



TC03262

Appeal number: TC/2012/03518

*Value Added Tax – Default surcharge – appeal against 10% surcharge –
appeal dismissed and surcharge upheld.*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MILE END JOINERY LTD

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE P M PETHERBRIDGE
MRS M HANDS**

Sitting in public at Nottingham on the 18 December 2013

Mr Gary Pearson Director of the Appellant

Mr P Osborne, Officer of H M Revenue & Customs, for the Respondent

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DECISION

1. This is the appeal of Mile End Joinery Ltd (“the Company”) against the VAT default surcharge of £1,602.11 imposed for the late payment of VAT for the quarter ended the 31 August 2010.
2. The Company accepted that it had paid the VAT late.
3. There was no dispute as to whether the notice of assessment of surcharge was received by the Company.
4. The assessment was raised under Section 59 of the VAT Act 1994.
5. The assessment was charged at 10% of the VAT unpaid at the due date, equating to a penalty of £1,602.11.
6. A full review of the decision to raise an assessment was carried out by HMRC and the decision to assess the surcharge was upheld.
7. The Appellant appealed against the Respondent’s decision by notice dated the 09 February 2011.

The Evidence

8. The Tribunal was provided with a bundle from HMRC, including:
 - (1) Correspondence between the parties and between the parties and the Tribunal;
 - (2) Notes of contact centre calls and transcripts, and surcharge liability notices.
9. In addition, Mr Pearson gave oral evidence.
10. On the basis of that evidence, the Tribunal found the following facts.

The facts

11. The Company entered the default surcharge scheme when their payment for the quarter ended 30 November 2009 was late – it was due by 31 December 2009 but not paid by cheque until the 11 January 2010. The VAT return was also received on the 11 January 2010. This was the Company’s first default so no surcharge was levied, but a notice was issued on the 15 January 2010.
12. The payment for the next quarter ended 28 February 2010 was also late. It was due by the 31 March 2010, but not paid by cheque until the 08 April 2010. The VAT return was also received on the 08 April 2010. No surcharge was levied because the default surcharge of 2% being £80.90 was less than the £400 limit.

13. The VAT for the next quarter ended 31 May 2010 was paid electronically so the due date was extended by 7 days to 07 July 2010, but the payment was a day late. The VAT return was even later – it was not filed until 18 August 2010. However, no surcharge was levied because the default surcharge of 5% of £248.29 was less than the £400 limit.

14. Since the quarter currently under appeal, the payment for the quarter ended 30 November 2010 was late and a default surcharge of £2,118.61 has been levied. The quarter ended 28 February 2011 was on time but default surcharge for the quarters ended 31 May 2011, 31 August 2011 and 30 November 2011 have been levied, but the last default surcharge has been cancelled because it was found that the VAT payment had been made on time.

Legislation, Regulations and Directions

15. The surcharge was levied under Section 59 Value Added Tax 1994 (VATA).

16. The Company was on a quarterly basis for VAT, so its VAT return and the related payments were due on or before the end of the month following each calendar quarter.

17. The Company was due to pay its VAT for the quarter ending the 31 August 2010 on the 07 October 2010.

18. The Respondent's bundle includes a transcript of a telephone conversation that Mr Pearson had with the Respondents on the 05 July 2010 in respect of the on line VAT payment due for the May quarter due on the 07 July 2010.

19. The Respondent's bundle also includes a transcript of a further conversation Mr Pearson had with the Respondent of the 08 October 2010.

20. In his oral evidence to the Tribunal, Mr Pearson explained that he did have a book keeper but that the administration, such as the submission of the Company's VAT returns, was something that he was responsible for. He said that the difficulty with regard to the payment due in July 2010 was something that he only became aware of when he was out of the office and his book keeper was going on holiday on the same day. However, between them they managed to send off a cheque for the VAT due on the 07 July 2010. As Mr Pearson concedes, it was paid late.

