TC01439

Appeal number TC/2011/04037

VAT – Default surcharge – Reasonable excuse – Proportionality – Appeal dismissed

FIRST-TIER TRIBUNAL

TAX

MR MARK KELLY **Appellant**

- and -

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

TRIBUNAL: DR CHRISTOPHER STAKER (Tribunal Judge)
MR ANTHONY HUGHES (Tribunal Member)

Sitting in public in London on 17 August 2011

The Appellant in person

Mr Robinson for the Respondents

DECISION

1. This is an appeal against the imposition of a default surcharge under s.59 of the Value Added Tax Act 1994 (the "Act") on late payment of VAT for the period 1 November 2010 to 31 January 2011 ("Quarter 01/11").

2. The amount of VAT due for the quarter, £22,245.93, was not in issue. It was also not in dispute that the VAT payment for this period was not made in full by the deadline. Payment was directly debited from the Appellant's account by HMRC based on the details provided in the Appellant's VAT return. It is common ground that the due day for submission of the VAT return was 7 March 2011, and that payment would have been made by the due date if the VAT return had been submitted by that date. It is furthermore common ground that the Appellant's VAT return for this period was submitted online on 8 March 2011, one day late.

3. Previously, HMRC had issued the Appellant with surcharge liability notices in respect of the periods 1 August 2008 to 31 October 2008, 1 November 2008 to 31 January 2009 and 1 November 2009 to 31 January 2010. The surcharge liability notice in respect of the first of these periods was subsequently withdrawn, although at the hearing Mr Robinson who represented HMRC was unable to say why this was. The result was that the surcharge liability notice for the period 1 November 2008 to 31 January 2009 has for present purposes been treated as a first default, attracting no penalty. The surcharge liability notice in respect of the period 1 November 2009 to 31 January 2010 was treated as a second default, attracting a surcharge of 2%, although in fact no payment was required because of the HMRC policy not to enforce payment where the amount of the surcharge is less than £400.

4. The present appeal concerns only the surcharge liability notice for Quarter 01/11. HMRC have treated it as a third default attracting a surcharge of 5%, namely £1,112.29. It has not been suggested by the Appellant that the amount of the default surcharge has not been correctly calculated, if he was in default for a third time in Quarter 01/11.

5. The Appellant's appeal is based on three grounds. First, he contends that he was not validly served with correct surcharge liability notices in respect of the two periods which HMRC contend were the first and second defaults. Secondly, he contends that he had a reasonable excuse for the late payment in Quarter 01/11, and that he is therefore not to be treated as in default in that quarter. Thirdly, he argues that the amount of the surcharge imposed is disproportionate and therefore contrary to European law, relying in particular on *Enersys Holdings UK Limited v HMRC* [2010] UKFTT (TC) ("*Enersys*").

The relevant legislation

6. Section 59 of the Act states in relevant part as follows:

(1) ... 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—

...

(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.

...

(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;

...

(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).

...

7. Section 71(1) of the Act states in relevant part as follows:

(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

(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.

The evidence and submissions of the parties

8. At the hearing, the Appellant appeared in person. HMRC was represented by Mr Robinson.

9. The Appellant gave oral evidence, and stated amongst other matters the following by way of evidence and submissions.

10. The Appellant does not remember whether or not he received surcharge liability notices in respect of the periods 1 November 2008 to 31 January 2009 and 1 November 2009 to 31 January 2010. The burden is on HMRC to establish that he was served with those notices, and HMRC have not discharged this burden. The HMRC evidence indicates that surcharge liability notices were issued, but there is no evidence to establish that they were actually served.

11. The HMRC position on what can amount to a reasonable excuse is formulaic and narrow. The expression "reasonable excuse" should have its ordinary meaning. It should be sufficient that the Appellant "seriously intended to honour his tax liabilities in all of the circumstances in the case".

