



TC04751

Appeal number: TC/2015/02742

VAT – the whole surcharge – Late Payment – whether reasonable excuse – no – appeal dismissed.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

	BIX ECOTECH LTD	Appellant
	- and -	
	THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	Respondents

TRIBUNAL: JUDGE DR. K KHAN

The Tribunal determined this appeal on 30 September 2015 without a hearing under the provisions of rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 28 May 2015 and HMRC's Statement of Case submitted 6 June 2015.

DECISION

Introduction

- 5 1. This is an appeal against a default surcharge for the period 09/14 applying at the rate of 15% in the sum of £437.85.
2. The Appellant's VAT payments remain outstanding.
- 10 3. The taxpayer has been in the default surcharge regime since 06/11

Please find below a chart showing the taxpayers default surcharge periods and liabilities.

Appellant: BIX ECOTECH LTD
Tribunal Reference: TC/2015/02742
VAT Registration Number: 970 8772 77

Def No	Period Period Dates	Due Date*	Amount Paid by Due Date £	Amount Paid After Due Date £	Date payment received+ method	Date Return Received	Tax Assessed Tax on Return	Surcharge Document issued	Surcharge Issued date	Rate %	Amount £0.00
1	06/11 01/04/11- 30/06/11	31/07/11	0.00	121.00	See Attached	25/07/11	121.00	V160	12/08/11	FD	0.00 - SLN
2	09/11 01/07/11- 30/09/11	31/10/11	0.00	798.46	See Attached	01/11/11	798.46	V161	11/11/11	2	0.00
3	12/11 01/10/11- 31/12/11	31/01/12	0.00	3699.47	See Attached	07/02/12	3699.47	V161	17/02/12	5	0.00
4	03/12 01/01/12- 31/03/12	30/04/12	0.00	908.62	08/05/12 FPS	08/05/12	908.62	V162 Removed by letter 29/08/12	-	-	-
5	06/12 01/04/12- 30/06/12	31/07/12	600.00	808.24	See Attached	03/08/12	1408.24	V162 Reduced by letter Reduce by letter	17/08/12 29/08/12 08/06/15	15 10 10	211.23 140.82 80.82

- Where payment is made electronically the due date for payment is extended to seven days after the statutory due date. If the extended due date falls on a bank holiday or weekend payment must clear HMRC's bank account before then (except for Faster Payments which can be received on bank holidays and weekends).

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6	09/12 01/07/12- 30/09/12	31/10/12	0.00	1748.92	See Attached	06/11/12	1748.92	V162	16/11/12	15	262.33
7	12/12 01/10/12- 31/12/12	31/07/13	0.00	1854.32	See Attached	06/02/13	1854.32.00	V162	15/02/14	15	278.14
8	03/13 01/01/13- 31/03/13	30/04/13	0.00	2494.43	See Attached	13/08/13	1723.00 2494.43	V166 V163	17/05/13 14/08/13	15 15	258.45 374.16
9	06/13 01/04/13- 30/06/13	31/07/13	0.00	2278.53	See Attached	05/08/13	2278.53	V162	16/08/13	15	341.77
10	09/13 01/07/13- 30/09/13	31/10/13	0.00	2158.91	See Attached	13/11/13	2158.91	V162	15/11/13	15	323.??

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11	12/13						2296.00	V166	14/02/14	15	344.??
	01/10/13- 31/12/13	31/01/14	0.00	2700.03	See Attached	10/12/14	2700.03	V163	10/12/14	15	405.00
12	03/14						2133.00	V166	16/05/14	15	319.95
	01/01/14- 31/03/14	30/04/14	0.00	3647.69	See Attached	08/08/14	3689.44	V163	08/08/14	15	553.41
13	06/14										
	01/04/14- 30/06/14	31/07/14	0.00	0.00	Remains o/s	07/08/14	772.04	V162	15/08/14	15	115.80
14	09/14										
	01/07/14- 30/09/14	31/10/14	0.00	0.00	Remains o/s	07/11/14	2919.06	V162	14/11/14	15	437.85

*Where payment is made electronically the due date for payment is extended to seven days after the statutory due date. If the extended due date falls on a bank holiday or weekend payment must clear HMRC's bank account before then (except for Faster Payments which can be received on bank holidays and weekends).

Legislation

4. The following legislations are applicable:

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(1) VATA 1994 Section 59(4), Section 59(5), Section 59(7)

(2) VAT Regulations 1995 regulation 25

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(3) VATA 1994 Section 70

(4) VATA 1994 Section 71(1) (a)

(5) Finance Act 2009 Section 108

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Background facts

5. From the chart above it can be seen that the Appellant has been
20 in a default surcharge regime from the period 06/11 onwards. The method of
payment has consistently been via the Faster Payment Service. The period
06/11 had the due date of 7 August 2011. The VAT Return was received before
the due date of 25 July 2011. The Appellant paid their VAT by way of three
25 payments which were all received after the due date on 9, 15 and
23 March 2012 as per the Schedule.

6. The period 09/11 had the due date of 7 November 2011. The VAT
Return was received before the due date on 1 November 2011. The Appellant
paid the VAT by way of nine payments. The first payment was received after
30 the due date on 23 March 2012 and the final payment was received on
17 May 2012.

7. For the period 2012/11 there was the due date of 7 February 2012. The
VAT Return was received by the due date on 7 February 2012. The Appellant
35 paid the VAT by way of 27 payments. The first payment was received after the
due date on 17 May 2012 and the final payment was received on
9 November 2012.

