



TC04965

Appeal number: TC/2015/04300

VALUE ADDED TAX – default surcharge – reasonable excuse – ill-health of director resulting in late payment of tax – whether reasonable excuse for appellant company – held, no – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

BOOST PAY LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE JOHN CLARK
JOHN ADRAIN**

**Sitting in public at Fox Court, 30 Brooke Street, London EC1N 7RS on 3
February 2016**

Eileen Breeze, Director, for the Appellant

**Lynne Ratnett, Officer, Appeals and Reviews, HM Revenue and Customs, for
the Respondents**

DECISION

1. The Appellant (which we refer to as “BPL”) appeals against a late payment default surcharge for VAT period 12/14 in the sum of £11,323.00 imposed by the Respondents (“HMRC”). BPL had also appealed against a surcharge for period 03/15; as this surcharge had been withdrawn by HMRC as indicated by their letter to Mrs Breeze dated 11 September 2015, we did not need to consider it.

The background facts

2. The evidence consisted of a bundle of documents. In addition, Mrs Breeze made various statements in the course of presenting the case for BPL, which we accepted as evidence. From the evidence we find the following background facts; we deal later with other factual issues.

3. BPL is a company which provides payroll services to its clients. It has three shareholders, who are not involved in the management of BPL’s business. It has been in business since the beginning of 2010. Its business grew rapidly; the level of growth had been 50 per cent each year. It had incurred substantial expense on the provision of the necessary software to carry on its business. The current position (as it was at the relevant time) is that there are two directors and eleven employees.

4. On 2 July 2013, HMRC wrote to BPL to direct it to make payments on account. The letter included the following statement:

“Please note that the businesses in the Payments on Account regime are not entitled to the seven day extension to the due date for payments made electronically. If your company was previously granted the seven day extension, this is now withdrawn.”

5. On 20 November 2013, HMRC sent BPL a Surcharge Liability Notice in respect of the first payment due for the period from 1 July 2013 to 30 September 2013.

6. BPL incurred a surcharge at 2 per cent in respect of a part of the balancing payment for period 06/14 paid after the due date. On behalf of BPL, Mrs Breeze accepted that the surcharge was due, and paid the surcharge without seeking to challenge it.

7. In respect of BPL’s VAT period 12/14, the first payment on account was due by 28 November 2014. As she was aware that she was about to go into hospital (having been given two weeks’ notice, on the basis that she would be paying for her operation), she made arrangements for that payment to be made to HMRC. According to HMRC’s records, payment was made by CHAPS and the amount was received on 25 November 2014.

8. On 27 November 2014 Mrs Breeze had a pre-operative assessment appointment at her hospital. By a letter of the same date she was notified that she was to be admitted to hospital on 2 December 2014 for her operation.

9. Mrs Breeze informed us that the operation (a hysterectomy) was carried out on 4 December 2014. It had been her intention to return to work shortly afterwards.

10. In a telephone conversation dated 4 September 2015 with Mrs Young of HMRC (see below) Mrs Breeze explained that although the recuperation period for the operation was six weeks, her intention was to work from home after three weeks; as she had Type 1 diabetes, she was already set up to do so.

11. At the hearing she described the operation as having been a difficult one; she had not expected the problems which had arisen afterwards. The operation had “put her on her back” for two weeks. A scan had been pre-booked for her for 11 or 12 December 2014. She had thought that what was wrong with her was flu, but it was later diagnosed as pneumonia; the scan showed a nodule on her lung. The pneumonia after her operation had “wiped her out”. It had become worse and worse; she had missed Christmas and the New Year, and had not returned to the office until 6 January 2015.

12. BPL’s second payment on account for period 12/14 was due by 31 December 2014. Mrs Breeze had assumed that she would be back in the office in plenty of time to arrange for the payment to be made. The nature of BPL’s business was such that it did not close for the Christmas period; normally payments of VAT instalments were made five days ahead of the due date.

13. As a result of the unexpected developments which had prevented her return to the office at the expected time, the payment had been made late. She had completely forgotten about the payment due on 31 December. As soon as she had received a call from HMRC, she had checked and then informed them that the payment would be made as soon as possible.

14. According to HMRC’s records, payment of the outstanding instalment was received by them on 16 January 2015, the day after the conversations between Mrs Breeze and HMRC.

15. BPL’s balancing payment for period 12/14 was due by 30 January 2015. On 27 January 2015 HMRC received £400,000 by way of CHAPS transfer, and on the following day £700,000 by the same method. These payments were not sufficient to complete the full amount of the balancing payment due; the amount outstanding was £8,301.78.

