



**TC05284**

**Appeal number: TC/2016/02069**

*Value Added Tax – default surcharges – reasonable excuse – delay by HMRC in paying CIS deductions – appeal allowed in part*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**SOS JOINERY LIMITED**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE ALASTAIR J RANKIN  
MS ELIZABETH BRIDGE**

**Sitting in public at Tribunal Hearing Centre, Royal Courts of Justice, Chichester Street, Belfast, BT1 3JF on 1 August 2016 at 14.00pm**

**Mr Clifford Rodgers Consultant with Weir & Co, Chartered Accountants for the Appellant**

**Ms Mary Donnelly, Presenting Officer of HM Revenue and Customs, for the Respondents**

## DECISION

1. The decision of the Tribunal is to allow the appeal in respect of the default penalty for the VAT quarter 06/13 and to reduce the penalties for the VAT quarters 12/13 and 03/14.

2. This is an appeal by SOS Joinery Limited (the Company) against VAT surcharge liabilities as follows:

	<u>Period</u>	<u>Amount</u>	<u>Calculated @</u>
	06/13	£963.87	2%
10	12/13	£1,696.65	5%
	03/14	£2,793.89	10%

### **The agreed facts**

3. The Company registered for VAT in 2010 and work in the construction industry. It was required to submit its VAT returns electronically.
- 15 4. For the period 03/13 the VAT return had to be submitted by 7 May 2013 and payment made by the same date. The return was submitted on 7 May 2013 but payment was made by two instalments on 21 May 2013 and 16 July 2013. A surcharge liability notice was issued on 17 May 2013 but as this was the first late payment no actual surcharge was imposed.
- 20 5. For the period 06/13 the VAT return had to be submitted by 7 August 2013 and payment made by the same date. The return was submitted on 7 August 2013 but payment was made by three instalments on 6 September 2013, 16 October 2013 and 22 October 2013. A surcharge liability notice was issued on 16 August 2013 for £963.87 being 2% of the VAT liability of £48,193.54.
- 25 6. The VAT return for the quarter 09/13 was submitted on time and payment was made by a 'Time to Pay' arrangement. As a result no surcharge liability arose.
7. For the period 12/13 the VAT return had to be submitted by 7 February 2014 and payment made by the same date. The return was submitted on 7 February 2014 but payment was not made until 21 February 2014. A surcharge liability notice was issued
- 30 on 14 February 2014 for £1,696.65 being 5% of the VAT liability of £33,973.07.
8. For the period 03/14 the VAT return had to be submitted by 7 May 2014 and payment made by the same date. The return was submitted on 7 May 2014 but payment was not made until 20 May 2014. A surcharge liability notice was issued on 16 May 2014 for £2,793.89 being 10% of the VAT liability of £27,938.96.
- 35 9. It should be noted that all VAT returns were submitted on time – only the payments were late.

10. When the VAT returns were submitted an acknowledgment is issued which advised the Company of the payment due date and for the Company to check with its bank as to the cut off times for making payments by way of Faster Payments. The acknowledgment continued:

5           “Any tax due must be paid electronically and received by HM Revenue &  
Customs by [Payment Due Date]. Payment should be made electronically, by  
Bankers Automated Clearing Services (BACS), Bank Giro Credit Transfer or by  
Clearing House Automated Payment System (CHAPS). You must use the VAT  
10           Registration number as a reference on your payment. Sort code, Account  
number and Account Name can be found on the HMRC web site.

<http://www.hmrc.gov.uk/payinghmrc/bank-account-checker.htm>

15           Please note: HMRC now accepts Faster Payments. Before making an electronic  
payment please contact your bank or building society to check the services  
available to you, any daily value limits and the latest cut off times for making  
15           payment. For more information on making electronic payments see the ‘How to  
pay’ guide on the HMRC website. <http://www.gov.uk/payinghmrc/vat.htm>”

11. HMRC owed the Company £41,224.24 for the tax year 2012/13 in respect of CIS  
payments. Although any CIS credits cannot be released until after the end of the tax  
year, the Company submitted its end of year return form P35 before the due date of 19  
20           April 2013. As a result of the Company having issued duplicate cheques during the  
tax year the form showed a different balance from the balance in the monthly CIS  
returns. The Company’s accountant wrote to HMRC on 23 April 2013 informing  
HMRC of the discrepancies. Unfortunately HMRC entered the corrections as  
increases instead of decreases and the repayment was not authorised by HMRC until  
25           20 November 2013.

