



TC03237

Appeal number: TC/2012/08452

*VAT- penalty for late payment – whether reasonable excuse – held, no –
appeal dismissed – liable for surcharge*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MEDECHO LTD

Appellant

-and

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

Respondents

TRIBUNAL: JUDGE PAULENE GANDHI

NICHOLAS DEE

Sitting in public at 45 Bedford Square on 21 June 2013

Mohim Ahmed accountant, and Rashid Karshe director, for the Appellant

**Alison McHugh HM Revenue and Customs Appeals and Reviews Unit, for the
Respondents**

DECISION

1. This is an appeal by Medecho Limited (“the company”), against a VAT default surcharge for the VAT period ending on 30 June 2011 (06/11 period), in the sum of £5,901.45 which is 10% of the tax outstanding at the due date of £129,014.57.
2. Although the appeal was out of time this was not a matter dealt with in any depth by either of the parties. In light of the matters mentioned in the grounds of appeal we give permission to the company to appeal out of time.
3. The issue in this case was whether there was a reasonable excuse for the late payment of the VAT.
4. The Tribunal gave its decision orally at the end of the hearing. We decided that the company did not have a reasonable excuse. We dismissed the appeal and found the company was therefore liable to the surcharge.
5. The company asked for full written findings of fact and reasons for the decision (a “full decision”) at the hearing, as they are entitled to do. This is that full decision.

The relevant legislation

6. 59 The default surcharge
- (1) [F1Subject 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.
- [F2(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.

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.

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

15 (a) is in default in respect of a prescribed accounting period ending within the surcharge period specified in (or extended by) that notice, and

20 (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.

25 (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—

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

35 (b) in relation to the second such period, the specified percentage is 5 per cent;

40 (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.

45 (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.

50 (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—

5 (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

10 (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
15 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).

20 (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

25 (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
30 period specified in or extended by that notice.

7. 71 Construction of sections 59 to 70.

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

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

The evidence

40 8. We heard oral evidence from Mr Ahmed and Mr Karshe who was asked questions by Ms McHugh and ourselves.

9. HMRC provided a bundle which included the correspondence between the parties together with the following documents:

- 45 (1) A skeleton argument for the respondent
- (2) A schedule of defaults from the 12/09 period through to the 06/11 period including the amount of the default surcharge
- (3) The surcharge liability notice and surcharge liability extension notices
- (4) The company's bank statements for their business current account
- 50 (5) Copies of the electronic VAT return submissions
- (6) Copies of computer printouts headed "historical ledger print"

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- (7) Copies of computer screen printouts headed “accounting interrogation print”
 - (8) HMRC’s “top tips on how to avoid VAT surcharges”
 - (9) Evidence the company has set up a direct debit to pay HM RC
 - (10) A cash flow questionnaire
 - (11) Notes of phone conversations between the company and HMRC
 - (12) Extracts from HMRC’s online guidance about using the faster payment service
 - (13) A computer printout headed “customer activity” for the company
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The issues

10. Although not bound by *Coales v Revenue and Customs Commissioners* [2012] UK FTT (477) (TC) we find that case is a helpful analysis of reasonable excuse with which we agree. We therefore follow the approach taken in *Coales*.
- 15 11. This means that the question we must ask ourselves in relation to whether there is a reasonable excuse is the following:
- 20 “... 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?”.

Summary of the company’s arguments

12. The reasons given by the company for paying late are:
- 25 a) Payment was made by the faster payment method which was not accepted by HMRC - reasonable excuse;
- b) Cash flow problems - reasonable excuse;
- c) The surcharge is unfair.

Undisputed facts

13. The following facts are not in dispute:
- 30 a) For the 06/11 period the VAT return and payment were due by 31/07/11. Where however payment is made electronically the due date for payment is extended to 7 days after the statutory due date.
- b) The VAT return was received by HMRC on 01/08/11.
- 35 c) £70,000 of the VAT payment was received by HMRC before the due date and £45,000 on 08/08/11 by BACS and another £14,014.57 on 09/08/11 by BACS.
- d) A Surcharge Liability Extension Notice was issued on 12/08/11 and then an amended version was issued on 15/11/12.
- e) This was the fourth default.

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Discussion

14. Applying the analysis of reasonable excuse in *Coales* to the facts of the case before us, the company having been in the default surcharge regime since the 12/09 period should have been aware, from correspondence sent by HMRC in relation to the previous defaults and from the information on HMRC's website, of how to make payment of their VAT to ensure it reached HMRC by the due date, and the consequences of not paying their VAT on time.
15. There is a legal obligation on the company to pay their VAT by the due date.
16. Understandably Mr Kashe is frustrated that HMRC told him they could see the money in their bank account but that it had not cleared.
17. However HMRC sent out numerous correspondence (for example pages 44, 53, and 59) making it clear that for the VAT period in question they did not accept faster payments and that a BACS payment would take three working days to clear into HMRC's bank account. Further HMRC's literature makes it clear that the only way for the same day transfer of cleared funds is by CHAPS or that a direct debit payment could be set up where the VAT payment is taken automatically by HMRC 10 days after the due date.
18. *Bancroft v Crutchfield (Inspector of taxes)* [2002] STC (S CD) 347 stated "A reasonable excuse implies that a reasonable tax payer would have behaved in the same way. A reasonable tax payer would at least have read the literature issued by HMRC".
19. In our view a reasonably diligent taxpayer would have been aware of when and how to make their VAT payments so it would reach HMRC's bank account in time having read the literature provided by HMRC.
20. Although a lack of funds is not accepted as a reasonable excuse in law nevertheless we can consider whether the underlying cause of a lack of funds may constitute a reasonable excuse. We accept that the company had cash flow problems caused by consistently late payments made by the NHS and they had immediate outgoings nevertheless these difficulties have been ongoing throughout 2010 and into 2011. It is therefore not a sudden or unforeseen difficulty but part of the normal hazards of trading in their business. As such the company should have made suitable provision to ensure that their payment of VAT reached HMRC's bank account by the due date.
21. Further although the company states that the default surcharge is unfair because three months after this VAT period HMRC started accepting faster payments the tribunal can only look at the situation as it was at the time the default occurred.

Conclusion and appeal rights

22. As a result of the foregoing, we find that the company does not have a reasonable excuse. We dismiss the appeal and find there is a liability to surcharge in the amount of £5,901.45.
23. 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.

- 5 24. 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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PAULENE GANDHI

TRIBUNAL JUDGE

RELEASE DATE: 14 January 2014