16. On 19 February 2015 HMRC sent BPL a Notice of Assessment of Surcharge. The total value of the default was £226,471, taking into account the delayed second payment on account of £218,170 and the default on balancing payment being £8,301. The surcharge, calculated at five per cent, was £11,323.

17. On 26 February 2015 HMRC’s Debt Management Unit wrote to BPL drawing attention to the amount of £8,301.78 which appeared to be overdue for period 12/14, and stating that if BPL agreed that this was outstanding, it should pay the amount immediately.

18. On 20 March 2015 HMRC's Debt Management Unit wrote to BPL, referring to its outstanding VAT payment for 12/14; the heading to the letter referred to the outstanding VAT amount being £19,624.78. (We note that this combines two amounts, namely the outstanding VAT amount of £8,301.78 and the default surcharge of £11,323; we comment on this later.)

19. Following that letter, Mrs Breeze wrote an undated reply to the Debt Management Unit, received on 27 March 2015, requesting revocation of the "penalty" for late payment of the VAT for December.

20. That letter was treated by HMRC as a request for a review of the default surcharge for the 12/14 period. In their review letter dated 27 April 2015, HMRC gave their decision; they did not accept that BPL had a reasonable excuse for the default. After referring to BPL's awareness of the consequences of default, the review officer stated:

15 "Whilst I have sympathy with your health problems, this was a foreseeable event and we would expect measures to have been put in place prior to your surgery in order to ensure payment of the VAT in your absence."

21. On 12 June 2015 Mrs Breeze wrote to HMRC to explain the circumstances in which the surcharges for 12/14 and 03/15 had arisen.

20 22. On 25 June 2015 HMRC replied, explaining that while in relation to period 12/14 BPL was not entitled to a second reconsideration, exceptionally the review officer had looked at the additional information sent in by Mrs Breeze in case it would allow the parties to reach agreement. The officer had been unable to cancel the decision, but BPL could still appeal to the Tribunal against the surcharge, subject to obtaining permission for a late appeal.

23. On 9 July 2015 BPL gave Notice of Appeal to the Tribunal.

Arguments for BPL

24. Mrs Breeze referred to the circumstances involving her operation and the subsequent health problems which had delayed her return to the office. Although she had accepted that the surcharge for period 06/14 was correct and had paid that amount, she felt that the position for period 12/14 was rather different. In the Grounds of Appeal set out in BPL's Notice of Appeal, she stated:

"The operation was a[n] urgent one and as I was barely organised for it I did not make alternative arrangements to send the payment."

35 25. She had tried to explain to Mrs Young, the HMRC officer who had telephoned her on 4 September 2015 to ask clarification of points referred to in BPL's appeal, the reasons why the complications after her operation had prevented her from arranging the VAT payment. Subsequently to that conversation, Mrs Breeze had learned that pneumonia could affect one's memory, as could sugar levels in relation to diabetes.

40 26. As she had expected to return to work in time to make the VAT payment due on 31 December 2014, she had not put in place any arrangements to make the payment in

her absence. Her co-director would not have asked her about the payment. Mrs Breeze stated that she would have given instructions to her co-director about the payment if she had remembered that it would be falling due while she was still away from work.

27. Mrs Breeze explained that she had since changed the way she worked; as soon as one payment had been made, the next would be ready to be sent, and she tried to make sure that payments were made before their due dates. To ensure this, following the imposition of the surcharges, BPL now had systems in place through its bank ensuring that payments on account would be sent in time to reach HMRC by the due dates; such deadlines were never going to be missed again.

10 *Arguments for HMRC*

28. On the question whether there had been a default in respect of period 12/14, Mrs Ratnett commented that Mrs Breeze had accepted that there had been such a default. In addition to the late payment of the instalment which had become due on 31 December 2014, there had been a sum of £8,301.78 left outstanding from the balancing payment due on 30 January 2015. No excuse had been given for the late payment of this amount.

29. Mrs Ratnett submitted that as Mrs Breeze's recovery had not been as quick as she had thought it would be, there had been a need for arrangements to be made for another person to make the VAT payment; HMRC's case was that there was no reasonable excuse in relation to that.

30. The surcharge had been correctly charged, based on five per cent of the amounts not paid on time in respect of period 12/14, producing the figure £11,323.

31. HMRC asked the Tribunal to find that the payments had been made late, that the surcharge was correct, and that there was no reasonable excuse in relation to either of the late payments. HMRC asked that the appeal should be dismissed.

Discussion and conclusions

32. Mrs Breeze accepted that the payment due on 31 December 2014 had been late, that the outstanding part of the balancing payment due on 31 January 2015 (£8,301.78) had also been late, and that there had been no reasonable excuse for the lateness of the latter payment. Thus the sole question for us to consider is whether BPL had a reasonable excuse for the late payment of the VAT instalment due by 31 December 2014.

