



TC03236

Appeal number: TC/2012/00517

*VAT- penalty for late payment – whether reasonable excuse – held, no –
appeal dismissed – liable for surcharge*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ESSENTIAL BEAUTY SUPPLIES LTD

Appellant

-and

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

Respondents

TRIBUNAL: JUDGE PAULENE GANDHI

ANDREW PERRIN FCA

Sitting in public at the Bristol Appeals venue on 2 July 2013

Steven Wright, director, for the Appellant

**Martin Priest HM Revenue and Customs Appeals and Reviews Unit, for the
Respondents**

DECISION

1. This is an appeal by Essential Beauty Supplies Limited (“the company”), against a VAT default surcharge for the VAT period ending on 30 August 2011 (08/11 period), in the sum of £973.83 which is 15% of the tax outstanding at the due date of £6,492.22.
2. The issue in this case was whether there was a reasonable excuse for the late payment of the VAT.
3. The Tribunal gave its decision orally at the end of the hearing. We decided that the company did not have a reasonable excuse. We dismissed the appeal and found the company was therefore liable to the surcharge.
4. The company asked for full written findings of fact and reasons for the decision (a “full decision”) at the hearing, as they are entitled to do. This is that full decision.

The relevant legislation

5. 59 The default surcharge

(1) [F1Subject 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—

(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,

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

[F2(1A)A person shall not be regarded for the purposes of this section as being in default in respect of any prescribed accounting period if that period is one in respect of which he is required by virtue of any order under section 28 to make any payment on account of VAT.]

(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.

5 (3) If a surcharge liability notice is served by reason of a default in respect of a prescribed accounting period and that period ends at or before the expiry of an existing surcharge period already notified to the taxable person concerned, the surcharge period specified in that notice shall be expressed as a continuation of the existing surcharge period and, accordingly, for the purposes of this section, that existing period and its extension shall be regarded as a single surcharge period.

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

15 (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

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

45 (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; 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.

50 (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

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

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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).

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(8) For the purposes of subsection (7) above, a default is material to a surcharge if—

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(a) it is the default which, by virtue of subsection (4) above, gives rise to the surcharge; or

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(b) it is a default which was taken into account in the service of the surcharge liability notice upon which the surcharge depends and the person concerned has not previously been liable to a surcharge in respect of a prescribed accounting period ending within the surcharge period specified in or extended by that notice.

6. 71 Construction of sections 59 to 70.

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(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;

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The evidence

7. We heard oral evidence from Mr Wright who was asked questions by Mr Priest and ourselves.

8. HMRC provided a bundle which included the correspondence between the parties together with the following documents:

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(1) A schedule of defaults from the 02/10 period through to the 08/11 period including the amount of the default surcharge

(2) The surcharge liability notice and surcharge liability extension notices

(3) Email to HMRC's Business Payment Support Service

(4) Copies of the electronic VAT return submissions

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(5) HMRC's "top tips on how to avoid VAT surcharges"

(6) Copies of computer printout headed "Info Log Entry".

(7) Notes of phone conversations between the company and HMRC

The issues

9. Although not bound by *Coales v Revenue and Customs Commissioners* [2012] UK FTT (477) (TC) we find that case is a helpful analysis of reasonable excuse with which we agree. We therefore follow the approach taken in *Coales*.

5 10. This means that the question we must ask ourselves in relation to whether there is a reasonable excuse is the following:

10 “... was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?”.

Summary of the company’s arguments

11. The company’s arguments essentially break down into two strands:

- a) Cash flow problems - reasonable excuse;
- b) Amount of the surcharge is disproportionate

15 **Undisputed facts**

12. The following facts are not in dispute:

- a) For the 08/11 period the VAT return and payment were due by 30/09/11.
- b) The VAT return was received by HMRC on 03/10/11.
- 20 c) Payment of the VAT was made by way of three cheques on 08/10/11 for £3,246.11, 25/10/11 for £1,623.05, and 26/10/11 for £1,623.05.
- d) A Surcharge Liability Extension Notice was issued on 14/10/11.
- e) This was the fifth default.

Discussion

25 13. Applying the analysis of reasonable excuse in *Coales* to the facts of the case before us, the company having been in the default surcharge regime since the 02/10 period should have been aware, from correspondence sent by HMRC in relation to the previous defaults and from the information on HMRC’s website, of how to make payment of their VAT to ensure it reached HMRC by the due date, and the consequences of not paying their VAT on time.

30 14. There is a legal obligation on the company to pay their VAT by the due date.

35 15. Although a lack of funds is not accepted as a reasonable excuse in law nevertheless we can consider whether the underlying cause of a lack of funds may constitute a reasonable excuse. We accept that Mr Wright had a very difficult two years in 2010 and 2011 both because of his serious illnesses at the beginning of 2011 and the subsequent recovery time, and at around the same time the bank withdrew his overdraft facilities as his business was declining and then, in effect, he was forced into factoring.

16. It is clear that factoring was not working for his business and around summer 2011 he came out of factoring and had to repay this money to his bank.
17. However he would have been aware that he would have had to repay the bank on coming out of factoring and also aware of the due date for payment of his VAT.
- 5 18. Although we accept there would have been a shortage of funds to pay his VAT as he had to repay the bank at around the same time as his VAT was due this shortage was neither unexpected nor sudden.
19. We are looking at what a diligent taxpayer, who took their tax obligations seriously, would have done in the circumstances. In our view a diligent tax payer would have explored a time to pay agreement with HMRC for the 08/11 period.
- 10 20. This means we find there was no reasonable excuse for the late payment of VAT for the 08/11 period.
21. The surcharge amount is set down by law. When a taxpayer has been in the penalty surcharge regime and defaulted on four previous occasions on the fifth occasion the surcharge is set out by law at 15%. We have no power to change this.
- 15 22. Further *HMRC v Total Technology* [2012] UKUT 418 (TCC) confirmed that the test when considering issues of the proportionality of a penalty is not whether the penalty is “harsh” but whether it is “plainly unfair” or “without reasonable foundation”. It stated that if the overall regime is found to be disproportionate, all penalties under it will fail, but if it is not, individual penalties can still fail for disproportionality. The upper tribunal were looking specifically at the VAT default surcharge regime which is a scheme where the amount of surcharge is related to the amount of tax payable. They found the overall regime was not disproportionate. We are bound by this decision.
- 20 23. The penalty regime for late VAT payment, as found in *Total Technology*, broadly satisfies the requirement of proportionality. However we must also consider whether this particular penalty does so. We must however “be astute not to substitute [our] own view of what is fair for the penalty which Parliament has imposed”.
- 25 24. Even if the penalty of £973.83 for being between 8 to 26 days late in paying their VAT may be regarded as “harsh”, we do not consider it to be “plainly unfair” or “without reasonable foundation”.
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Conclusion and appeal rights

- 35 25. As a result of the foregoing, we find that the company does not have a reasonable excuse. We dismiss the appeal and find there is a liability to surcharge in the amount of £973.83.
26. 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.
- 40 27. 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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PAULENE GANDHI

TRIBUNAL JUDGE

RELEASE DATE: 14 January 2014