



TC02999

Appeal number: TC/2013/00085

VAT – default penalty surcharge for late payment – whether there was a reasonable excuse – no – whether penalty disproportionate – no

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

WEBCURL LIMITED

Appellant

- and -

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

TRIBUNAL: JUDGE JOANNA LYONS

The Tribunal determined the appeal on 28 June 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 letter of appeal dated 21 December 2012, HMRC's undated Statement of Case (with enclosures) and the appellant's response dated 14 March 2013

DECISION

Summary of decision

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1. The Tribunal found that there was no reasonable excuse for the late payment of VAT for the period 08/12 and that the penalty imposed was lawful and proportionate. Accordingly the appeal against the default penalty surcharge of £1,869.36, is refused.

The Appeal

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2. This is an appeal against a default penalty surcharge of £1,869.36, imposed for the late payment of VAT for the period ending 31 August 2012. The VAT was due on 07 October 2012 and was paid on 11 October 2012. This was the appellant's fourth default within the surcharge liability period and a default penalty was applied at the rate of fifteen per cent of the tax due.

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3. Mr Colin Sherry is the managing director of the appellant company ("the company") and makes representations on its behalf.

The issues

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4. The Sherry appeals on the following grounds:

(1) There was a reasonable excuse for the late payment in that he was given misleading information regarding the payment date.

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(2) The penalty imposed is disproportionate.

5. HMRC take oppose both grounds of appeal.

The Law

6. Full details of the legislation and case law are shown in the appendix to this decision

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The legislation

7. The surcharge was imposed because the VAT was paid after the due date. S59 Value Added Tax Act 1994 ("VATA"). The penalty applied does not depend upon the length of the default period.

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8. A taxpayer is not liable to a surcharge if there is "reasonable excuse" for the late payment. s 59(7) VATA

Case Law

9. There is no definition in the legislation of a “reasonable excuse”. It has been held to be “*a matter to be considered in the light of all the circumstances of the particular case*” *Rowland v HMRC [2006] STC (SCD) 536 at [18]*.

5 10. The structure of the VAT default surcharge penalty regime was considered in the recent case *The Commissioners for her majesty’s Customs and excise v Total Technology (Engineering) Limited [2012] UKUT 418 TCC*. The case established that the VAT default surcharge regime was lawful and proportionate and the penalty was not related to the length of the delay.

10 **The default history**

11. Mr Sherry does not appear to contest the schedule of defaults provided by HMRC. The schedule contains the following relevant information :

(1) The surcharge liability period began on 14 January 2011.

15 (2) Since that date there had been three previous defaults in which all the VAT was paid after the due date.

(3) The VAT return was submitted on 05 October 2012.

20 12. The VAT for the period 08/12 was due on 07 October 2012, if paid electronically. The VAT amounted to £12,462.45 and was paid in full by card on 11 October 2012.

13. The last date for receipt of electronic payment was Friday 05 October as 07 October 2012, was a Sunday

14. The penalty was calculated at the rate of fifteen per cent of the tax due and amounted to £1,869.36. The penalty was imposed on 12 October 2012.

25 15. The Company did not make any enquires of HMRC regarding the payment date.

Reasonable excuse

The Appellant’s case

30 16. Mr Sherry submits that the late payment was made as a direct result of misleading information shown on the HMRC website regarding payment dates. He submits that this information has now disappeared from the website He quotes the guidance issued by HMRC which states as follows :-

35 *If you submit your return online you must pay electronically you get seven extra calendar days to submit your return and seven extra calendar days to pay any VAT electronically.*

17. He submits that he took this advice to mean that he had a first extra period of seven days to file the return and an additional period of seven days to make his

payment. In making his payment on 11 October he assumed that it was made within the additional time allowed.

5 18. Mr Sherry submits that HMRC have provided misleading information regarding payment dates and that, but for this misleading information, the default would not have occurred. Mr Sherry does not accept that there was any room for ambiguity in the advice contained on the website and did not consider it necessary to make enquires of HMRC.

The Respondent's case

10 19. HMRC do not appear to dispute that the information quoted appeared on the website at the relevant time. However they do not accept that the wording quoted by Mr Sherry is ambiguous.

15 20. HMRC submit that there is clear information on their website regarding the due dates for payment. They submit that all the relevant information is available and that it would have been reasonable for Mr Sherry to make enquires of them regarding the relevant payment deadlines.

