



**TC03209**

**Appeal number: TC/2013/03110**

*TYPE OF TAX – Value Added Tax – default surcharge – whether payment was wrongly allocated and whether there were payment proposals by the due date – no – whether there was reasonable excuse for late payment – no – default surcharge confirmed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**VERDE LONDON LIMITED**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE FIONAGH GREEN**

**The Tribunal determined the appeal on 27 September 2013 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 23 April 2013 (with enclosures) and HMRC's Statement of Case submitted on 18 July 2013 (with enclosures).**

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## DECISION

### Introduction

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1. This is an appeal against a surcharge of £345.76 for late payment of tax for the quarter period 1 October 2012 to 31 December 2013 and that money paid on the correct date was wrongly allocated to a small debt and not to the period.

### The Evidence

10 2. The appeal was determined without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 the Tribunal having decided that there was sufficient evidence and that it was fair and just to proceed. The evidence was contained within the Notice of Appeal, HMRC's Statement of Case and correspondence.

### 15 The Facts

3. Verde London Limited (the Company) has been in a default surcharge regime from the quarter ending September 2011. There had been five Surcharge Liability Notices issued.

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	Surcharge Document issued	Surcharge issued date	Rate %	Amount £0.00
							Tax on Return				
1	0611 01/04/11 – 30/06/11	31/07/11	0.00	5148.06	See attached	12/07/11		V160	12/08/11	0	0.00
							5148.06				
2	0911 01/07/11 – 30/09/11	31/10/11	0.00	3998.78	See attached	06/10/11		V161	11/11/11	2	0.00
							3998.78				
3	1211 01/10/11 – 31/12/11	31/01/12	0.00	7485.67	See attached	25/01/12		V161	17/02/012	5	0.00
							7485.67				
4	0312 01/01/12 – 31/03/12	30/04/12	0.00	4503.39	See attached	23/04/12		V162 Removed by DMU	18/05/12 12/06/12	10 -	450.33 n/a
							4503.39				
5	0912 01/07/12 – 30/09/12	31/10/12	0.00	Full amount o/s	Full amount o/s	09/12/12		V162 Withdrawn by Letter	16/11/12 10/11/13	10 -	460.70 n/a
							4607.08				
6	1212 01/10/12 – 31/12/12	31/01/13	3500.00	Balance Remains o/s	06/02/13 FPS	15/01/13		V162 Reduced by Letter Reduced by Letter	15/02/13 08/04/13 10/11/13	15 15 10	1043.64 518.64 345.76
							6957.61				

20 4. The first default was for the period ending June 2011 and the company entered the default surcharge regime.

5. Following the appeal HMRC have withdrawn the default surcharge for period ending November 2012 as an agreement pursuant to section 108 Finance Act 2009 has been reached.
6. The quarter period 1 October 2012 to 31 December 2012 had a due date of 31 January 2013. Where payment is made electronically the due date for payment is extended to seven days after the statutory due date, 7 February 2013.
7. The return for the quarter period 1 October 2012 to 31 December 2012 was received electronically on time on 15 January 2013. Electronic returns had been made by the company from the period ending March 2011.
8. The tax due of £6957.61 was received in part by BACS Faster payments on 6 February 2013 with £3457.81 remaining unpaid as at 1 July 2013.
9. On 5 March 2013 the Company requested a review of the surcharge explaining that the intention had been to make a payment on time against the quarter period ending 31 December 2012 tax due. On 8 April 2013 HMRC amended the quarter period ending 31 December 2012 default to show the £3,500.00 part payment received on 6 February 2013. The surcharge was amended from £1043.64 to £518.64.
10. The Company had been in contact with HMRC with regard to existing debt over a prolonged period and had reached an agreement in accordance with section 108 Finance Act 2009 and the default surcharge for the quarter period ending 30 September 2012 has been withdrawn by HMRC. The surcharge was reduced on amendment from £518.64 to £345.76.
11. There was no agreement in respect of the payment to be made by the due date for the quarter ending 31 December 2012.
12. The Company's VAT returns indicate that the business turnover has remained within the limit for using the Cash Accounting Scheme throughout the default cycle.
13. An agreement had been reached following contact by Ruby Cook on behalf of the Company on 23 November 2012 with payments of £1000.00 to HMRC on day 16 of each month by bank transfer. £1,000.00 was paid on 19 November 2012. The tax due of £6957.61 did not form part of that agreement.
14. The Company is a small company. Ruby Cook has struggled to keep the company operating and the staff to keep their jobs. Ruby Cook has used her savings and is a widow and single mother and suffers from chronic fatigue syndrome.