33. Mrs Breeze's explanation for that late payment is that she had expected to return to work in time for the payment to be arranged, that she had not foreseen the complications which arose following her surgery, and that as a result of those complications she forgot about the need to arrange for the payment to be dealt with.

34. Mrs Ratnett argued that HMRC's record of the telephone conversation between HMRC and Mrs Breeze on 15 January 2015 at 16.51 contradicted Mrs Breeze's evidence that she had forgotten about the payment. The entry in HMRC's "Action History" includes the following:

“ . . . wasn’t aware of missing POA due 31/12 will call me back soon as she has checked bank payments.”

The next entry in that reverse chronology, on the same date at 17.01 is:

5 “ . . . Tele call from Eileen breeze [*sic*] . . . She wasn’t aware the transaction for POA installment [*sic*] had not been paid. Is goin [*sic*] to Pay asap.”

35. We do not consider this to be in conflict with Mrs Breeze’s evidence that she had forgotten about the payment; in our view it supports the conclusion that, following her post-operative problems, she had forgotten to arrange for the payment
10 and had subsequently assumed that the December 2014 payment had been made. We find that conclusion to be correct on the basis of the evidence before us.

36. At the hearing, following both parties’ submissions, we adjourned for a 15 minute period to consider whether we could arrive at an immediate decision. Having done so, we announced our decision, which was that we would dismiss the appeal,
15 and that we would explain in greater detail our reasons in our subsequent written decision.

37. We told Mrs Breeze that if she had been a sole trader, we would have had no hesitation in finding that she had a reasonable excuse for the late payment of the instalment due on 31 December 2014. However, the taxable person is BPL, not Mrs
20 Breeze, and it is BPL’s responsibility as a corporate entity to make VAT payments on the due dates.

38. The evidence was that BPL has two directors and eleven staff. Further, as Mrs Breeze told Mrs Young on 4 September 2015, her co-director Lisa Hill does have authority to instruct BPL’s bank to make VAT payments. We note that in the same
25 conversation Mrs Breeze explained that she deals with the VAT payments and Lisa Hill deals with the payroll; Mrs Breeze explained to us that Lisa Hill was not involved in dealing with the VAT returns, her involvement being with the reconciliation of accounts.

39. Thus the theoretical position is that Lisa Hill could have been asked to deal with the December 2014 VAT payment if Mrs Breeze had asked her to do so; in practice,
30 given the way in which functions were divided between the two directors, this would not have happened without Mrs Breeze taking specific steps to ensure that the payment would be dealt with. For entirely understandable reasons, this was not done.

40. However, those reasons do not amount to a reasonable excuse for the failure of BPL as a corporate entity to make the payment by the due date. Leaving aside cases
35 of “one-person companies”, a company needs to put arrangements in place to ensure that, if a key person within the company who normally deals with VAT payments happens in any circumstances to be unable to carry out that function, some other person within the company will take over that responsibility so that the VAT
40 deadlines will not be missed.

41. Mrs Breeze explained to us that arrangements have since been put in place to ensure that BPL will not in future be late in making its VAT payments. In our view it is necessary for those companies which depend on designated staff to deal with their

VAT functions to make such contingent arrangements. The fact that such arrangements have now been made shows that BPL could have had such measures in place in advance of Mrs Breeze's unexpectedly extended absence so as to avoid delay in making its VAT payments. Unfortunately for BPL, it has had to learn this lesson as a result of experience rather than by taking precautionary steps in advance.

42. We would like to add a comment on the form of the letter dated 20 March 2015 from HMRC's Debt Management Unit. This referred to a composite sum, the combination of £8,301.78 VAT and £11,323 default surcharge, as being a "VAT amount due". In our view, in order to help taxable persons understand the nature of what is said to be due, such letters ought to state clearly what part of the liabilities said to be outstanding is VAT and what part consists of liability to default surcharge. In particular, if a taxable person appeals against a surcharge, that part of the liability does not have to be accounted for until the appeal has been determined.

43. We have found that the surcharge was properly due and that there was no reasonable excuse for BPL's failure to pay on time the VAT liabilities consisting of its second payment on account for period 12/14 due by 31 December 2014 and of the balancing payment for that period amounting to £8,301.78 due by 30 January 2015. Despite our sympathy for Mrs Breeze and the difficulties caused by her ill health, we have no alternative but to dismiss BPL's appeal.

20 *Right to apply for permission to appeal*

44. 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.

30

35 **JOHN CLARK**
TRIBUNAL JUDGE

RELEASE DATE: 9 MARCH 2016