12. The Appellant is a sole trader, in private practice as a barrister. His Chambers has premises in Birmingham, London and Bristol. He resides in South Croydon. He had a major trial in Birmingham Crown Court that lasted several months which began on 7 March 2011, the due date for payment of the VAT. The first days of the trial are important and he was very occupied. On 7 March 2011, he was thus working away from home in Birmingham. He intended to pay his VAT on time that day. He kept his password and user ID for the HMRC online system in his diary. However, he discovered that it was in his previous year's diary, which he did not have with him in Birmingham. He does not remember if he tried to access the HMRC online system on 7 March 2011, but does not suggest that he did. He would not have been able to get online access in any event without his password and user ID. He called the HMRC Helpline the following day, 8 March, but in relation to a different matter and he does not recall raising in this conversation his difficulties in submitting his VAT return online. He submitted his VAT return online on 8 March, after his partner managed to retrieve his password and user ID from papers that he had at home.

13. The Appellant had no reason not to make payment by the due date apart from the fact that he did not have his password and user ID. There was no advantage to him to wait until 8 March to make the payment. Although he knew that he would be away from home in Birmingham on 7 March, he normally pays on or near the last day, and did not anticipate that it would be an issue. It is a very simple matter to submit the return.

14. Because of the nature of his occupation, the amount of the Appellant's receipts varies from time to time. As it happens, in Quarter 01/11 the amount of his receipts was atypically exceptionally large. He knew in advance of the deadline that he had received a significant amount of money in that quarter, and that the amount of VAT that he would be paying that quarter would be substantial. The effect is that the imposition of a 5% surcharge in respect of this quarter results in a much higher penalty than if a 5% surcharge were imposed in respect of a more typical quarter. The impact for him of this surcharge in this particular quarter is very significant, the amount being very punitive bearing in mind that he was just one day late. The Appellant acknowledges that he has been late in making VAT payments in the past.

15. On behalf of HMRC, Mr Robinson submitted as follows.

16. The previous surcharge liability notices were served. HMRC has no record of letters coming back and delivered. The letters were addressed to the Appellant's last known address where he had resided for many years. This is valid service in accordance with s.98 of the Act. It may be that the Appellant does not recall receiving the earlier notices because they did not require any payment from him. The evidence is sufficient to establish on a balance of probabilities that the earlier notices were served.

17. The Appellant does not have a reasonable excuse for the late submission of the VAT return, and hence for the late payment of VAT. He knew the due date, he knew that he had earned more than usual income in that quarter, and he knew that he could expect a penalty of 5% if he did not pay it on time. The Appellant did not contact HMRC until 8 March, by which time his payment was already late. Mere intention to pay on time does not amount to a reasonable excuse. The concept of a reasonable excuse goes to *why* payment was late, rather than the amount of time by which payment was late. The due date was 37 days after the end of the quarter, and the Appellant therefore had 37 days to comply. Particularly given his history of previous default, he should not have waited until the last minute, and he was familiar with the system. It was reasonable to expect him to make arrangements to enable him to pay on time.

18. In relation to the Appellant's argument based on proportionality, Mr Robinson provided written submissions at the hearing. Because the Appellant had not previously seen these written submissions, the Tribunal asked him if he would like a period of time in which he could provide written submissions in response. The Appellant declined the opportunity.

19. Mr Robinson submitted that the Tribunal in *Enersys* wrongly assumed a jurisdiction in the matter of proportionality, that the Tribunal does not have the power to consider proportionality arguments, and that *Enersys* is not binding in other appeals. He further submitted that the appeal in this case does not fall within the circumstances contemplated in *Enersys* in any event.

20. The Appellant submitted as follows.

21. Reliance is placed on *Enersys*. It would be consistent with *Enersys* to have regard to the fact that he was only one day late, and that he had received a large portion of his individual income in one single quarter. There is no evidence to establish that HMRC served notices of previous defaults on him. The HMRC evidence consists of facsimiles printed from a computer and there is no evidence of what notices he might have actually received. Furthermore, because HMRC withdrew the first surcharge liability notice, this renders the information in all of the subsequent surcharge liability notices incorrect, because the percentage of the surcharge stated in the subsequent notices would no longer be correct. The Appellant added however that this was not the thrust of his submission, which was that notices must be served as a statutory requirement, and the evidence did not establish that he had been served at all. Normally, a surcharge liability notice requires payment of a surcharge, so that the payment of the surcharge is evidence that the surcharge liability notice was served.

