



**TC03447**

**Appeal number: TC/2014/00260**

*Value Added Tax – default surcharge – whether reasonable excuse for late payment – no – whether penalty disproportionate – no – appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**OMNIFIC DESIGNS LIMITED**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE JOANNA LYONS  
MR NIGEL COLLARD**

**Sitting in public at Southampton on 25 February 2014**

**The appellant company was not represented**

**Mr Martin Priest, Higher officer of HM Revenue & Customs, for the  
Respondents**

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## DECISION

### **The Appeal**

- 5 1. This is an appeal against a default penalty surcharge of £4,248.56, imposed for the late payment of VAT for the three month period ending 31 October 2013.
2. The VAT was due on 07 December 2013 and was paid on 10 December 2013. This was the appellant's eighth default within the surcharge liability period and a default penalty was applied at the rate of 15 % of the VAT due.
- 10

### **Non attendance by the appellant**

3. Miss Nicola Oxley is a director of the appellant company ("the company"). She made written representations on behalf of the company but did not attend the hearing.
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4. Rule 33 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 provides that the Tribunal may proceed in the absence of the appellant if the appellant has been notified of the hearing and it is in the interests of justice to proceed.
- 20
5. Natalie Galsworthy, the company accounts manager, was contacted immediately prior to the hearing. She stated that Miss Oxley was not intending to attend the hearing although she was aware of the date. No further explanation was given.
6. We were satisfied that the company had been notified of the hearing. We were further satisfied that it was in the interests of justice to proceed in the absence of a representative of the appellant company, no explanation was provided for their failure to attend the hearing.
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### **The issues**

- 30 7. This appeal raises the following issues :
- (1) The company's liability to pay the surcharge;
  - (2) Whether there is a reasonable excuse for late payment and
  - (3) The proportionality of the penalty imposed.

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### **The facts**

40 *The agreed facts*

8. The default history does not appear to be contested by Miss Oxley in her notice of appeal or in correspondence.

9. The default history can be summarised as follows :

5 (1) Period 01/10 – default one - the VAT was due on 28 February 2010 and was paid by cheque on 12 April 2010. No penalty was incurred but a surcharge liability notice was issued.

10 (2) Period 04/10 - no default - the VAT was due on 07 June 2010 and was paid by in full by BACS on 11 June 2010. A penalty of 2 % per cent was issued. However the company appealed against the penalty and this was accepted by Her Majesty's Revenue & Customs (“HMRC”) on 25 August 2010. The company was also sent a letter entitled “advice to help you avoid a default surcharge”. The letter contained the following paragraph

15 *Please remember that if the 7<sup>th</sup> day falls on a weekend or bank holiday payment must reach our account by the last working day beforehand. Check with your bank to see how long the process takes.*

20 (3) Period 07/10 – default two - the VAT was due on 07 September 2010. £40,000 was paid on time, £10,000 was paid on 08 September 2010 and the balance of £6,138.77 was paid in on 09 September 2010. All payments were by BACS. A surcharge of 2 % was applied. However, because this was less than £400, HMRC did not issue a penalty surcharge but extended the surcharge liability notice for a further 12 months.

25 (4) Period 10/10 – default three - the VAT was due on 07 December 2010 and was paid in three instalments on 08, 09 and 10 December 2010. A 5 % surcharge was issued in the amount of £1,232.72.

30 (5) Period 01/11 - default four - the VAT was due on 07 March 2011. £16,100.57 was paid on time and the balance of £10,000 was paid in full by BACS on 08 March 2011. A 10 % surcharge was issued in the amount of £1,000. The company appealed against this penalty but this was refused on 07 April 2011. HMRC’s letter of refusal contained the following paragraph

35 *I must reiterate BACS payments take at least 3 working days to reach our account as HMRC is unable to receive payments via the faster payments service. Please ensure you allow enough time for payments to reach us. The advice letter was resent.*

40 (6) Period 04/11 - default five - the VAT was due on 07 June 2011. £10,000 was paid on time and the balance was paid in two instalments on 08 and 09 June 2011. A 15% surcharge was issued in the amount of £2,099.53.

45 (7) Period 04/12 – default six - the VAT was due on 07 June 2012 and was paid via the Faster payments service (“FPS”) on 12 June 2012. A 15% surcharge was issued in the amount of £4,913.16. The company appealed on the grounds that the payment had left their account on 06 June and it was assumed it would be received on 07 June 2012. In rejecting the appeal HMRC reiterated the comments made in their letter of 25 August 2010 regarding bank payments.

(8) Period 10/12 – default seven - the VAT was due on 07 December 2012 and was paid in two instalments on 01 February 2013 and 20 March 2013. A 15% surcharge was issued in the amount of £3,756.66.

5 10. The VAT for the period 10/13 was due on 07 December 2013. The last date for receipt of electronic payment was Friday 06 December 2013 as 07 December 2013, was a Saturday. The VAT amounted to £28,323.77 and was paid in full by FPS on 10 December 2013. The penalty was calculated at the rate of 15 % of the tax due and amounted to £4,248.56.

### *The contested facts*

10 *The appellant's case*

11. In her appeal Miss Oxley states that she paid the VAT via FPS on 06 December 2013. She asserts that the bank must have made a mistake in processing the payment or alternatively there has been a delay caused by an error on the part of HMRC. She has not provided any evidence in support of her case.