12. HMRC owed the Company about £90,000.00 for the tax year 2013/14 in respect  
of CIS payments. This money was promptly authorised for payment by HMRC on 27  
April 2014.

### **The Company’s Arguments**

30           13. The Company experienced substantial cash flow issues as a direct result of the  
delayed CIS payment for 2012/13. The VAT liability for the quarters 03/13 and 06/13  
had due dates for payment of 7 May 2013 and 7 August 2013 respectively. If the CIS  
repayment had been processed promptly by HMRC the Company’s cash flow  
problems would have been eased considerably and payment could have been made by  
35           the due dates.

14. The Company understood a ‘Time to Pay’ arrangement was in place for each  
quarter as HMRC held large amounts of CIS tax belonging to the Company. In a letter  
dated 1 December 2015 HMRC states that their records do not show any requests for  
an offset of the CIS against the VAT liabilities. Mr Rodgers maintained it was for  
40           HMRC to offer to offset the CIS credit against the VAT liability not for the Company  
to ask for an offset. Mr Rodgers thought it was unlikely the Company would have

been aware that the CIS credit could be offset. By November 2013 the Company's CIS position was in credit by about £90,000.00 – more than sufficient to enable the Company to discharge its VAT liabilities for the quarters 09/13, 12/13 and 03/14.

5 15. As a result of their cash flow problems the Company was forced to refinance with a different bank.

### **HMRC's arguments**

10 16. The first default was recorded for the period 03/13 with the result that the Company entered the default surcharge regime. The first Surcharge Liability Notice included warnings to "Submit your return on time" and "Pay your VAT on time". Under the heading "Think ahead" the Notice advised:

"If you can't pay the full amount on time, pay as much as you can. By paying as much as you can by the due date, you will reduce the size of any surcharge. It may even prevent you getting a surcharge altogether."

15 17. HMRC's web pages referred to above in paragraph 10 include a "VAT payment deadline calculator" which advises the last date for payment by Faster Payment Service for each VAT accounting period.

20 18. Section 62(3) of the Finance Act 2004 states that CIS deductions are first to be treated as paid on account of any 'relevant liabilities' of the Company. 'Relevant liabilities' in this context means the Company's obligations to pay any PAYE, NICs, CIS deductions or Student Loan liabilities. Any excess CIS deductions determined at the end of the tax year when the Company has submitted its annual return form P35 can be set against corporation tax or repaid to the Company.

25 19. Statutory Instrument 2005/2045 precludes the repayment of any sum deducted from CIS until the tax year has ended. Therefore HMRC maintain that the CIS deductions could not be paid to the company until after the end of each tax year.

30 20. HMRC was obligated to enquire into the discrepancies reported by the Company's accountant with regard to the CIS deductions for 2012/13. HMRC now accepts that it entered the discrepancies incorrectly and that it was slow in responding to correspondence from the Company's accountants. However as each VAT return is dealt with separately the Company should not have withheld payment of the VAT liability.

35 21. During telephone calls with Mrs Scullion, the wife of the director and owner of the Company, HMRC were informed that payment of VAT for the quarter 03/13 was overlooked and then was delayed as the Company was expecting a contractor to make the Company a payment. No mention was made during any telephone calls that the Company was due a refund by HMRC.

22. A promise to pay the 06/13 VAT liability was not kept though a 'Time to Pay' arrangement was agreed on 4 September 2013, after the due date. Section 108 of the Finance Act 2009 specifies that there is no liability to a default surcharge for a period

where contact is made with HMRC prior to the due date in order to agree a 'Time to Pay' arrangement. As the Company did not make an arrangement prior to the due date the surcharge is unaffected by section 108.

