



TC03238

Appeal number: TC/2012/03150

*VAT- penalty for late payment – whether reasonable excuse – held, yes –
appeal allowed - no liability to surcharge*

FIRST-TIER TRIBUNAL

TAX CHAMBER

ETC (EAST ANGLIA) LTD

Appellant

-and

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

Respondents

TRIBUNAL: JUDGE PAULENE GANDHI

ANNE REDSTON

Sitting in public at Norwich on 26 June 2013.

Graham Coe, manager for ETC, for the Appellant

**Tom Eyre HM Revenue and Customs Appeals and Reviews Unit, for the
Respondents**

DECISION

1. This is an appeal by ETC (East Anglia) Limited (“the company”), against VAT default surcharges for the VAT periods ending on 30 June 2010 (06/10 period), 30 September 2010 (09/10 period), 31 December 2010 (12/10 period), 31 March 2011 (03/11 period), and 30 June 2011 (06/11 period) in the sum of £509.58 which is 5% of the tax outstanding at the due date of £10,191.79, £631.91 which is 10% of the tax outstanding as of the due date of £6,319.90, and £1,197.83 which is 15% of the tax outstanding as of the due date of £7,985.56
3. The issue in this case was whether there was a time to pay arrangement in place or if not did the company have a reasonable belief that there was a time to pay arrangement in place for the periods in question and therefore a reasonable excuse for late payment of their VAT.
4. The Tribunal gave its decision orally at the end of the hearing. We decided that the company did have a reasonable excuse. We allowed the appeal and found he was not liable to the surcharge.
5. HMRC 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.

(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.

The evidence

7. We heard oral evidence from Mr Coe who was asked questions by Mr Eyre and ourselves.
8. HMRC provided a bundle which included the correspondence between the parties together with the following documents:
 - (1) A schedule of defaults from the 06/10 period through to the 06/11 period including the amount of the default surcharge
 - (2) The surcharge liability notice and surcharge liability extension notices
 - (3) Copies of computer printouts headed “action history”
 - (4) Copies of computer printouts headed “trader screen print”
 - (5) Copies of computer screen printouts headed “historic period details”
 - (6) Notes of phone conversations between the company and HMRC
 - (7) A sample time to pay letter dated 22 December 2011 relating to another taxpayer
 - (8) Extracts from HMRC’s online guidance for time to pay requests

and default surcharges

The issues

9. 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*.
10. This means that the question we must ask ourselves in relation to whether there is a reasonable excuse is the following:

“... 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

11. Essentially the company’s arguments break down into three strands:
 - a) They did not receive the surcharge liability notice for the 06/10 period.
 - b) They had a time to pay arrangement in place which enabled them to pay their VAT on a monthly basis and thus their VAT payment was not late.
 - c) Alternatively they had a reasonable belief that they had a time to pay arrangement in place which enabled them to pay their VAT on a monthly basis and thus a reasonable excuse for late payment of their VAT.

Undisputed facts

12. The following facts are not in dispute:
 - a) For the 06/10 period the VAT return and payment were due by 31/07/10.
 - b) The VAT return was received by HMRC on 28/07/10.
 - c) VAT payment was received by HMRC on 13/08/10 and 27/08/10 by BACS.
 - d) A Surcharge Liability Notice was issued on 13/08/10.
 - e) For the 09/10 period the VAT return and payment were due by 31/10/10.
 - f) The VAT return was received by HMRC on 17/11/10
 - g) VAT payment was received by HMRC on 19/11/10 and 09/12/10 by BACS.
 - h) A Surcharge Liability Extension Notice was issued on 30/09/11.
 - i) For the 12/10 period the VAT return and payment were due by the 31st/01/11 .

- j) The VAT return was received by HMRC on 31st/01/11 .
- k) VAT payment was received by HMRC on 14/02/11 and 14/03/11 by BACS.
- l) A Surcharge Liability Extension Notice was issued on 11/01/11 .
- m) For the 03/11 period the VAT return and payment were due by 30/04/11
- n) The VAT return was received by HMRC on 27/04/11.
- o) VAT payment was received by HMRC on 25/05/11, 07/06/11, and 06/07/11 by BACS.
- p) A Surcharge Liability Extension Notice was issued on 13/05/11 .
- q) For the 06/11 period the VAT return and payment were due by 31st/07/11.
- r) The VAT return was received by HMRC on 27/07/11 .
- s) VAT payment was received by HMRC on 08/08/11, 06/09/11, and the 06/10/11 by BACS.
- t) A Surcharge Liability Extension Notice was issued on 12/08/11.
- u) There were a total of five defaults in this period.

