



TC03007

Appeal number: TC/2013/02462

*VAT – default surcharge – Section 59 Value Added Tax Act 1994 -
proportionality - appeal dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MATT TELECOM SERVICES LIMITED

Appellant

- and -

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

Respondents

TRIBUNAL: G. NOEL BARRETT LLB (Presiding Member)

The Tribunal determined the appeal on 13th 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 which is dated 3rd April 2013 and HMRC's Statement of Case submitted on 25th July 2013. The Appellant has not responded to HMRC's Statement of Case.

DECISION

Introduction

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1. This is an appeal against a default surcharge imposed at the rate of 15%, in the sum of £238.55, for late payment of VAT, in the sum of £1590.36, for the quarter ending 30th November 2012. This quarters VAT payment was due by the 31st December 2012, (or 7 days after this, if the payment was made electronically, that is
10 by Monday 7th January 2013). The Appellant's electronic payment was not actually received by HMRC until Tuesday 8th January 2013.

2. The Appellant appeals on the basis that the default surcharge is excessive and is disproportionate to its default.

15 *The Law*

3. The provisions of *Section 59(1) (a) and (b) of the Value Added Tax Act 1994 (VATA)* operate such that a person shall be regarded as being in default for that period:

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“ If, by the last day on which a taxable person is required.....to furnish a returnthe Commissioners have not received that return or..... have received that return but have not received the amount of VAT shown on the return.....”

25 4. The specified percentages are set out in *Section 59 (5) VATA*:

- 30 “(a) in relation to the first such prescribed period the specified percentage is 2%
(b) in relation to the second such period the specified percentage is 5%
(c) in relation to the third such period the specified percentage is 10%
(d) in relation to such period after the third the specified percentage is 15%”

5. *Section 59(7) VATA* provides that the taxable person shall not be liable to the surcharge and shall not be treated as having been in default:-

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“If a person.....satisfies a tribunal that, in the case of a default which is material to the surcharge...

- (a) ...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...within the appropriate time limit or
- (b) there is a reasonable excuse for the return or the VAT not having been so despatched.”
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The Evidence and my Findings of Facts

10 6. I was provided with the correspondence between the parties, the Appellant’s
Notice of Appeal dated 3rd April 2013 and HMRC’s Statement of Case submitted on
25th July 2013. The Appellant has not replied to HMRC’s Statement of Case. I was
also provided with copies of the Surcharge Liability Notice and Notice Extension
together with specimen generic copies of information available to Tax Payers from
15 HMRC’s web site on the filing and payment of VAT.

7. The Appellant first entered the default surcharge regime when it paid its VAT
late for the quarter ending 31st August 2010 and subsequently defaulted by paying late
for the quarters ending 31st August 2011, 31st May 2012, 31st August 2012, and the
quarter on appeal - 30th November 2011.

20 8. The Appellant has offered no explanation as to why payment was not made by
the due date, being 7th January 2013.

9. The Appellant submitted in correspondence with HMRC that the surcharge
penalty was unfair or disproportionate in view of the fact that the Appellant only paid
its VAT a day late.

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Proportionality

10. The burden of proving this appeal rests upon the Appellant.

30 11. The question of whether or not this tribunal has the power to determine whether
or not a particular penalty, (as decided upon by Parliament), is or is not proportionate
to the particular “default” was examined recently in great detail by the Upper Tribunal
in the case of *HMRC v Total Technology (Engineering) Limited [2012] UKUT 418*
(*TCC*).

35 12. In that case the payment was only one day late; previous defaults had been due to
innocent errors; the tax-payer had an excellent compliance record prior to the first of

the defaults; the amount of the penalty was £4,260.26 and the tax-payer's profits were around £50,000 per year.

13. Mr Justice Warren and Judge Bishopp said at page 26 para 81:

5 “.....the VAT default surcharge regime penalises only the failure to deliver a return and to make payment of the tax owed by the due dateIt is to be noted that the penalty does not increase as time goes by: the penalty is for failure to do something by a due date, not a penalty for a continuing failure to put right the original default.....”

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14. At page 31 para 99 they concluded:

15 “In our judgment there is nothing in the VAT default surcharge which leads us to the conclusion that its architecture is fatally flawed. There are however some aspects of it which may lead to the conclusion that, on the facts of a particular case, the penalty is disproportionate. But in assessing whether the penalty in any particular case is disproportionate, the tribunal must be astute not to substitute its own view of what is fair for the penalty which Parliament has imposed.”

20 15. In *HMRC v Total Technology* the surcharge was held not to be disproportionate.

16. In the earlier First Tier tribunal case of *Energys Holdings UK Limited v HMRC [2010]UKFTT 20(TC)* (which was endorsed in *HMRC v Total Technology* at para's 64 to 66), Judge Bishopp said at para 48:

25 “the authorities made it clear that a measure may not be struck down unless it is “not merely harsh but plainly unfair” or as Waller LJ put it in *R(Federation of Tour Operators) v HM Treasury [2008] STC 2524* at para 32, “it is devoid of reasonable foundation” a phrase derived from observations made by the European Court of Human Rights in *Gasus Dossier-und Fördertechnik GmbH v Netherlands (Application 15375/89)*.”

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17. In this case whilst the surcharge may seem to the Appellant to be harsh it is not unfair, even bearing in mind the relatively short period of the Appellant's default. The purpose of the surcharge regime is to encourage compliance and payment by the due date. It is not a penalty for a continuing failure, the only liability for which
35 is to pay interest. The amount of penalty increases as there are further defaults. Therefore the regime cannot, be said to devoid of reasonable foundation.

Decision

18. For the reasons I have given I do not accept that the default surcharge was unfair or disproportionate.

5 19. In the circumstances I therefore dismiss the appeal and confirm the default surcharge in the sum of £238.55.

20. 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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**G NOEL BARRETT LLB
TRIBUNAL PRESIDING MEMBER**

20 **RELEASE DATE: 25 October 2013**

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