#### The Legislation

15. Value Added Tax Act 1994 (VATA)

#### The default surcharge.

Section 59 (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...

(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.

(11) For the purposes of this section references to a thing's being done by any day include references to its being done on that day.

## 16. VATA Section 71 Construction of sections 59 to 70.

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Section 71 (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

10 (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...

## 17. Finance Act 2009

### Section 108

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(1) This section applies if—

(a) a person (“P”) fails to pay an amount of tax falling within the Table in subsection (5) when it becomes due and payable,

20 (b) P makes a request to an officer of Revenue and Customs that payment of the amount of tax be deferred, and

(c) an officer of Revenue and Customs agrees that payment of that amount may be deferred for a period (“the deferral period”).

25 (2) P is not liable to a penalty for failing to pay the amount mentioned in subsection (1) if—

(a) the penalty falls within the Table, and

30 (b) P would (apart from this subsection) become liable to it between the date on which P makes the request and the end of the deferral period.

(3) But if—

(a) P breaks the agreement (see subsection (4)), and

35 (b) an officer of Revenue and Customs serves on P a notice specifying any penalty to which P would become liable apart from subsection (2), P becomes liable, at the date of the notice, to that penalty.

(4) P breaks an agreement if—

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(a) P fails to pay the amount of tax in question when the deferral period ends, or

(b) the deferral is subject to P complying with a condition (including a

condition that part of the amount be paid during the deferral period) and P fails to comply with it.

(5) The taxes and penalties referred to in subsections (1) and (2) are— ...

5	<i>Tax</i>	<i>Penalty</i>
	Value added tax	Surcharge under section 59(4) or 59A(4) of VATA 1994

10 (6) If the agreement mentioned in subsection (1)(c) is varied at any time by a further agreement between P and an officer of Revenue and Customs, this section applies from that time to the agreement as varied....

15 (10) In this section, except in the entries in the Table, “penalty” includes surcharge and penalty interest.

20 (11) This section has effect where the agreement mentioned in subsection (1)(c) is made on or after 24 November 2008.

### The Issues

18. The issues for the Tribunal were whether—

- 25 (i) the Company was in a default surcharge period
- (ii) the monies paid on 6 February 2013 were wrongly allocated to a small debt rather than to the quarter period 1 October 2012 to 31 December 2012
- (iii) the tax due for the quarter period 1 October 2012 to 31 December 2012 was paid by the due date
- 30 (iv) there was an agreement for time to pay the tax due
- (iv) there was reasonable excuse for the late payment

### The Submissions of the Parties

35 19. The Company

That -

(i) the tax paid of £3,500.00 was not allocated to the VAT account but was allocated to a small debt paid on the 16 day of every month in the sum of £1,000.00

(ii) the Company had always paid tax on the correct date of the submission and that there had not been a previous problem

5 (iii) although the surcharge had been reduced that it was still a large sum for the Company to pay

(iv) HMRC did not take into consideration the fact that the Company was a small company trying to manage overheads and for staff to keep their jobs. Ruby Cook, on behalf of the Company, worked long hours at low pay to keep the business operating.  
10 Ruby Cook was up to the limit with the bank and had used all her savings. Ruby cook suffered from chronic fatigue syndrome and is a widowed single mother

(iv) that a reasonable excuse has been given and continued throughout the period of default

15 20. HMRC

That -

(i) the Company has been in a default surcharge regime from the quarter ending September 2011. There had been five Surcharge Liability Notices issued. The potential financial consequences attached to the risk of further default were known to  
20 the Company. The Surcharge Liability Notice includes a warning that returns and any tax due must reach HMRC by the due date

(ii) following the appeal HMRC have withdrawn the default surcharge for period ending November 2012 as an agreement pursuant to section 108 Finance Act 2009 has been reached

25 (iii) the quarter period 1 October 2012 to 31 December 2012 had a due date of 31 January 2013. Where payment is made electronically the due date for payment is extended to seven days after the statutory due date, 7 February 2013

(iv) the return for the quarter period 1 October 2012 to 31 December 2012 was received electronically on time on 15 January 2013

30 (v) the tax due was received in part by BACS Faster payments on 6 February 2013

(vi) £3457.61 tax remained unpaid as at 1 July 2013.

(viii) the Company had made electronic returns from the period ending March 2011 and would have been familiar with the process and the requirement to render payment electronically



(ix) the Company had been in contact with HMRC in respect of an existing debt over a prolonged period which was paid on the 16 day of each month to HMRC.

(x) there were no payment proposals or agreement for payment in respect of the tax due for the period 1 October 2012 to 31 December 2012.