Discussion

13. Mr Coe's credibility was not challenged by HMRC and we found him to be a credible witness.
14. The first issue we need to decide is whether Mr Coe received the surcharge liability notice for the first default period of 06/10. If this was not received then the company would not enter the default surcharge regime. Mr Coe says he didn't receive it however HMRC's computer record show it was sent on 13 August 2010. In light of the fact Mr Coe received all of the subsequent surcharge liability extension notices we find that he did receive the surcharge liability notice.
15. The second issue is whether Mr Coe had a time to pay arrangement for the VAT periods from 03/10 to 06/11. HMRC submit that he didn't and the time to pay arrangement was only for the one VAT period of 03/10.
16. We find that there was no time to pay agreement after the 03/10 period. This is because we accept that the surcharge liability notice and extension notices would not have been issued had there been a time to pay arrangement in place.
17. We then have to consider if Mr Coe had a reasonable belief that he had a time to pay agreement and could pay monthly under this agreement.
18. HMRC states it is not possible for the time to pay agreements to cover future periods. However Mr Eyre accepted that HMRC's guidance (page 47) did allow for advanced requests although this wasn't the general position.

19. The question we have to ask ourselves is what Mr Coe believed was the position in relation to his time to pay agreement.
20. We accept his evidence that he believed he was allowed to pay monthly. We accept this for the following reasons:
 - a) His view on this is consistent with HMRC's computer records (page 37) which shows that on 7 March 2011 the time to pay arrangement was cancelled. Mr Eyre says in his opinion this was just the cancelling of a time to pay agreement that had ended to take it off the computer system. He stated however he had no first-hand experience of this system. We do not accept this explanation because if this was the case it seems surprising that it had taken until March 2011 to remove a time to pay agreement that HMRC stated related to an agreement for the 03/10 period. This is also not consistent with Mr Coe's evidence which we accept that when he rang HMRC they stated the computer was telling them that there was a time to pay agreement.
 - b) We accept Mr Coe's evidence that he rang HMRC after receiving the surcharge liability extension notices and HMRC were unable to clarify the position. The position in relation to the time to pay agreement was not clarified until 19 September 2011 when Miss O'Reilly of HMRC rang Mr Coe.
 - c) In relation to Mr Coe's letter of 6 September 2011 (page 21) we accept Mr Coe's evidence that this letter was not setting out what he wanted to happen in the future despite the phrase used "we would like" but was reiterating his understanding of his time to pay agreement.
 - d) We also accept that Mr Coe did not pay monthly for all the periods in question because at times he had the money to pay before what he thought was the due date.
21. We have to consider whether Mr Coe's belief that he had a time to pay arrangement in place for the periods in question was a reasonable one.
22. Mr Eyre states that Mr Coe would have received a letter of which they have provided a sample (page 45) dated 22 December 2011. This letter clearly states that the time to pay can only be agreed for the current VAT liability and on condition that all future liabilities were paid in full by the due dates and that HMRC cannot consider a payment proposal for future periods becoming due also.
23. Mr Coe says he never received a similar letter as his time to pay agreement was made by phone.
24. Mr Eyre states that time to pay agreements are always confirmed in writing. He was however unable to produce the time to pay letter for Mr Coe.
25. In any case we note the letter of 22 December 2011 (page 45) relied on by Mr Eyre is a sample letter relating to another taxpayer for a different VAT period, over a year after the time to pay agreement we are looking at. Mr Eyre assures us that the letter has not change but we have no evidence of this and this is contradicted by HMRC's own guidance which indicates that they can sometimes make forward agreements (page 47).

26. We therefore find Mr Coe's belief that he could make monthly payments reasonable until he received the call from Miss O'Reilly in September 2011 after the VAT periods we are looking at.
27. We therefore allow the appeal and find the company is not liable to the surcharges which are under appeal before us in the total amount of £2,309.32.
28. Additionally we note that although HMRC state in their letter of 21 October 2011 (page 25) that "*genuine mistakes, honestly and acting in good faith are **not** accepted as reasonable excuses for surcharge purposes*" in fact a mistake if reasonable in all the circumstances can amount to a reasonable excuse (see *Coales v R&C Commrs* [2012] UKFTT 477(TC)). We find it unhelpful to give guidance to taxpayers which is incomplete and misleading.

Conclusion and appeal rights

29. As a result of the foregoing, we find that the company does have a reasonable excuse. We allow the appeal and find there is no liability to the surcharges in the total amount of £2,309.32.
30. 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.
31. 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.

PAULENE GANDHI

TRIBUNAL JUDGE

RELEASE DATE: 14 January 2014