



TC03571

Appeal number: TC/2014/00020

VALUE ADDED TAX – default surcharge – whether reasonable excuse for late payment – no – whether penalty disproportionate – no

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

TOTAL HOUSE SOLUTIONS LIMITED

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE JOANNA LYONS

The Tribunal determined the appeal on 11 April 2014 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 18 December 2013 and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal 03 February 2014.

DECISION

The Appeal

5 1. This is an appeal against a default penalty surcharge of £1,007.68, imposed for the late payment of VAT for the three month period ending 31 August 2013. The penalty was imposed in accordance with Section 59(4) Value Added Tax Act 1994 (“VATA”).

2. Mr Webster appeal on behalf of the appelland company (“the company”).

The issues

10 3. Mr Webster appeals on the following grounds:

(1) There was a reasonable excuse for late payment and

(2) The penalty imposed is disproportionate.

4. These matters are disputed by HMRC.

The agreed facts

15 *The default history*

5. The default history was not contested and can be summarised as follows:

20 (1) Period 05/12 - default one - electronic payment was due on 07 July 2012 and was paid on 15 August 2012. No penalty was incurred but a surcharge liability notice was issued. The surcharge liability notice contained the following paragraph

“Your VAT returns and any tax due must reach HMRC by the due date. If you expect to have any difficulties contact either your local VAT office .. or the National advice service”

25 (2) Period 11/12 - default two - electronic payment was due on 07 January 2013 and was paid on 21 February 2013. 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. The reminder paragraph quoted above was also contained on the notice.

The default for the period 08/13

30 6. For the period 08/13 - default three - the electronic payment and return were due on 07 October 2013. The return was filed on 27 September and the payment was made via Billpay on 10 October 2013. When submitting the return an automated screen acknowledgement refers the taxpayer to the “VAT deadline calculator”.

HMRC have provided a screen shot of the online payment calculator for the relevant period 08/13 which reads:

5 “02 October 2013 is the last date you can pay by online debit or credit card using BillPay for the period ending 31 August. HMRC must receive cleared funds by 07 October 2013”

7. The VAT due for the period 08/13 amounted to £20,153.73. As this was the third default a default surcharge was applied at the rate of 5% of the VAT due, amounting to £1,007.68.

Company cash flow

10 8. The company is engaged in the building trade. They take 25% advance deposits from customers the remaining 75 % being paid at the end of the project. For the quarter 08/13 deposits and second payments had been taken from clients leading to an artificially inflated income for that period. The majority of purchase invoices fell into the 11/11 quarter giving rise to a VAT reclaim amounting to £4,043.

15 **Reasonable excuse**

The law

9. Section 59 (7) Value added Tax Act 1994 (“VATA”) provides:

20 " 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—

(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

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

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..

30 10. 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 arguments

35 11. Mr Webster states that he made a mistake for the 08/11 period and assumed that he had until 19 October to pay the VAT.

12. HMRC submit that Mr Webster would have been aware of the date for payment as this information was contained on the reverse of the previous surcharge liability

notices. They also point out that the online return, filed on 27 September, directed Mr Webster to the payment deadline calculator in which the payment date was clearly shown. (paragraph 6 above)

Reasons for decision

5 13. I accept that Mr Webster made a genuine mistake as to the payment date. However I find that that this mistake was not reasonable in the circumstances because he does not appear to have sought advice from HMRC in accordance with the information given in the preceding surcharge liability notices. I also take into account that he was referred to the payment deadline calculator upon submission of the return
10 on 27 September.

14. For these reasons I am satisfied that there is no reasonable excuse for the late payment of VAT.

Proportionality

The law

15 15. The default occurs if the payment is made after the due date for payment s59(1) VATA. The penalty is imposed for the late payment and does not take into account the period of the default s59(4) VATA.

16. The issue of proportionality was considered in the case of *Total Technology (Engineering) Ltd v HMRC [2012] UKUT 418 (TCC)*. The Upper Tribunal
20 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”.^[105]

The arguments

25 17. Mr Webster submits that the penalty is substantial due to the inflated earnings for the period 08/11 as compared with the subsequent quarter. He points out that this was a short delay and the penalty imposed is disproportionate in the circumstances.

18. 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
30 previous defaults. In support of their case they refer to the decision in the case of *Total Technology (Engineering) Ltd (above)* in which the structure of the default surcharge regime was found to be proportionate.

Reasons for decision

35 19. I accept that this was a short default period. However the penalty was correctly imposed in accordance with s59(4) VATA which 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. I acknowledge that the company experienced an artificially inflated VAT liability for the period 08/13 and that this impacted upon the level of the resulting penalty. However this does not give rise to a ground of appeal as the penalty is calculated in proportion to the level of income in that particular period together with the number of previous defaults, s59(4) VATA. I also take into account that the company did not incur a penalty in relation to the previous two defaults.

21. For these reasons I am satisfied that the penalty imposed is proportionate.

10 **Decision**

22. There was no reasonable excuse for the late payment of VAT.

23. The penalty imposed was proportionate.

24. The appeal against the VAT penalty surcharge of £1,007.68 is dismissed.

Rights of appeal

15 25. 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
20 “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: 7 May 2014