



**TC03591**

**Appeal number: TC/2013/09132**

*VAT default surcharge - payment received by HMRC one day late – Appellant on holiday when return and VAT due which caused delay in payment - whether in the circumstances a penalty of £1,256.97 was unfair and disproportionate - no - whether reasonable excuse - no - Appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**TRADE FINANCE SOLUTIONS & OUTSOURCING LTD      Appellant**

**- and -**

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

**TRIBUNAL:    JUDGE MICHAEL S CONNELL**

**The Tribunal determined the appeal on 20 February 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 Notice of Appeal dated 26 November 2013 and HMRC's Statement of Case submitted on 02 December 2013**

## DECISION

### The Appeal

1. Trade Finance Solutions and Outsourcing Limited (“the Appellant”) appeals  
5 against a default surcharge of £1,256.97, for its failure to submit, in respect of its VAT period ended 30 June 2013, by the due date, payment of the VAT due.

2. The point at issue is whether or not the Appellant has a reasonable excuse for making late payment.

### Background

10 3. The Appellant entered the VAT default surcharge regime in period 06/11 and subsequently defaulted on VAT payments in periods 03/12, 09/12, 03/13 and again in period 06/13 which is under appeal.

4. The Appellant paid VAT on a quarterly basis. Section 59 of the VAT Act 1994 requires a VAT return and payment of VAT due on or before the end of the month  
15 following the relevant calendar quarter. [Reg 25(1) and Reg 40(1) VAT Regulations 1995].

5. HMRC have discretion to allow extra time for both filing and payment when these are carried out by electronic means. [VAT Regulations 1995 SI 1995/2518 regs. 25A (20), 40(2)]. Under that discretion, HMRC allow a further seven days for  
20 electronic filing and payment.

6. The due date for the Appellant’s VAT return and VAT payment for the 06/13 period was 31 July 2013. As payment was made electronically, the due date for the 06/13 period was 7 August 2013. The Appellant’s return was received by HMRC on 6 August 2013. The amount due under the return was £25,139.41. Payment of the VAT  
25 due was received by HMRC by electronic transfer of funds on 8 August 2013, one day late.

7. Section 59 Value Added Tax Act 1994 (“VATA”) sets out the provisions in relation to the default surcharge regime. Under s 59(1) a taxable person is regarded as being in default if he fails to make his return for a VAT quarterly period by the due date, or if he makes his return by that due date but does not pay by that due date the amount of VAT shown on the return. The Commissioners may then serve a surcharge liability notice on the defaulting taxable person, which brings him within the default surcharge regime so that any subsequent defaults within a specified period result in assessment to default surcharges at the prescribed percentage rates.  
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8. The specified percentage rates are determined by reference to the number of periods in respect of which the taxable person is in default during the surcharge liability period. In relation to the first default after the issue of a VAT Surcharge Liability Notice, the specified percentage is 2% and the percentage ascends to 5%, 10% and 15% for the second, third and fourth default.  
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9. A taxable person who is otherwise liable to a default surcharge may nevertheless escape that liability if he can establish that he has a reasonable excuse for the late payment which gave rise to the default surcharge(s). Section 59 (7) VATA 1994 sets out the relevant provisions : -

5                                   ‘(7) If a person who apart from this sub-section would be liable to a surcharge under sub-section (4) above, satisfies the Commissioners or, on appeal, a Tribunal that in the case of a default which is material to the surcharge –

10                                   (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

15                                   (b) there is a reasonable excuse for the return or VAT not having been so despatched then 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 ..’

20                                   10. The initial onus of proof rests with HMRC to show that a surcharge has been correctly imposed. If so established, the onus then rests with the Appellant to demonstrate that there was a reasonable excuse for late payment of the tax. The standard of proof is the ordinary civil standard on a balance of probabilities.

#### Appellant’s Case

11. The Appellant does not dispute that its VAT payment for the period 06/13 was paid late.

25                                   12. The Appellant’s grounds of appeal as stated in its Notice of Appeal were

                                  ‘HMRC has rejected our appeal, which was made by our accountant, on the basis that “no reasonable excuse has been established”. Our appeal in fact offered no excuse. We believed that a £1,256.97 fine for a less than 24 hour payment delay was an error that needed pointing out to HMRC.

