Offset Ltd* [1989] STC346. In that case, Medway had appealed to the VAT Tribunal, against a default surcharge assessment, on the basis that it had not received a surcharge liability notice prior to the assessment and accordingly was not liable to the surcharge. It was found as a fact that Medway had not received the notice in time.

12. The Tribunal granted Medway's appeal and the Crown appealed against that decision.

13. In the High Court it was held that it was Parliament's intention that a warning in the form of a surcharge liability notice should be given before a surcharge could be levied. Receipt of the notice was crucial so as to enable the taxpayer to avoid the surcharge.

14. Macpherson J said

> "The scheme of the Act therefore provides that taxpayers shall be given notice of their liability to surcharge. And it is right to stress at the outset that a taxable person conversant with the provisions of s19 could say to himself that he could expect a warning in the form of a surcharge liability notice before surcharge could be levied in respect of any further default during the surcharge period"

15. He then went on to say

> "I have come firmly to the conclusion that in the present cases it was the intention of Parliament that a warning should be given before a surcharge could be levied. And thus I agree with His Honour Judge Medd's first conclusion. As

a matter of construction of s19, the whole scheme of default surcharge is dependent on service of the surcharge liability notice. If this were not so the legislature could simply have decreed (for example) that a third default in any defined period would of itself trigger the commissioner's right to surcharge the taxpayer. It was decided that this should not be the scheme of the section and that even defaulting taxpayers were entitled to be warned of an impending surcharge.

I am not sure that the phrase "condition precedent" used by His Honour Judge Medd is wholly apt in a non-contractual case. But the requirement for the warning notice is express, and the time for its service, namely after the first two relevant defaults and before the next default, is explicit.

It is perfectly true that the taxpayer has a duty in any event not to default in respect of each return and payment of tax. And he is warned that this is so and that penalties may follow if he is late in making his returns. But there are quite separate penalties which may be incurred in respect of individual defaults. And in my judgment Parliament intended that the taxpayer should be properly warned before the additional default surcharge could be exacted".

16. Service of a default surcharge notice is governed by two statutory provisions. The first of these, Section 98 of VATA is set out below

Any notice, notification, requirement or demand to be served on, given to, or made of any person for the purposes of this Act may be served, given or made by sending it by post in a letter addressed to that person or his VAT representative at the last or usual residence or place of business of that person or representative.

17. The second provision is Section 7 of the Interpretation Act 1978 which states

Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

Reasonable excuse

18. When considering whether the appellant has a reasonable excuse, we adopt, with gratitude, the principles promulgated by Judge Brannan in the case of *Stuart Coales -v- The Commissioners for Her Majesty's Revenue & Customs* [2012] UKFTT (477) ("*Coales*"), set out below:

"Meaning of "reasonable excuse"

25. Under Section 59C(9)(a) I can, however, set aside the surcharge determination if it appears that, throughout the period of default, the taxpayer had a reasonable excuse for not paying the tax. The onus is on the appellant to satisfy me that there was a reasonable excuse. The statute provides (Section 59C(10)) that inability to pay the tax shall not be regarded as a reasonable excuse.

26. In this context, I consider the reasonable excuse exception to be an objective test applied the individual facts and circumstances of the appellant in question.

27. In *Bancroft and another v Crutchfield (HMIT)* [2002] STC (SCD) 347 in relation to Section 59C(9)(a) the learned Special Commissioner (Dr John Avery Jones CBE) stated:

> "A reasonable excuse implies that a reasonable taxpayer would have behaved in the same way. A reasonable taxpayer would at least have read the literature issued by the Revenue…"

28. The concept of "reasonable excuse" appears throughout VAT and direct tax legislation in respect of the imposition of surcharges on penalties. There is a considerable amount of case law in this tribunal as well as its predecessors (the VAT and Duties Tribunal and the Special and General Commissioners). It is not possible to do justice to all these decisions but I think that helpful guidance can be obtained from the decision of the VAT Tribunal in *The Clean Car Company Limited v C & E Commissioners* [1991] VATTR 239 and I can do no better than quote from the passage where the Tribunal (HH Judge Medd OBE QC) said:

> "So I may allow the appeal if I am satisfied that there is a reasonable excuse for the Company's conduct. Now the ordinary meaning of the word 'excuse' is, in my view, "that which a person puts forward as a reason why he should be excused".
>
> A reasonable excuse would seem, therefore, to be a reason put forward as to why a person should be excused which is itself reasonable. So I have to decide whether the facts which I have set out, and which Mr Pellew-Harvey [for the Appellant] said were such that he should be excused, do in fact provide the Company with a reasonable excuse.
>
> In reaching a conclusion the first question that arises is, can the fact that the taxpayer honestly and genuinely believed that what he did was in accordance with his duty in relation to claiming input tax, by itself provide him with a reasonable excuse. In my view it cannot. It has been said before in cases arising from default surcharges that the test of whether or not 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 at the relevant time, a reasonable thing to do? Put in another way which does not I think alter the sense of the question: was what the taxpayer did not an unreasonable thing for a trader of the sort I have envisaged, in the position the taxpayer found himself, to do? … It seems to me that Parliament in passing this legislation must have intended that the question of whether a particular trader had a reasonable excuse should be judged by the standards of reasonableness which one would expect to be exhibited by a taxpayer who had a responsible attitude to his duties as a taxpayer, but who in other respects shared such attributes of the particular appellant as the tribunal considered relevant to the situation being considered. Thus though such a taxpayer would give a reasonable priority to complying with his duties in regard to tax and would conscientiously seek to ensure that his returns were accurate and made timeously, his age and experience, his health or the incidence of some particular difficulty or misfortune and, doubtless, many other facts, may all have a bearing on whether, in acting as he did, he acted reasonably and so had a reasonable excuse. Such a way of interpreting a statue which requires a court to decide an issue by judging the standards of the reasonable man is not without precedent of the highest authority, though in a very different field of the law. (See *DPP v Camplin* ([1978] 2 All ER 168)."

Evidence and findings of fact

19. Mrs Parsons–Young gave oral evidence on behalf of the appellant. In addition to her evidence, we were provided with a bundle of documents which included correspondence between the parties, and contact records, compiled by the respondents, which set out details of contact between the appellant and the respondents, including contact during the default periods.

20. We found Mrs Parsons-Young to be an honest and credible witness and we accept her evidence.

21. On the basis of the evidence, we make the following findings of fact:

(1) The appellant has been registered for VAT since November 2009. It provides asbestos removal consultancy services. It has a licence which enables it to remove asbestos from commercial and domestic buildings.

(2) During the default periods the approximate turnover of the business was £300,000. It is currently about £700,000.

(3) The appellant has always employed an office administrator and, in addition, there are a further 10 or so people involved with the business, some of whom are employees and some of whom are self-employed under the CIS system.

(4) Throughout the default periods the appellant employed an external firm of accountants to compile and submit its VAT returns. An employee of the appellant (very often Mrs Parsons-Young) would deliver the invoices for the relevant periods to the accountants. The accountants would use these to compile the VAT returns. They would submit the returns and, at the same time, tell the appellant how much VAT the appellant should pay. The appellant was therefore responsible for paying its VAT.

(5) The appellant issued its own invoices to its customers. This would involve about 10 invoices per month. The responsibility for issuing the invoices was either with Mrs Parsons-Young or with one of the account managers.

(6) During the default periods, the major customer was Celsa, a company involved in the steel industry. Mrs Parsons-Young estimated that 70% of the value of the work they did during the period was for Celsa, The other 30% being for Viridor; a hotel chain; and (the minority of business) for private individuals who were demolishing their garages.

(7) Although the appellant tries to invoice on a regular (monthly) basis, in reality they are governed by the commercial arrangements dictated to them by their customers; so this was usually only possible with domestic customers. Much of the invoicing for commercial clients is done once a job has been completed. For Celsa, Viridor and for the hotels, this would mean that the work would be needed to be completed to the satisfaction of somebody at the relevant organisation who would, internally within that organisation, sanction its accounts department to settle the invoice submitted by the appellant.

(8) Payment terms were dictated by the customer who had the greater commercial bargaining strength. This meant that payment was usually 90 days after the invoice was submitted. Mrs Parsons-Young told us that this fluctuated from 90 down to 80 up to 85 throughout their relationship with Celsa. And later, down to and up from 60 days with Viridor.

(9) But, where there was such a change in payment terms, the customer would give the appellant notice of that fact. The change was not "sprung" on it.

(10) Customers would also pay in accordance with their terms. They were not late in paying. Payment, in fact, was not made on the 90th day, but for Celsa on the 21st day of the month following the 90 day period (and Viridor, the 12th day of the month following the 90 day period). From a cashflow perspective, the appellant therefore suffered in the initial days of its business. Once it got into a regular payment cycle, however, the money would come through regularly, and as predicted. Mrs Parsons-Young confirmed that she knew how much money they were going to receive, and on what days they were going to get it from the customers.