The Respondent's case

21. The VAT for the quarter ended 31 August 2010 was due by the 07 October 2010, but not paid electronically until the 22 October 2010. The VAT return was late, having been filed on the 12 October 2010. A default surcharge of £1,602.11, being 10% of the late VAT payment, was levied on the 15 October 2010.

22. Mr Pearson acknowledged that the payment was late, but that there was a reasonable excuse.

23. Section 59 (7) has to be applied subject to the limitation contained in Section 71 (1) VATA 1994 which provides as follows:

(1) For the purposes of any provision of Section 59 which refers to a reasonable excuse for any conduct –

“Any insufficiency of funds to pay any VAT is not a reasonable excuse.”

Although an insufficiency of funds to pay any VAT is not a reasonable excuse, case law has established a principle that the underlying cause of the insufficiency of funds may constitute a reasonable excuse. However, the circumstances have to be exceptional and out of the Appellant’s influence and control. From the information provided the circumstances in this case are viewed as being the normal hazards of trade.

The Appellant’s case

24. In the Company’s letter of the 23 November 2010, the Company said that they had a bad debt, but no details were provided. Mr Pearson said that there was no one particular bad debt, but that there were a number of bad debts that caused him to have a cash flow problem.

25. It was evident that the Appellant had problems with the electronic filing and payments for the quarter ended 31 August 2010 and had had to reapply.

26. A time to pay arrangement was discussed on the 30 December 2011, but the Appellant was unable to provide specific dates and amounts. No time to pay agreement was, in fact, agreed.

27. On the 04 March 2010, the Company was advised that they could not log in because they were using an incorrect password. On the 05 July 2010, the Company telephoned HMRC and was advised how to recover their password and it is that conversation that a transcript is within the Respondent’s bundle.

28. On the 06 July 2010, the Company telephoned HMRC again and was advised how to recover their password.

29. The Company telephoned HMRC on the 08 October 2010 and said that they were having problems filing on line and a transcript of that conversation is within the Respondent’s submission.

30. On the 11 October 2010, the Company advised that they had lost their ID and password, but that was after the due date for payment.

31. The surcharge liability notice and the extension notices gave advice to the Company about contacting HMRC if they were having difficulty with payment. No time to pay arrangement was requested by the Company until a call was made by it on the 30 December 2011. No time to pay arrangement could be negotiated with the Company because the Company was unable to provide specific dates and amounts. The Company has paid its VAT in full, but late. The Company’s letter of the 23 November 2010 says that its return was filed on the 08 September 2010 but, in fact, it was not filed until the 12 October 2010.

32. Whilst there is no definition in the legislation of a ***“reasonable excuse”*** it has been held to be ***“a matter to be considered in the light of all the circumstances of the particular case”***, ***Roland v HMRC [2006] STC (SCD) 536 [18]***.

33. The Tribunal accepts the submission of the Respondent that for something to be a “*reasonable excuse*” it needs to be something unexpected, something unusual to the business and something outside of the prudent tax payer’s control.

34. Whilst the Tribunal note the Company’s difficulties in dealing with its VAT return on line and it is accepted that its attempt in July 2010 was the first occasion that it was required to comply with that arrangement, it does not accept that that difficulty has any relevance to the late payment of the VAT due on the 07 September 2010 in respect of the quarter ended the 31 August 2010.

35. Having considered the totality of the evidence and having taken into account the oral evidence of Mr Pearson for the Company, the Tribunal determined that the Company had not provided a “*reasonable excuse*” for its late payment of the VAT for the quarter ended 31 August 2010.

Decision and appeal rights

36. On the basis of the foregoing, we dismiss the Company’s appeal and confirm the surcharge of £1,602.11.

37. Having initially indicated that the Tribunal would be providing a summary decision, which the parties agreed, on further consideration, it was determined that a full statement of reasons would be given.

38. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has the right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009.

39. The application must be received by the 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.

**P M PETHERBRIDGE
TRIBUNAL JUDGE**

RELEASE DATE: 22 January 2014