5 23. HMRC has no record of the Company requesting a 'Time to Pay' arrangement for the quarter 12/13.

24. On 27 April 2014 HMRC authorised the release of the balance of the Company's CIS deductions for the tax year 2013/14 amounting to £56,053.30. However the Company did not pay its VAT liability for the quarter 03/14 until 20 May 2014.

10 25. HMRC maintains that the Company's VAT returns show that it continued to trade and had sufficient income to pay its VAT liabilities throughout the periods under appeal. If the Company had arranged its finances in a different manner the VAT could have been paid on time.

26. The onus of proof rests with HMRC. Once established the onus is then on the Company to demonstrate that there is a reasonable excuse for late payment.

## 15 **The legislation**

27. Section 59 of the Value Added Tax Act 1994 states:

“(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 –

- 20 (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,

25 then that person shall be regarded for the purposes of this section as being in default in respect of that period.”

28. Subsection (1A) does not apply to the current situation.

29. Subsection (4) of section 59 states:

“(4) Subject to subsections (7) to (10) below, if a taxable person on whom a surcharge liability notice has been served –

- 30 (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 30. Subsection (5) of section 59 states:

10 “(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;

15 (c) in relation to the third such period, the specified percentage is 10 per cent:

(d) In relation to each such period after the third, the specified percentage is 15 per cent.”

31. Subsection (7) of section 59 states:

20 “(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 –

(b) there is a reasonable excuse for the return or VAT not having been so despatched,

25 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.)”

30 32. Section 71 of the Value Added Tax Act 1994 states:

“(1) For the purposes of any provision of sections 59 to 70 which refers to a reasonable excuse for any conduct –

(b) an insufficiency of funds to pay any VAT due is not a reasonable excuse; “

35 33. Regulation 40(2) of the Value Added Tax Regulations 1995 states that any person required to make a return shall pay to the Controller such amount of VAT as is

payable by him in respect of the period to which the return relates not later than the last day on which he is required to make his return.

34. Section 62 of the Finance Act 2004 deals with CIS deductions held by HMRC. In subsection (3) (b) (c) and (d) it states:

5           “(b) regulations must provide for the sum to be applied in discharging relevant liabilities of the year of assessment in which the deduction is made;

          (c) if the amount is more than sufficient to discharge the sub-contractor’s relevant liabilities, the excess may be treated, in accordance with the regulations, as being corporation tax paid in respect of the sub-contractor’s  
10           relevant profits; and

          (d) regulations must provide for the repayment to the sub-contractor of any amount not required for the purposes mentioned in paragraphs (b) and (c).”

35. Subsection (4) states:

15           “For the purposes of subsection (3) the “relevant liabilities” of a sub-contractor are any liabilities of the sub-contractor, whether arising before or after the deduction is made, to make a payment to the Inland Revenue in pursuance of an obligation as an employer or contractor.”

### **Case Law**

20           36. In *Customs and Excise Commissioners v Salevon Ltd* [1989] STC 907 Nolan LJ said:

          “I would add however that in my view the cases in which a trader with insufficient funds to pay the tax can successfully invoke the defence of ‘reasonable excuse’ must be rare. That is because the scheme of collection which I have outlined involves at the outset the trader receiving (or at least  
25           being entitled to receive) from his customers the amount of tax which he must subsequently pay over to the commissioners. There is nothing in law to prevent him from mixing this money with the rest of the funds of his business and using it for normal business expenses (including the payment of input tax), and no doubt he has every commercial incentive to do so. The tax which he has  
30           collected represents, in substance, an interest-free loan from the commissioners. But by using it in his business he puts it at risk. If by doing so he loses it, and so cannot hand it over to the commissioners when the date of payment arrives, he will normally be hard put to invoke s 19(6)(b). In other words, he will be hard put to it to persuade the commissioners or the tribunal that he had a reasonable  
35           excuse for venturing and thus losing money destined for the Exchequer of which he was the temporary custodian.”