That does not apply in the present case because the previous notices did not require any payment. It is not known why the first surcharge liability notice was withdrawn. It might have been because the first notice was inaccurate or had not been served, and if so, that might also have been true of subsequent notices. The Appellant's evidence as to what transpired on 7 and 8 March was not challenged by HMRC, and must therefore be accepted by the Tribunal. Although he need not have waited until the last day to submit his return, this is something that a reasonable person could have done. It is immaterial that he did not try to access the computer on 7 March because he would not have been able to log on in any event. He did not recall if he tried to call the HMRC Helpline on 7 March, but he would not have expected to be able to get his password or user ID from the Helpline.

Findings

22. The Tribunal has considered the arguments and evidence in the case as a whole.

23. The Tribunal is satisfied on the evidence before it, on a balance of probabilities, that the earlier default surcharge notices were served on the Appellant. The Appellant does not deny receiving them. He simply says that he does not *remember* receiving them. The evidence of HMRC, even if it consists of computer printouts rather than copies of notices actually sent, is evidence pointing to the relevant notices being issued in the normal way.

24. The Tribunal is not persuaded that the cancellation of the first default liability notice meant that the subsequent notices became invalid unless they were reissued, correcting the amount of the subsequent surcharges.

25. The Tribunal is not satisfied that the Appellant has a reasonable excuse for the late payment. He knew the deadline. He knew that the amount of VAT to be paid in that quarter was unusually large. There was no reason to wait until the last day. Even if he did wait until the last day, the onus was on him to ensure that he would have all that he needed to submit the return when away from home in Birmingham. He managed to submit the return the following day while still in Birmingham. He says that his partner managed to provide him with the details by telephone. No particular reason has been given why he could not have obtained this information from his partner by telephone the previous day. In any event, there is no evidence that he tried to do so. There is no evidence that he tried to raise the problem with HMRC prior to expiry of the deadline.

26. The Tribunal has also considered the argument that the penalty was disproportionate. In *Enersys* it was said at [69] by the Tribunal that "*I am quite willing to accept—indeed experience of its operation tells me—that the default surcharge regime, by and large, produces a fair penalty, or at least one which is not obviously disproportionate to the offence*". However, that case also stated that the penalty in an individual case may be discharged by the Tribunal where the default penalty regime leads to a penalty in that particular case that is "*wholly disproportionate to the gravity of the offence*" and "*not merely harsh but plainly unfair*".

27. The Tribunal has considered all of the evidence before it. There was in fact little evidence presented by the Appellant in support of the claim that the penalty was disproportionate. The VAT due for Quarter 01/11 (£22,245.93) does indeed appear to be higher than in other quarters for which evidence is available, which in turn may suggest a higher than usual amount of receipts in that quarter. However, even if it were to be assumed for the sake of argument that the amount of VAT in that quarter was twice the amount of an average quarter (and the Tribunal does not find it to be established on the evidence that the amount in this quarter was above average to that degree), the default surcharge would be only some £556 more than it would have been in an "average" quarter. The Tribunal does not have details of the Appellant's personal gross or net income, and the degree of actual personal or business hardship to him is therefore not established. The Tribunal is not persuaded on the evidence that the imposition of a default surcharge of £1,112.29 rather than an undefined lesser amount of surcharge that would been imposed in an average quarter would produce such hardship or unfairness as to be in any sense disproportionate.

28. On its consideration of the evidence and circumstances of the case as a whole, the Tribunal is not persuaded that the penalty is disproportionate. For instance, in *Crane Ltd v HMRC* [2010] UKFTT 378 (TC), which involved a 2% surcharge, the Tribunal concluded that "*Judged against the purpose of a regime which is intended to encourage the timely submission of VAT returns and payment of VAT and to penalise late submission, rather than to compensate the State for the interest cost of the late payment or to recover the funding benefit of late payment of the taxpayer, a penalty of £5000, even for one days' delay, does not seem to us to be wholly outside the realms of what is necessary to achieve that object in this particular case*". Every case must be decided on its own particular facts, so this is not to be regarded as a precedent that should be followed. However, the Tribunal reaches the same conclusion in this case, involving a surcharge of 5%.

29. The Tribunal therefore does not need to consider the HMRC submissions concerning the correctness of the decision in *Enersys*.

Conclusion

30. For the reasons above, the appeal is dismissed.

31. 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.

Christopher Staker

TRIBUNAL JUDGE
RELEASE DATE: 12 SEPTEMBER 2011