30                                   With respect to hardship, the topic of this section, I have attached our accounts. As you can see our company is very small and just keeping its head above water. We have narrowly avoided posting a loss in this financial year (year end June 2013) by not paying myself a salary (if not very small amounts as and when cash was available). Our company would be unprofitable should I pay myself a salary. I have been trying to get this business off the ground for the past four years and it is proving a struggle. I have no employees (because I cannot pay them) and my wife, who is not an accountant, helps me in keeping track of expenses and also calculates the VAT due to/owed from HMRC. The proposed fine, if posted in the last accounting year, would result in a loss as opposed to break-even. I will elaborate in a later section on the reasons of this unfortunate delayed payment. As this section deals with hardship I feel that, regardless of our difficult financial situation, a late fine of such magnitude (GBP £1,256.97) is hard to digest once considered that our payment delay was less than one day.

40                                   I will not attempt to dispute the formal correctness of HMRC’s decision. They must know the VAT regulations better than me and I accept their formal position. What I am  
45                                   disputing is the magnitude of the fine resulting from a payment delay of under one day.

A fine that would result in the business posting a loss and my enthusiasm in trying to get this small business off the ground further dented.

#### BACKGROUND TO THIS LATE PAYMENT

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1. In order to complete the quarterly VAT returns we need the credit card statements which we receive in the second week of the month. This leaves us only 3 weeks to complete the accounts and post the returns

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2. I have no employees and my wife helps with the expense reports as and when she is available, depending on her work and child rearing commitments

3. I have little inclination towards dealing with figures, which perhaps is due to my dyslexia, and I tend to rely on others. My wife on a quarterly basis and Crowthers accounts once a year are all I have.

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4. Our company is normally in a VAT refund situation. Over the years I never felt as worthwhile to superimpose administrative duties such as claiming a small VAT refund to our commercial priorities.

#### EVENTS TRIGGERING THIS LATE PAYMENT

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1. I entered the payment reminder on Outlook for 07/08/13 with 24 hours' notice. Too short.

2. In the days leading to the VAT due date I was camping at 6,000ft altitude with no access to the internet. The bank movements were therefore to be effected manually and from distance as opposed to via the NatWest website.

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3. I realised late (although it was in my consciousness) that the VAT payment was to be made in GBP. The trade that triggered a VAT liability was conducted in EUR and on the VAT due date I had yet to change EUR into GBP. This was the final glitch that caused the delay.

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4. On the day, on holiday, I did not have the bank secure-key with me.

On 7 August as I realised that I was foolishly left with hours for paying VAT I descended into a valley of a small town to fax an instruction to the Bank to exchange currency and effect the payment.

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13. The Appellant does not dispute that the surcharge under appeal has been correctly applied. Its appeal is based on the claim that firstly there is a reasonable excuse because of the logistical problems described by the proprietor in his notice of appeal and secondly that the penalty is disproportionate in all the circumstances. The proprietor of the Appellant Company submits that a penalty of £1,256.97, imposed in respect of a delay in payment by one working day in circumstances where he had made a clear attempt to pay on time, was excessive and disproportionate.

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#### HMRC's Case

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14. The Appellant's VAT Period 06/13 had a statutory due date of 30 July 2013 which is extended by seven days where payment is made electronically. The VAT should have been received by 7 August 2013 and was therefore one day late.

15. The potential financial consequences attached to the risk of further defaults would have been known to the Appellant after issue of Surcharge Liability Notices for previous periods. The information contained on the reverse of each Notice states:

5                   ‘Please remember 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, listed under HM Revenue & Customs in the phone book as soon as possible, or the National Advice Service on 0845 010 9000.’

16. The requirements for submitting timely electronic payments can also be found -

- 10           • In notice 700 "the VAT guide" paragraph 21.3.1 which is issued to every trader upon registration.
- On the actual website [www.hmrc.gov.uk](http://www.hmrc.gov.uk)
- On the E-VAT return acknowledgement.

15           17. Also, the reverse of each default notice details how surcharges are calculated and the percentages used in determining any financial surcharge in accordance with the VAT Act 1994 s 59(5).

20           18. HMRC may allow additional time for payment if requested. Any request must be made prior to the date on which the VAT falls due. No request for a time to pay arrangement was received by HMRC from the Appellant prior to the default. Whilst the proprietor of the Appellant Company was on holiday at the time the payment was due, this was a foreseeable event, which does not represent a reasonable excuse.