(11) She also told us that Viridor, who subsequently became their major customer following the demise of Celsa, operated a similar system.

(12) Mrs Parsons-Young explained that some of the correspondence, including the default surcharge notices, had not been received from HMRC, even though HMRC say that they sent them to the appellant's principle place of business.

But, it is clear from the correspondence that some communications from HMRC were delivered to the appellant since Mrs Parsons-Young has responded to them. Mrs Parsons-Young also accepted, in cross-examination, that she knew (i.e. the appellant knew) that it had to pay VAT within seven days after the end of the return period, and knew too that a surcharge would be levied if payment was late.

(13) The appellant entered into the default surcharge regime from the period 12/10 onwards i.e. well before the default periods.

(14) The surcharges for the default periods are set out below:

Period	**Amount £**	**Calculated @**
06/13	200.55	15
09/13	652.72	15
12/13	1,449.96	15
03/14	1,605.84	15
06/14	1,087.41	15

(15) For each of these periods, payment of VAT was received after its due date.

(16) HMRC allocated payments in the following way. Where a payment exactly matched the amount of VAT shown on a specific return, the payment was allocated to that return. This was the position for the periods 09/13, 12/13, 03/14 and 06/14.

(17) For the period 06/13, payments were allocated on 29 April 2014 (£399.92), 3 June 2014 (£614.04) and 08 July 2015 (£323.10).

(18) A time to pay agreement was entered into on 3 August 2015. The VAT arrears and surcharges which were subject to this time to pay agreement fall outside the period in question in this appeal.

(19) However, an earlier time to pay agreement had been "granted" to the appellant in April 2013. This included arrears for the periods 09/11 and 06/12. That time to pay agreement was granted on the understanding that the VAT for the 03/13 and subsequent periods would be paid on time. The VAT for the 03/13 period was not paid in full until October 2013. The payment for the period 06/13 (the first period under appeal) was not paid in full until 8 July 2015.

(20) HMRC's contact record shows that on 31 July 2013, the time to pay agreement had failed as "not paid as agreed".

(21) The HMRC contact record also shows that, between 2 July 2013 and 18 June 2015, there was no verbal communication between the appellant and the respondents.

Burden and standard of proof

22. The respondents accept that the initial burden of proof lies with them to show that

(1) VAT was paid late and the liability to the surcharges has been incurred;

(2) valid surcharge liability notices for the default periods were served on the appellant.

23. Once the respondents have satisfied their burden of proof, then the burden shifts to the appellant to show that

(1) it did not receive a valid surcharge liability notice;

(2) a reasonable excuse exists;

(3) the surcharges are disproportionate.

24. In each case the standard of proof is the usual civil standard, namely the balance of probabilities.

Appellant's submissions

25. Mrs Parsons-Young submissions were aimed more at the appellant's failure to pay the surcharges than whether they were due in the first place.

26. Her submissions were as follows:

(1) Before 27 July 2015, the appellant was unaware of the surcharges prior to the 30/9/2014 period, and would have paid them had it known about them.

(2) It was unaware of the surcharges since it did not receive the surcharge notices from HMRC.

(3) It is currently paying off its arrears of VAT and surcharges at a rate of £3,000 a month, and has not missed a payment since August 2015.

(4) It thought that its payments were being credited against its oldest debts first and were being used to clear the balance.

(5) The foregoing comprised a reasonable excuse for filing to pay the VAT and surcharges on time.

Respondents submissions

27. On behalf of the respondents, Mrs Rees submitted as follows:

(1) VAT for the default periods was paid late. Mrs Parsons-Young accepted that she knew that the appellant had to pay VAT within 7 days of the end of the

return period and failure to do so would render the appellant liable to surcharges.

(2) The default surcharge notices were properly sent out to the appellant's principal place of business and there is no evidence that they were not delivered.

(3) The appellant has no reasonable excuse. Shortage of funds and reliance on another cannot be a reasonable excuse. There was no specific unforeseen event which caused the default.

(4) If there was a time to pay agreement granted or requested in relation to the default periods, the appellant had failed to comply with its terms and so the benefits of section 108 Finance Act 2009 cannot apply.

(5) But in any event, a time to pay arrangement can only be made in respect of a quantified debt. So, given there was no contact with the appellant during the default periods, no time to pay arrangement could have been requested or agreed in respect of these periods.

(6) The surcharges are proportionate.

(7) Although the appeal is out of time, she is content that we can hear it.