15 *The respondent's case*

12. Mr Priest stated that Faster payments can be received by HMRC on the same day if made before 4pm. Payments made after 4pm will be paid to them on the following working day. If the payment is made after 4pm on a Friday payment will not be received into their account until the following Monday as they are unable to accept payments on non business days.

13. Their ledger shows that the payment was received into HMRC's account on Tuesday 10 December 2013. It follows that the payment could have been made on 09 December after 4pm or before 4pm on 10 December. It is very unlikely that payment would have been made on 06 December as, if this had occurred, payment would have been received on 06 or 09 December. In support of his case he has supplied a copy of the ledger showing the relevant entry.

### *Findings of fact*

14. We are not satisfied on the balance of probabilities that the VAT was paid by the company on 06 December because Miss Oxley has not provided any evidence from her bank regarding the date of payment nor is there any other evidence to suggest that there was a mistake made by the bank.

15. We are satisfied on the balance of probabilities that the payment was made on 09 or 10 December because this is consistent with the explanation given by Mr Priest regarding the operation of the FPS which was supported by a ledger entry showing receipt of the funds by HMRC on 10 December.

### **Liability for the surcharge**

#### *The law*

16. Insofar as it applies to the present case S59 Value Added Taxes Act 1994 ("VATA") provides :

(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...

5 (b) the Commissioners have received that return but not received the amount of VAT shown on that 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

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.

17. Section 59 (5) VATA provides that a default surcharge is payable depending on the number of defaults within a surcharge liability period. The specified percentage  
25 surcharge rises from 0 % for the first default to 15 % for the fifth default.

#### *The submissions*

18. The company made no specific representations regarding their liability to pay the surcharge and did not dispute the history of defaults.

19. Mr Priest submitted that the company had been within the surcharge liability  
30 period since 12 March 2010 and there had been seven previous defaults during which the surcharge had escalated to 15%. The company did not appear to contest the schedule of defaults or the percentage surcharge applicable.

#### *Reasons for decision*

35 20. We are satisfied that the company is liable to pay the surcharge in accordance with S59(1) and (4) VATA because the history of defaults has been established in evidence by HMRC and has not been disputed by the company.

#### **Reasonable excuse**

40 *The law*

21. Section 59 (7) VATA provides:

" If a person who, apart from this subsection, would be liable to a surcharge under subsection (4) above satisfies ..a tribunal that, in the case of a default which is material to the surcharge—

5 (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 by the Commissioners within the appropriate time limit, or

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

10 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..

22. The legislation does not define the term “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]*.

#### *The submissions*

23. Miss Oxley submits that she made the payment on 06 December 2013 and had reasonable grounds to believe that her payment would be received on that date.

20 24. Mr Priest does not accept that the payment was made on 06 December. He maintains that the company would have been alert to the payment deadlines in view of the default history as outlined above. He states that the company were specifically advised to allow sufficient time to ensure that payment was received by them before the due date.

#### 25 *Reasons for decision*

25. We do not find that there is a reasonable excuse due to a mistake by the bank or HMRC as we do not find as a fact that any such mistake was made.

30 26. We do not find that there was a reasonable excuse based on a misunderstanding regarding payment deadlines because the company had incurred previous late payment surcharges based on similar mistakes and would have been alert to the need to ensure payment was made on time. Indeed the company appear to have made an identical mistake in relation to the period 10/12.

27. We also take into account that HMRC advised the company of the relevant payment deadlines and the steps to take in order to avoid incurring surcharges.

#### 35 **Proportionality**

##### *The law*

40 28. The default occurs if the payment is made after the due date for payment S59(1) VATA (above). The penalty imposed in accordance with S59(4) and (5) does not take into account the period of the default.

29. The issue of proportionality was considered by the Upper Tribunal in the case of *Total Technology (Engineering)Ltd V HMRC [2012] UKUT 418 (TCC)*. The Upper

Tribunal acknowledged that the default surcharge regime did not take into account the number of days of the default. However it was decided that this did not “lead to the conclusion that the Default Surcharge regime infringes the principle of proportionality”.<sup>[105]</sup>

5 *The submissions*

30. Miss Oxley submits that the surcharge is disproportionate in the circumstances as this is a substantial penalty for a small company and the VAT was paid only one day late.

10 31. HMRC submit that the penalty has been imposed in accordance with the legislation taking into account the amount of the late payment and the number of defaults. In support of their case they refer to the decision in the case of *Total Technology* (above) in which the structure of the default surcharge regime was found to be proportionate.

*Reasons for decision*

15 32. We accept that this was a short default period. However the penalty imposed in accordance with S59 (above) does not take into account the period of the default. In the case of *Total Technology (Engineering) V HMRC* (above) the Upper Tribunal considered this aspect of the legislation and did not find it to be disproportionate.

20 33. We accept that this was a substantial penalty for a small company. However we take into account that this was the company’s eighth default within the surcharge liability period and the penalty was calculated as a percentage of the company’s VAT liability.

34. For these reasons we do not find the penalty imposed to be disproportionate.

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**Decision**

35. The company is liable to pay the penalty in accordance with S59(1) VATA.

30 36. There was no reasonable excuse for the late payment of VAT in accordance with S59(7) VATA.

37. The penalty imposed was proportionate.

35 38. The appeal against the VAT penalty surcharge of £4,248.56 is refused.

**Right of appeal**

40 39. 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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**JOANNA LYONS  
TRIBUNAL JUDGE**

**RELEASE DATE: 25 March 2014**