21. HMRC state that there were alternative sources of information available to the company regarding the due date including :-

20 (1) the guidance note on payment dates is contained within Section 21.3 of Notice 700 The VAT Guide (April 2012) which states

Paying by an approved electronic method will give you up to seven extra calendar days to submit your return and pay your VAT

(2) the specific date for payment is shown on their website via the VAT payment deadline calculator (Page 14). This guidance states that for the period 08/12 *cleared funds must be received by HMRC by 05 October 2012.*

25 (3) The due date for payment is shown on the receipt issued upon submission of the return. In this case the receipt was issued on 05 October as the return was submitted on that date. A pro-forma receipt is shown on page 20.

(4) The surcharge liability notice for the period 11/10 contained the following standard paragraph.

30 *“If you expect any difficulties contact either your local VAT office or the National Advice Service”*

Proportionality

The appellant's case

35 22. Mr Sherry submits that the surcharge is disproportionate in the circumstances taking into account the short period of the default. He submits if the penalty were to

be expressed as interest the rate would be very high and would compare unfavourably with “pay day loans”.

The Respondent’s case

23. HMRC submit that the company has a history of defaults and the surcharge imposed is a penalty and not a charge to interest.

Reasons for decision

Reasonable excuse

24. There is clearly a conflict of evidence as to the information given regarding payment deadlines. I am satisfied, on the balance of probabilities, that all the information quoted by both parties was available online at the relevant time as both sides have provided documentary evidence in support of their case.

25. I am satisfied that the information on the website quoted by Mr Sherry was potentially misleading. However this information did not clearly state the due date for payment and Mr Sherry could have sought confirmation of the date from alternative sources.

26. I do not find that this amounts to a reasonable excuse for the late payment in the circumstances because:

(1) There no evidence to suggest that Mr Sherry contacted the HMRC helpline in order to confirm the due date.

(2) The company had incurred previous defaults and Mr Sherry would have been aware of the need to observe the payment deadlines in order to avoid incurring a surcharge.

(3) The due date for payment would have been shown on the acknowledgement of receipt provided upon submission of the return.

(4) The best possible evidence regarding the date of payment was the VAT payment deadline calculator. I am satisfied that this information was available on the website at the relevant time and could have been accessed by Mr Sherry.

Proportionality

27. I accept that the penalty imposed is substantial for a small company and that this was a short default period.

28. However the VAT default surcharge regime is structured in such a way that a penalty is imposed regardless of the length of the default or the reasons for the delay in making payment.

29. The recent case of *Total Technology (engineering)* above considered the structure of the default surcharge regime and found it to be both lawful and proportionate. I also take into account that this was the company's fourth default within the surcharge liability period.

5 **Decision**

30. There was no reasonable excuse for the late payment of VAT for the period 08/12.

10 31. The penalty imposed is lawful and proportionate.

32. The appeal against the VAT default penalty surcharge of £1,869.36, imposed on 12 October 2012, is refused.

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Right of appeal

33. 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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30 **JOANNA LYONS**
TRIBUNAL JUDGE

RELEASE DATE: 25 October 2013

APPENDIX

The Legislation

Section 59 Value Added Tax Act 1994 (“VATA”)

The default

5 Section 59 (1) VATA provides

...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...

10 *(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.

The imposition of a penalty for the default

15 *(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,

20 *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.*

25 *(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—*

30 *(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;

35 *(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.

40 *(e)*

5 (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;*

(7) *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.*

10 *Reasonable excuse*

59 (7) VATA provides

If a person whowould 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—

15 (b) *there is a reasonable excuse for the .. VAT not having been so despatched, ...he shall not be liable to the surcharge.*

Relevant Caselaw

Reasonable excuse

20 34. There is no statutory definition of the term “reasonable excuse”. Case law has established that a reasonable excuse “*is a matter to be considered in the light of all the circumstances of the particular case*”. *Rowland v HMRC [2006] STC (SCD) 536 at [18]*.

Proportionality

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The case of *The Commissioners for her majesty's Customs and excise v Total Technology (Engineering) Limited [2012] UKUT 418 TCC* was a decision of the Upper Tribunal Mr Justice Warren, Chamber President, and Mr Colin Bishopp , President of the tax chamber.

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The case established that

“there is nothing in the VAT default surcharge which leads us to the conclusion that its architecture is fatally flawed”.

35 It was accepted by the Upper Tribunal that the default surcharge regime has the following features :

- (1) *Does not take into account the number of days of the default*
- (2) *Imposes an absolute penalty*
- (3) *There is an ‘inexact correlation of turnover and penalty’*

(4) *There is no power to mitigate the penalty.*

However it was decided that “*none of them [the above factors] leads to the conclusion that the Default Surcharge regime infringes the principle of proportionality*”

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