25           19. Surcharges are imposed by statute at a level which is commensurate with the amount paid late and the number of previous defaults. The case of *Total Technology [Total Technology (Engineering) Limited [2012] UKUT 418]* established that unless a surcharge is “devoid of reasonable foundation” and of an amount which is entirely in excess of what might be considered reasonable and fair, taking into account all the circumstances and that penalties are intended to incentivise compliance, the surcharge cannot be said to be disproportionate.

30           20. Therefore the surcharge has been correctly issued in accordance with the VAT Act 1994 s 59(4).

### Conclusion

35           21. As the Upper Tribunal said in *Total Technology*, there is nothing in the VAT default surcharge regime which leads to the conclusion that its architecture is fatally flawed or that it infringes the principle of proportionality. The Tribunal recognised that the VAT default surcharge legislation imposes a highly prescriptive regime with an inflexible table of surcharges laid down with no, or virtually no, discretion for HMRC to relieve a surcharge once imposed. It concluded however that there must be some upper limit on the penalty for a default which was proportionate, although it did

not suggest what that might be, given that all the circumstances of the default must be taken into account.

22. The Tribunal said that it is therefore open to Tax Tribunals to consider individual default surcharges without having first concluded that the default surcharge regime as a whole is disproportionate. However in assessing whether a 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. The Tribunal should show the greatest deference to the will of Parliament when considering the application of the VAT default surcharge scheme.

25. By way of further background to the Tribunal's reasoning in *Total*, the Tribunal referred to what Simon Brown LJ had said in *International Transport Roth GmbH v Home Secretary* [2003] QB 728 at [26], setting out the test for assessing proportionality -

“... it seems to me that ultimately one single question arises for determination by the court: is the scheme not merely harsh but plainly unfair so that, however effectively that unfairness may assist in achieving the social goal, it simply cannot be permitted? In addressing this question I for my part would recognise a wide discretion in the Secretary of State in his task of devising a suitable scheme, and a high degree of deference due by the court to Parliament when it comes to determining its legality. Our law is now replete with dicta at the very highest level commending the courts to show such deference.”

The Tribunal observed that the “not merely harsh but plainly unfair” test set a high threshold which must be surmounted before a Tribunal could find that a penalty, correctly levied on the taxpayer by statutory provisions set by Parliament, should be struck down as disproportionate.

26. Although the Appellant regards the penalty as unfair, a surcharge is only imposed on a second or subsequent default, and after the taxpayer has been sent a surcharge liability notice warning him that he will be liable to a surcharge if he defaults again within a year. The taxpayer therefore knows his position and should be able to conduct his affairs so as to avoid any default. The penalty is not a fixed sum but is geared to the amount of outstanding VAT. The percentage applicable to the calculation of the penalty increases with successive defaults if they occur within twelve months of each other. It is then open to the taxpayer to show whether a reasonable excuse exists for the late payment.

27. Is the penalty disproportionate? The penalty imposed was £1,256.97. The delay was just one day but the penalty would have been the same if the delay had been significantly longer. There must of course be a proportionate upper limit to a penalty. The penalty is certainly substantial but cannot be described as “devoid of reasonable foundation”. In the Tribunal's view it cannot be said to be within a range which would sensibly regarded as entirely disproportionate.

28. Was there a reasonable excuse for the late payment? The Appellant was clearly aware of the due date for payments of its VAT and the potential consequences of late payment.

5 29. Instructions were not given to the Appellant's bank to make a payment of VAT until 8 August 2013. Had the instructions been given a day earlier the funds would have reached HMRC on time. The proprietor of the Appellant may have temporarily forgotten about the need to pay the VAT but an oversight or a mistake, albeit honestly made, is not a reasonable excuse.

10 30. The burden of proof is on the Appellant to show that the underlying cause of its failure to meet its VAT payment obligations was due to unforeseen circumstances or events beyond its control. In the Tribunal's view, for the reasons given above, that burden has not been discharged and there was no reasonable excuse for the Appellant's late payment of VAT for the 06/13 period.

31. The appeal is accordingly dismissed and the surcharge upheld.

15 32. 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.

**MICHAEL S CONNELL**

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**TRIBUNAL JUDGE**

**RELEASE DATE: 12 May 2014**