5 (xi) there was no reasonable excuse for the late payment

## Discussion

21. The first issue was considered. The Company was in the default surcharge regime from the quarter period 1 July 2011 to 30 September 2011 and five earlier  
10 Surcharge Liability Notices had been issued. The potential financial consequences attached to the risk of further default were known to the Company. The Surcharge Liability Notice includes a warning that returns and any tax due must reach HMRC by the due date. In the appeal documentation the Company did not dispute that it was in the default surcharge regime but believed that monies paid had been allocated to the  
15 wrong account. The Surcharge Liability Notice was correctly issued.

22. The second issue was then considered. The Company did pay £3500.00 on 6 February 2013 and HMRC accept that the intention of the Company had been to make a payment on time against the tax due for the quarter period 1 October 2012 to 31 December 2012. .

20 23. The Tribunal decided the third issue and that there was tax due which was not paid by the due date. £3,457.61 remained unpaid as at 1 July 2013.

24. The Tribunal decided the fourth issue and that there was no Time to Pay Agreement in respect of the tax due for the quarter period 1 October 2012 to 31 December 2012. The Tribunal accepts that the Company had been in contact with  
25 HMRC over a long period and that agreement had been made in accordance with the Finance Act 2008 for the quarter period ending 30 September 2012. The default surcharge for the quarter period ending 30 September 2012 has been withdrawn by HMRC which reduces on amendment the surcharge the subject of the appeal. There was however no agreement or proposals relating to the tax due by the electronic due  
30 date of 7 February 2013.

25. The Tribunal then considered whether there was reasonable excuse within Section 59 (7)(b) VATA 1994. There is no definition in law of reasonable excuse. Case law has determined that reasonable excuse is a matter to be considered in the  
35 light of all the circumstances of the particular case. A reasonable excuse is normally an unexpected or unusual (but not exceptional) event, either unforeseeable or beyond control which prevents compliance with an obligation which otherwise would be carried out. It is necessary to consider the actions on behalf of the Company from the perspective of a prudent taxpayer exercising reasonable foresight and due diligence,

having proper regard for their responsibilities. There was nothing exceptional which prevented the Company from paying the tax by the due date. The Company should have checked to ensure that all tax due was paid particularly as £1000.00 was being paid on 16 day of each month for tax already due. The Tribunal decided that the primary reason for the inability to make payment in full on time was an insufficiency of funds. Section 71 1 (a) of The Value Added Tax Act 1994 precludes an insufficiency of funds from providing a reasonable excuse. The Tribunal considered the reasons for the insufficiency of funds. Ruby Cook, on behalf of the Company, provided information that she was up to the limit of bank borrowing, had used her savings and was a widowed mother trying to keep the small business operating and staff employed. Ruby Cook was also suffering from chronic fatigue syndrome however a prudent taxpayer exercising reasonable foresight and due diligence would have taken time to check and to contact HMRC regarding the actual payment of the tax due for the quarter period and to ensure that a fresh Time to Pay agreement was reached. The Company returns indicate that the business turnover has remained within the limit for using the Cash Accounting Scheme. There had been contact by the Company with HMRC in respect of the previous debt but there was no agreement for Time to Pay for the payment due for the period ending 31 December 2012. The potential financial consequences attached to the risk of further default were known to the Company and the Surcharge Liability Notice includes a warning that returns and any tax due must reach HMRC by the due date.

26. The Tribunal decided that the Company was aware of its obligations in respect of the payment of tax. The Company was also aware that it was in a default surcharge regime. There had been an insufficiency of funds to pay Value Added Tax and there was no sudden event which it had not been reasonable to anticipate and the Tribunal decided that there is no reasonable excuse for the late payment and that the reasons behind the insufficiency of funds did not provide a reasonable excuse.

27. The default surcharge regime as a whole is not disproportionate or non-compliant with the European Court of Human Rights nor in the circumstances of the late payment is the particular penalty disproportionate or non-compliant. The Tribunal has no power to reduce the penalty. The surcharge is only imposed on a second or subsequent default, and after the taxpayer has been sent a surcharge liability notice warning them that they will be liable to surcharge if defaults again within a year. Taxpayers thus know their positions and should be able to conduct their affairs so as to avoid any default.

28. The appeal is dismissed. The surcharge of £345.76 at 10% on the unpaid tax for the period 1 October 2012 to 31 December 2012 is affirmed as it is in accordance with section 59 (4) Value Added Tax Act 1994 part payment having been received after the due date and there is no reasonable excuse for the late payment.

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.

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**FIONAGH GREEN  
TRIBUNAL JUDGE**

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**RELEASE DATE: 7 January 2014**