37. The reference to s 19(6)(b) is a reference to a similar piece of legislation to section 71(1)(b) quoted in paragraph 32 above.

38. In Paul Raymond Marsh v The Commissioners for Her Majesty's Revenue & Customs in 2007 9Decision Number 20091) the VAT Tribunal Chairman at paragraph 13 had

5            "...no hesitation in saying the default surcharge should be struck out because the Appellant had a reasonable excuse for the late payment. It is plain from the fact that without the repayment his bank would not, and indeed, did not honour the cheque which he actually issued on time that the failure to receive the CIS repayment was what caused the initial failure on the part of the Appellant to pay his VAT on time."

## 10    **Decision**

39. The Tribunal is persuaded by the decision in Paul Raymond Marsh which, although not binding, has remarkably similar facts to the facts surrounding the default for the period 06/13. We are satisfied that there was inexcusable delay on the part of HMRC in issuing the CIS repayment for the year 2012/13. The Company's  
15    accountant supplied the required information in form P35 on 23 April 2013. The Company should not be penalised because HMRC entered the corrections wrongly and took over six months to rectify its own errors despite correspondence and telephone calls from the Company's accountant. If the payment of the CIS deductions had been made in a timely manner, as happened with the 2013/14 deductions, the  
20    Company would have had sufficient funds to discharge the 06/13 VAT liability. The Company had no means of knowing when HMRC would make the repayment.

40. Accordingly the Tribunal finds that the Company has a reasonable excuse within the meaning of section 59(7)(b) of the 1994 Act for failing to make payment of the 06/13 VAT liability on time. The default surcharge for the period 06/13 amounting to  
25    £693.87 is therefore cancelled.

41. The Company has failed to satisfy the Tribunal that it has a reasonable excuse for failing to pay its VAT liability for the 12/13 quarter on time. The Company should have been aware that a 'Time to Pay' agreement was necessary for each VAT quarter. There does not appear to have been any request for such an agreement in respect of  
30    the 12/13 quarter. The Company's accountants were in correspondence with HMRC around the time the VAT payment was due but there is no mention in the correspondence about the Company having difficulty in paying Vat nor any request for a 'Time to Pay' arrangement.

42. However as the Tribunal has allowed the appeal in respect of the 06/13 default surcharge, the percentage rate for the 12/13 surcharge reduces from 5% to 2%. The  
35    default surcharge for the VAT period 12/13 is reduced from £1,696.65 to £674.46.

43. The Tribunal is unable to agree that HMRC was dilatory in issuing the balance CIS deductions for the tax year 2013/14. The balance repayment was authorised by HMRC on 27 April 2014. The legislation does not allow HMRC to offset a CIS credit  
40    against a VAT liability as the latter is not amongst the "relevant liabilities" referred to in section 62(4). It appears the repayment was by cheque which upon receipt by the



Company had to be cleared through its bank account before the Company could make a Faster Payment in respect of the VAT liability for the 03/14 quarter.

5 44. The Tribunal adopts the words of Nolan LJ quoted at paragraph 36 above and considers the Company has no reasonable excuse for failing to pay its 03/14 VAT liability on time.

45. As the appeal in respect of the default surcharge for the period 06/13 has been allowed and thus the 03/14 default becomes the second default the percentage rate for the 03/14 surcharge reduces from 10% to 5%. The default surcharge for the VAT period 03/14 is reduced from £2,793.89 to £1,396.95.

10 46. In summary, the default surcharge for the period 06/13 is cancelled, that for the period 12/13 is reduced to £674.46 and that for the period 03/14 is reduced to £1,396.95. The total of the surcharges due by the Company is reduced from £5,454.41 to £2,071.11.

15 47. 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)”  
20 which accompanies and forms part of this decision notice.

**ALASTAIR J RANKIN**  
**TRIBUNAL JUDGE**

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**RELEASE DATE: 04 AUGUST 2016**