Discussion

Service of surcharge liability notices

28. As we have said above, Mrs Parsons-Young impressed us with her honesty and candour when giving evidence. She cheerfully admitted that she recognised that the appellant had an obligation to pay VAT and that a failure to do so would render the appellant liable to surcharges.

29. But this general recognition, by Mrs Parsons-Young on behalf of the appellant, is not sufficient for HMRC to satisfy the condition precedent (we think this is a useful form of shorthand even though it was slightly frowned upon by Macpherson J) of having served a valid surcharge liability notice for each of the default periods.

30. HMRC must show, on the balance of probabilities that such notices were served on the Appellant. They can do this under Section 98 of VATA, and under Section 7 of the Interpretation Act, if they can establish on the balance of probabilities that the notices had been put in the post, properly addressed, and prepaid.

31. Mrs Rees is unable to provide copies of liability notices which relate, specifically, to the default periods. She provided us with some proformas, and stated that notices including the relevant information "would" have been sent out to the appellant. As Mrs Rees recognises we suspect, this goes nowhere near discharging the respondents burden of proof.

32. However we are more impressed with the following;-

(1) Letters to the appellant, which the appellant accepts were received, were addressed to the correct address. This suggests that the address on the respondents system was the correct one.

(2) A surcharge liability notice for the period 6/15 (i.e. one which is outside the default periods) was clearly received by the Appellant, and that notice contained the Appellant's correct address.

(3) The contact records show entries that "SLNE issued" for each of the default periods. That for 06/13 on 16.8.13; for 09/13 on 15.11.13; for 12/13 on 14.2.14; for 3/14 on 6.5.14; and for 6/14 on 15.8.14.

33. In light for the foregoing we find (and this is finely balanced) that the respondents did satisfy the requirement in Section 98 of VATA of serving a default surcharge liability notice on the appellant for the default periods.

34. And so, unless the appellant can prove to the contrary (i.e. that it did not receive those notices), then the deeming provision in Section 7 of the Interpretation Act will take effect.

35. Mrs Parsons-Young's position on this is simply that the Appellant did not receive default surcharge notices for the default periods. Before 27 July 2015, the Appellant was unaware of the surcharges prior to the 13/9/14 period. And she said that they would have been paid had the Appellant known of them.

36. Of itself, this is important evidence given that, as we say, we have found Mrs Parsons-Young to be a credible and honest witness. But that is an easy thing for a taxpayer to assert. What (if any) other factors might weigh in her favour?

37. We consider the following to be important:-

(1) Firstly, although other people at the appellant were involved in VAT (for example Sabina Nir) during 2013, it is clear from the contact records that Mrs Parsons-Young was involved. She has told us (and we find it likely) that any documents that were received by the appellant which related to VAT would have come to her attention. We find it unlikely that any such documents sent to the appellant would have been overlooked by either Mrs Parsons-Young, or a colleague of hers.

(2) The contact record shows that there were calls between HMRC and the appellant on 26 April 2013, 1 May 2013, 3 June 2013, 2 July 2013 and (although this is not free from doubt) perhaps on 2 October 2013. These calls concerned time to pay arrangements which the appellant was seeking to put in place, and the fact that the appellant having promised to make payments pursuant to the time to pay agreement might not manage to fulfil that obligation. We think, therefore, that it would have been likely that if the appellant had received the surcharge liability notices for the default periods, they would have contacted HMRC and discussed with HMRC the possibility of satisfying the payments thereunder pursuant to a time to pay agreement or some other less formal arrangement. As we say, Mrs Parsons-Young's submissions today were

aimed at payment rather than liability. Like any small business the appellant was concerned about its cash flows. So had there been notices served on the appellant seeking further sums, our view is that Mrs Parsons-Young would have sought to deal with these as part of the ongoing discussions with HMRC concerning time to pay or other arrangements which were being conducted as regards earlier periods.

(3) We do not believe that Mrs Parsons-Young understands the significance and importance of the condition precedent of receipt of a surcharge liability notice. She is candid in her accepting that the appellants had received correspondence from HMRC prior to the default periods. She is equally candid that on the industrial estate on which the appellant is based traders will assist each other; so if post is delivered incorrectly to a trader, that person will pop round to the intended recipient. This has not happened with the default surcharge notices. We do not think that she has cynically accepted that she has received correspondence and notices from periods other than those under appeal, and recognising the significance of the respondent's failure to serve notices, has denied their receipt for the default periods.

