TC01452

Appeal numbers TC/2011/2699
TC/2011/2702
TC/2011/2706

Value Added Tax – Default surcharges – whether surcharges not validly made : no on the facts – whether the appellants had a reasonable excuse for any of the defaults: no on the fact – appeals dismissed

FIRST-TIER TRIBUNAL

TAX

McFLETCH LIMITED
McFLETCH HIRE SERVICES LIMITED
McFLETCH WASTE MANAGEMENT LIMITED **Appellants**

- and -

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

TRIBUNAL: JOHN WALTERS, QC
JOHN CHERRY, FCA (Chairman)

Sitting in public at Portal House, 27 Southway, Colchester, CO2 7BA on 23 August 2011

John Seago of Seago & Stopps, Chartered Certified Accountants for the Appellant

Phillip Rowe for the Respondents

DECISION

Introduction

1. These three appeals are heard together in accordance with Directions dated 10 June 2011 and with the agreement of the parties.

2. The appellants McFletch Limited (M), McFletch Hire Services Limited (MHS) and McFletch Waste Management Limited (MWM) are all companies controlled by Mr Christopher Fletcher, a Director and the major shareholder of each company.

3. Mr Fletcher attended the hearing as a witness for the appellants.

The appeals

4. The appeals are against default surcharges for late returns or payments. For M: 48 defaults between periods 08/01 and 11/10; for MHS: 16 defaults between periods 05/06 and 11/10; and for MWM: 31 defaults between periods 08/01 and 08/10. The surcharges appealed total £37,429.24 for M, £7,716.76 for MHS (reduced from £13,441.51 on review), and £7,313.74 for MWM (reduced from £10,895.53 on review).

5. The appellants asked HM Revenue & Customs (HMRC) for reviews of the surcharges. In the case of MHS and MWM the defaults for periods 05/06 and 08/01 respectively (which periods had been assessed in the absence of returns) were withdrawn on review, and the default surcharges were revised in the light of the amounts of tax due per the returns subsequently made. This had a consequential effect on subsequent defaults, in the progressive surcharge regime, reducing the surcharge totals as referred to in 4 above. Otherwise the outcome of the reviews was that HMRC decided all other surcharges would stand as charged.

6. The grounds of appeal are that assessments raised in November and December 2008 could have been incorrect, the surcharges could have been incorrectly calculated, and that the appellants have a reasonable excuse by reason of financial difficulties. We consider these 3 aspects in turn.

The law

7. The relevant legislation in relation to default surcharges is contained in sections 59 and 71 of the Value Added Tax Act 1994 ("VATA"). We set it out in the Schedule to this Decision.

The evidence and our findings

Assessments raised in November and December 2008

8. Mr Seago referred to assessments raised on all three companies in November and December 2008 following an HMRC officer's visit to the companies' previous accountants, Moore Green, Chartered Accountants, on 4 November 2008. Mr Fletcher confirmed that he was present during that visit. There was a further, follow-up, visit

on 21 November 2008, after which assessments were raised as follows: £50,260 on M dated 27 November, £85,852 on MHS dated 4 December and £14,798 on MWM dated 27 November. Mr Rowe explained that the assessments on M and MWM were raised in the absence of returns, and that they were both reduced to nil when the returns were subsequently submitted.

9. Mr Rowe pointed us to the HMRC officer's Audit Report following the visits referred to in 7 above, which set out the background to the assessment on MHS. In summary, the assessment resulted from undeclared output tax and over claimed input tax.

10. Mr Seago said he could not check the officer's calculations as he had been unable to obtain any financial records from Moore Green. He said he had doubts about the accuracy of the assessment, as he could not imagine that a firm of qualified accountants "could get the figures so wrong". Mr Fletcher added that, when he expressed great surprise to Moore Green about the assessment, they simply told him it was correct, so he took no action to appeal it. He thereafter ceased to use that firm of accountants.

11. Mr Rowe showed us a letter from Moore Green to HMRC dated 18 December 2008 which appealed the assessment on the grounds that an amount of £5,372 VAT had been incorrectly included (which was subsequently removed by HMRC, reducing the assessment to £80,480). That letter closed with the sentence "It would appear that everything else seems reasonable".

12. In view of the letter referred to above, and the lack of any evidence to challenge the assessment on MHS, the burden of proof being on the appellants, we saw no grounds for giving permission for a late appeal against the assessment.

13. We further find that the assessment on MHS, as reduced, was correctly made and that the assessments on M and MWM, which have been reduced to nil – see: above, paragraph 5 – are not relevant to these appeals.

Whether surcharges have been calculated correctly

14. Mr Seago argued that there could be errors in the calculation of surcharges as he had no access to records before his firm was engaged by the Appellants, and because HMRC had been seen to make errors in these matters. He described the removal of the defaults referred to in 5 above as examples of the correction of errors. He also pointed out that the HMRC Skeleton Argument relating to MHS contained an incorrect figure for the total of surcharges originally appealed.

15. Mr Rowe replied that the removal of defaults arose because the appellants submitted late returns that displaced estimated assessments, and that the figure in the MHS Skeleton Argument was the amount incorrectly shown in the original appeal form submitted by Seago Stopps.

