



**TC03084**

**Appeal number: TC/2013/06228**

*VAT – default surcharge- insufficient funds- yes- no reasonable excuse-  
appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**GAMES HEAVEN**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE DAVID S PORTER  
ROLAND PRESHO**

**Sitting in public at Lincoln County Court on 4 November 2013**

**No one appearing for the Appellant**

**David Wilson, an inspector, instructed by the General Counsel and Solicitor to  
HM Revenue and Customs, for the Respondents**

## DECISION

5 1. Charline Millward (Mrs. Millward) emailed the Tribunal on the morning of the hearing and indicated that she would not be attending the hearing due to her lack of mobility arising from spinal surgery in 2009 and the fact that she had developed fibromyalgia and other conditions, which restricted her movement. Judge Porter decided to hear the case in the absence of the Appellant under rule 33 of the Tribunal  
10 Procedure Rules (First-tier Tribunal) (Tax Chamber) Rules 2009 as the Appellant had been advised as to the date of the hearing and it was in the interests of justice to proceed with the hearing

15 2. Mrs. Millward appealed on behalf of the Appellant partnership against a surcharge of £299.18 arising from the Appellant's failure to pay its VAT due on 30/4/13 for the period 03/13. Mrs Millward said that the Appellant had only been one day late with its payment, because Amazon, their principle customer, had delayed its payment to the Appellant, the payment having been received one day after the due date for the VAT payment. The Appellant had severe financial problems. Mrs Millward had had spinal surgery in 2009 and developed fibromyalgia and other  
20 conditions, which restricted her movement. She is now registered as disabled. As a result her husband is struggling to care for her and their two children, and in addition to running the business. The Respondents, HMRC, say that Mrs Millward was familiar with the surcharge procedures and had requested time to pay on previous and subsequent occasions. In relation to period 03/13 insufficiency of funds was advanced  
25 by the Appellant for the reason for the failure to pay by the due date. The fact that Amazon had failed to pay when the Appellant had expected it to do so was an exigency of business and did not amount to a lack of funds sufficient to give rise to a reasonable excuse.

### The Facts

30 3. Mr Wilson told us that the Appellant's was a cash business selling gaming consols and computer games over the internet. Payments were made by its customers to Amazon by 'Pay Pal' or credit/debit cards. Amazon appears to pay the Appellant at least twice a month, but at various times during each month. The Appellant has produced its bank statement for April and May 2013 which reveals:

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- An overdraft position of £10,007.44 on 19 April 2013. We were told that its overdraft limit was £10,000
  - A payment of £3359.84 from Amazon on 23 April 2013.
  - An overdraft position of £9,571.39 on 7 May 2013 the due date for payment of its VAT electronically.
- 40
- A payment of £4112.21 on 8 May 2013 from Amazon, and

- A consequential payment of £2987.75 on 8 May 2013 by ‘faster payment’ to HMRC being the VAT due for the period 03.13 – a day late.

4. The Appellant paid its VAT at the rate of 7.5% under the flat rate scheme calculated on its gross sales. In its letter to HMRC received on 4 September 2013 the  
5 Appellant had applied to be de-registered for VAT purposes.

5. Mrs Millward stated in her Notice of Appeal dated 29 August 2013 that the Appellant’s financial debts totalled £59,658.37 owed on credit cards, 2 bank loans and the overdraft. The Appellant had also received financial assistance from family and their children. She confirmed that the Appellant had applied for a ‘time to pay arrangement’ for the period 03/13, but after the liability arose she had been  
10 embarrassed to ask for a further ‘time to pay’ arrangement since an earlier one had been allowed.

6. The schedule of surcharges revealed that the Appellant had been in the regime as follows:

- 15 • 09/11 VAT due 31/10/11 VAT paid 10/11/11. No surcharge as first notice.
- 12/11 VAT due 31/01/12 VAT paid 14/02/12. No 2% surcharge raised as under £400
- 12/12 VAT due 31/01/13 VAT paid 11/03/13 and 25/03/13. No 5% surcharge raised as under £400
- 20 • 03/13 (the subject of this appeal) VAT due 30/04/13 paid 08/05/13. Surchage raised at 10% amounting to £299.18

7. Mr Wilson submitted that as the Appellant was aware of the default surcharge regime it did not have a reasonable excuse for its failure to pay its VAT on time. In  
25 *Total Technology (Engineering) Limited* [2012] UKUT 418 (TCC) the Upper Tribunal had held that the default surcharge regime was proportional and Tribunals must make their decisions within the terms of the legislation. He confirmed that HMRC, by concession, does not raise a surcharge where the amount of the surcharge does not exceed £400. It was for that reason that the Appellant had not been required to pay any surcharge for the earlier defaults. However, this did not stop the percentage  
30 escalating to 10%. Once the surcharge reached the 10% level HMRC withdrew its concession. The Appellant clearly had insufficient funds, but section 70 (4) of the Value Added Tax 1994 specifically states that an insufficiency of funds does not amount to a reasonable excuse. He conceded that an insufficiency of funds could amount to a reasonable excuse if it arose from unforeseen and extraordinary  
35 circumstances. He submitted that the Appellant was aware that the dates of the payments from Amazon fluctuated and it should have made arrangements accordingly. The fact that the payment was a day late did not assist. The payment in *Total Technology (Engineering) Limited* had only been a day late. In the circumstances the appeal should be dismissed.

## **The decision**

8. We have considered the facts as provided by Mrs Millward and Mr Wilson and the law and we have decided that the Appellant does not have a reasonable excuse for its failure to pay its VAT on time for the period 03/13. We have considerable sympathy for Mrs Millward and her husband not least because of her illness. They are however, aware of their difficulties and have been in the regime for some time. They have had the benefit of the VAT prior to it becoming due. They can pay their VAT liability at anytime during the fourth month before the due date. If they chose to leave the payment to the last minute then they take the risk that the payment might become delayed as in this case. Their financial position does not give rise to a reasonable excuse as it has been on-going for some considerable time. It is not for HMRC to finance the Appellant's business. We therefore dismiss the appeal.

9. 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.

**DAVID S PORTER**  
**TRIBUNAL JUDGE**

**RELEASE DATE: 27 November 2013**