(4) Finally, we have seen for ourselves that letters to the appellant may still be going astray. At the start of the hearing, there was no representation from the appellant, and it was only a call to them by the Tribunal Clerk that precipitated Mrs Parsons-Young's attendance at the hearing. She was hoping that her accountants could attend to represent her but they were unavailable. During the initial part of the hearing, she made a call to her father to sort out her childcare arrangements (once we had told her that we were intending to proceed with a hearing). This behaviour did not strike us as the behaviour of someone who was dishonest or cynical. Although she had not received notification from the Tribunal of the hearing date, she understood that it would be helpful if she could attend and made every effort to do so. And, as we have said, gave her evidence frankly, candidly and in the spirit of assisting the Tribunal in coming to a decision.

38. Mrs Rees suggests that the appellant had been issued with, and had received, an error correction notice in respect of the period 03/13 which included reference to a default surcharge notice issued for the period. She then goes on to suggest that in light of such notice the appellant would have been aware of the liability to the surcharges. That might be the case but a letter which cross refers to a default surcharge notice goes nowhere near fulfilling the statutory requirement that a default surcharge notice must be served on the appellant.

39. We therefore find that the factors set out in [37] support Mrs Parsons-Young's assertion that the appellant did not receive the surcharge liability notices for the default periods. And we find that the appellant has discharged the burden that on the balance of probabilities, surcharge liability notices for the default periods were not received by (and so were not served on) the appellant.

40. Given that the appellant's liability to the surcharges only arises if the respondents can show that valid surcharge liability notices for the default periods were served on

the appellant, and they have failed to do this, we must allow the appeal. The condition precedent for the appellant's liability for the surcharges has not been met. There is, therefore, no need for us to consider reasonable excuse, time to pay arrangements or proportionality. However, since these matters were argued before us, we set out below our views on them.

Reasonable excuse, time to pay and proportionality

41. Mrs Parsons-Young also accepts that the appellant was fully aware of the payment cycle of its customers; the fact it would have to wait some considerable time after invoicing to be paid; that the customers once invoiced would invariably honour their commitment to pay by the notified due date; and that if that date was altered by the customer, the appellant was told of this in good time.

42. In light of the foregoing we find that the appellant has no reasonable excuse for failing to pay the VAT for the default period. A reasonable taxpayer conscious of his obligations to pay tax on time would have done just that. The appellant cannot rely on an insufficiency of funds as being a reasonable excuse (see [6] above). A reasonable taxpayer in the appellant's position would have managed its cash flow in order to ensure that it paid its tax on time.

43. We fully understand and appreciate the cash flow difficulties faced by the appellant. But, as Mrs Parsons-Young very fairly said, whilst the payment delays were difficult when the appellant was starting up its business, once that business got going, the payments came in on a regular basis.

44. Had the appellant been on cash accounting from the start, Mrs Parsons-Young thinks it is unlikely they would have had the VAT payment problems that their payment history demonstrates. The appellant is now on cash accounting. We hope that her optimism is justified. It would be inappropriate for us to comment as to whether they should have been better served by being advised to move to cash accounting before now. But to the extent relevant, reliance on another is statutorily barred from being a reasonable excuse (see [6] above).

45. As regards a time to pay agreement, we do not consider there to have been a request for one which covers the default periods, let alone an agreement itself. A time to pay agreement can only be requested and agreed in respect of a quantified liability. The agreement referred to in [13(19)] above related to earlier periods where the liability for VAT and surcharges had been quantified. It did not relate to the default periods.

46. We have found as a fact that there was no contact between the appellant and HMRC between 2 July 2013 and 18 June 2015. So no request could have been made for a time to pay arrangement in relation to the default periods. And one which would have come within the provisions of section 108 Finance Act 2009 could only have been made during these periods since, prior to them, the amount of VAT liability would not have been quantifiable. Each quarter there would have been a window of opportunity of approximately 5 - 6 weeks when the VAT due and payable for each

return covered by the default periods, could have formed the basis of a discussion with HMRC as to whether the latter would enter into a time to pay agreement. The contact history mentioned above shows that no such approach was made by the appellant during the default periods.

47. So we find that there was no time to pay agreement either requested or agreed which might have affected the appellant's obligations to pay its VAT on time for the default periods.

48. We also agree with Mrs Rees that the surcharges are proportionate.

Decision

49. For the reasons given above we allow this appeal.

50. 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.

JUDGE NIGEL POPPLEWELL

TRIBUNAL JUDGE
RELEASE DATE: 14 DECEMBER 2016