8. For the period 03/13, the Default Surcharge has been cancelled.

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9. For the period 06/12 which had the due date of 7 August 2012 return
was received before the due date on 3 August 2012. The taxpayer paid £600.00
before the due date on 6 August 2012. The balance of the payments was made
through 9 further payments. The second payment was received after the due
45 date on 9 November 2012 and the final payment was received on
28 February 2013. As a result the £600.00 was being received before the due

date that the whole surcharge had been reduced from £140.82 at 10% to £80.82 at 10%.

5 10. For the period 09/12 there is the due date of 7 November 2012. The VAT Return was received before the due date on 6 November 2012 the Appellant paid the VAT by way of 18 payments. The first payment was received after the due date on 28 February 2013 and the final payment was received on 1 October 2013.

10 11. For the period 12/12 it had the due date of 7 February 2013 the VAT Return was received before the due date on 6 February 2013. The Appellant paid the amount by way of 12 payments. The first payment was received after the due date on 1 October 2013 and the final payment was received on 18 February 2014.

15 12. For the period 03/13 which had the due date on 7 May 2013 the VAT Return was received on 13 August 2013. The VAT itself was paid via five payments, the first payment was received after the due date on 18 February 2014 and the final was received on 31 March 2014.

20 13. For the period 06/13 which had the due date of 7 August 2013, the VAT Return was received before the due date on 5 August 2013. The Appellant paid the VAT by way of 14 payments. The first payment was received after the due date on 31 March 2014 and the final payment was received on 28 July 2014.

25 14. For the period 09/13 which had the due date of 7 November 2013 the VAT return was received after the due date on 13 November 2013. The Appellant paid the arrears by way of 11 payments. The first payment was received after the due date on 28 July 2014 and the final payment was received on 26 September 2014.

30 15. For the period 12/13 which had the due date of 7 February 2014 the VAT Return was received on 10 December 2014. The Appellant paid the VAT by way of 16 payments, the first payment was received after the due date on 26 September 2014 and a final payment was received on 6 January 2015.

35 16. For the period 03/14 which had the due date of 7 May 2014, the VAT Return was received on 8 August 2014. The Appellant paid the VAT by way of 10 payments the first payment was received after the due date on 6 January 2015 and the balance of £41.75 remains outstanding.

40 17. For the period 06/14 which had the due date of 7 August 2014 the VAT return was received by the due date. The VAT due of £772.04 remains outstanding. A Time to Pay arrangements has been agreed.

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18. As is apparent from the Schedule and the commentary the Appellant has been late continually with their VAT payments and has been subject to the Surcharge Notices at the highest rate.

5 **The Appellant's case**

19. The Appellant's letter dated 1 April 2015 states that they cannot afford to pay the tax due since they are already making payments of arrears to HMRC on a weekly basis. They indicated that they are having difficulties with customers paying their invoices.

20. It is the belief of the taxpayer that the upholding of the surcharge will simply delay the company from paying off HMRC's debt given its poor trading position.

21. The Appellant had made clear in a letter of 24 March 2015 that the company has no money and has entered into factoring arrangements with banks which have been suspended due to customers owing over £40,000.00 in unpaid invoices.

22. The Appellant has made clear that there is an insufficiency of funds and they are unable to pay.

HMRC's submissions

23. HMRC points out that the VAT for the period 09/14 which is due on 7 November 2014 remains outstanding. A Time to Pay arrangement has been agreed with the taxpayer.

24. There is no liability to a default surcharge for a period where a contract is made with HMRC prior to the due date in order to arrange a Time to Pay. However the Appellant did not make the arrangements prior to the due date for the period 09/14 which are the subject of this Notice of Appeal, therefore the penalty would apply.

25. The liability to VAT surcharge is governed by VATA 1994 Section 59 and the reverse of each notice issued details how surcharges are calculated and the percentages used in determining any financial surcharge in accordance with VATA 1994 Section 59(5).

26. The Appellant has been in receipt of the surcharge notices all of which have been sent to the correct address.

27. The main contention is that pursuant to VATA 1994 Section 71(1) (a) an insufficiency of funds does not give rise to a reasonable excuse. The Appellant Company has used invoice discounting which means that they would have received payments from their invoice finance company prior to the due date. That money would therefore be available to meet their VAT liability. However the Appellant's have indicated in their letter of 24 March 2015 that the finance arrangements were suspended or withdrawn by their bank in March 2015. The due date for payment for the period 09/14 was 7 November 2014 and as such the finance arrangements would have been in place at that time.

28. The Appellant indicated that their bad debts are between £10,000.00 and £12,000.00 and as such under the Cash Accounting Scheme they will not be entitled to bad debt relief.

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Conclusion

29. The taxpayer is obviously in financial difficulty and the Tribunal sympathises with this position.

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The default surcharge of £4,379.85 for the period 09/14 is less than 2% of the total value of sales which is £20,459.00.

30. The Appellant has not provided any grounds which contain a reasonable excuse for the late payment other than that there is an insufficiency of cash which is not itself a reasonable excuse.

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31. A prudent and competent business person would have taken measures to ensure that the VAT money was available for payment or entered into an agreement with HMRC.

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32. It seems to the Tribunal that the taxpayer had not arranged their affairs in such a manner as to allow themselves to be in a position to pay their debts. This is not a reasonable position to take.

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33. In the circumstances the Tribunal finds that there is no reasonable excuse since insufficiency of cash does not provide a reasonable excuse.

34. The taxpayer has not acted in a prudent manner with regard to their finances and in the circumstances the appeal is dismissed and the penalty is upheld. This document contains full findings of facts and reasons for the decision.

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This document contains full findings of facts and reasons for the decision.

Any party dissatisfied with the decision has a right to apply for permission to appeal against it pursuant 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 the 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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K KHAN

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TRIBUNAL JUDGE
RELEASE DATE: 26 NOVEMBER 2015