16. Mr Seago contended that the assessments referred to in 7 above had been settled by HMRC appropriating payments made to them to that account, thus causing defaults to appear against current VAT quarters that had in fact been paid by the due date.

17. Mr Rowe reminded us that the assessments on M and MWM were reduced to nil, so that no monies were allocated against them. He produced a schedule of the monies used to settle the assessment on MHS, and cross referred it to correspondence and file log entries that showed the amounts used had been paid in for that purpose by Mr Fletcher, or were repayment credits used for that purpose as requested by Seago Stopps.

18. We find that the appellants have failed to satisfy us by evidence that any of the surcharges were incorrectly calculated.

Whether the companies have a reasonable excuse

19. Mr Seago told us that the appellants were finding it difficult to survive in the current economic climate, and that tax revenues totalling around £180,000 per annum would be lost to HMRC if they failed. He added that if the staff were consequently made redundant, and were unable to find employment, their claims for state benefits would be a further financial loss to the community. He pointed out that Mr Fletcher had cooperated with HMRC fully and promptly, and that the companies had tried to keep up with the Time To Pay agreements they had arranged with HMRC from time to time. Mr Fletcher added that his companies always pay their corporation tax and PAYE on time.

20. Mr Fletcher explained that he left all paperwork to the accountants, as he is dyslexic and concentrates wholly on doing his work. He described himself as a workaholic and stated that he had built the companies from 1999. He felt very let down by Moore Green, whom he had used as accountants for some ten years. After receiving the assessments, he tried to take legal action against Moore Green, but they counter-claimed for unpaid fees, and he was advised not to pursue the matter further. The whole episode had had a very bad effect on him, and he now finds it difficult to motivate himself to work. He summed up by saying he relied on the professionals, who had "messed up" and it had all "snowballed from there".

21. In their letter accompanying the appeals, Seago Stopps stated that "Mr Fletcher does fully acknowledge that some of the surcharges will be as a result of either VAT returns being submitted late or the actual VAT liabilities themselves being paid late given cash flow difficulties".

22. Mr Seago argued that the arrival of the assessments in 2008 took the appellants totally by surprise and put them into financial difficulty from which they have not been able to escape. He asked the Tribunal to take a compassionate view, and reduce the surcharges by £24,000 as that would "make a big difference" to the appellants. In their letter accompanying the appeals, Seago Stopps had requested that 65% of the surcharges be cancelled.

23. Mr Rowe pointed out that the assessments were raised late in 2008, but that many of the defaults that gave rise to the surcharges occurred before then. Therefore the assessments could not have caused financial difficulties relating to any of the defaults prior to period 2/09. He asked whether the appellants were appealing only against surcharges from period 2/09 onwards. He further pointed out that section 71(1) VATA dictates that neither a lack of funds nor reliance on a third party can be a reasonable excuse. He referred to the Court of Appeal decision in *Customs and Excise Commissioners v Steptoe* [1992] STC 757 where it was decided that any underlying reasons for financial difficulties, beyond the appellants' control, should be taken into account when considering the question of reasonable excuse. He said that in this case no underlying reasons had been put forward, save for the assessment on MHS in 2008, which had arisen as a direct result of the company's actions.

24. The effect of the decision in *Steptoe* is conveyed in the following passage taken from the judgment of Lord Donaldson at p.770:

> "… save in so far as Parliament has given guidance, it is initially for the commissioners to decide whether the underlying cause constitutes a reasonable excuse and for the tribunal to decide this on an appeal. That said, there must be limits to what could be regarded as a reasonable cause. Nolan LJ, as I read his judgment explaining and expanding on his judgment in *Customs and Excise Commissioners v Salevon Ltd* [1989] STC 907, is saying that if the exercise of reasonable foresight and of due diligence and a proper regard for the fact that the tax would become due on a particular date would not have avoided the insufficiency of funds which led to the default, then the taxpayer may well have a reasonable excuse for non-payment, but that excuse will be exhausted by the date on which such foresight, diligence and regard would have overcome the insufficiency of funds."

25. Mr Seago confirmed that the appellants wished to appeal against all the surcharges made since 2001 and reiterated his request that the Tribunal take a compassionate view and reduce the surcharges "as they see fit".

26. The Tribunal declined to give permission to bring a late appeal because no justification for doing so had been shown by Mr. Seago.

27. We considered the relevant legislation and the case of *Steptoe*. We find that the appellants have failed to show that they have any reasonable excuse which we can take into account for the purpose of removing liability (pursuant to section 59(7) VATA) for any of the surcharges imposed and we point out that the Tribunal has no power to mitigate such surcharges (as opposed to removing liability for them pursuant to section 59(7) VATA). We find that the appellants' circumstances are not such as would enable them to rely on *Steptoe*.

Conclusion

28. The three Appeals are all dismissed.

29. 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.

JOHN WALTERS

TRIBUNAL JUDGE
RELEASE DATE: 19 SEPTEMBER 2011

SCHEDULE

The legislation

Section 59 VATA – 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)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.

(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.

(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—

(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.

(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.

(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.

(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).

(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.

(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.

(10)If the Commissioners, after consultation with the Treasury, so direct, a default in respect of a prescribed accounting period specified in the direction shall be left out of account for the purposes of subsections (2) to (5) above."

Section 71(1) VATA

"(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; and

(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."