



TC03599

Appeal number: TC/2014/00389

VALUE ADDED TAX – default penalty surcharge – whether appellant liable for the penalty – yes - whether there was a reasonable excuse for late payment – no – whether penalty disproportionate - no

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

PEACHY PRODUCTIONS (LONDON) LTD

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE JOANNA LYONS

The Tribunal determined the appeal on 22 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 Notice of appeal dated 14 January 2014 and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 14 February 2014.

DECISION

The Appeal

- 5 1. This is an appeal against a penalty of £915.38, imposed for the late payment of VAT for the six month period ending 30 September 2013. The penalty was imposed in accordance with Section 59(4) Value Added Tax Act 1994 (“VATA”).
2. Mr Douglas Dean is the financial controller of the appellant company (“the company”) and appeals on its behalf.

The issues

- 10 3. Mr Dean appeals on the following grounds:
- (1) The company are not liable for the penalty;
 - (2) There was a reasonable excuse for late payment and
 - (3) The penalty imposed is disproportionate.
4. These matters are disputed by HMRC.

15 The facts

The previous default – contested facts

(a) The appellant’s case

5. Mr Dean states that he was not aware that he had made a previous late payment. He does not state whether or not the company received surcharge liability notice
20 issued on 15 February 2013.

(b) The respondent’s case

6. HMRC submit that the company incurred a previous default for the three month period ending 31 December 2012. The VAT, amounting to £36,261.29 was due on 07 February 2013 and was paid in full on 20 February 2013. As this was the first default
25 no penalty was imposed but a surcharge liability notice was issued on 15 February 2013 for a period of 12 months.

7. The surcharge liability notice contained the following warning

30 “if you can’t pay the full amount on time, pay as much as you can before the payment is due contact the business payment support centre.”

(c) Findings of fact

8. I am satisfied on the balance of probabilities there was a late payment for the period 12/12 because HMRC have provided details of the late payment and Mr Dean has not provided any evidence to show that the default did not occur. I am satisfied
5 that the surcharge liability notice was served on 15 February 2013 as this has been recorded by HMRC and Mr Dean has not provided any specific evidence regarding the service of the notice.

The current default – agreed facts

9. The company was due to file a return for the three month period ending 30 June
10 2013. However the business had recently notified HMRC of a change of address and there were technical difficulties in filing the return. Mr Dean contacted HMRC on 01 August 2013 to advise them of this difficulty. He was advised that the VAT accounting period would be extended for a further three months to 30 September. The effect of this was that the payment of VAT for the period ending 30 June was deferred
15 until 30 September 2013.

10. The VAT return and payment were due on 07 November 2013. The return was submitted online on 04 November 2013. Upon submission of the return HMRC sent the company an acknowledgement which provided links to payment information and due dates.

20 11. The Business Payment Support Service link on the HMRC website contains the following information:

25 “If you have payments due now or in the near future the sooner you get in touch the sooner HMRC can begin working with you to find a solution. They may....allow you time to pay. If your payment isn’t due yet you can call the support service nearer the time ...But remember that you need to get in touch in HMRC in advance of the payment deadline date. Don’t wait until the payment is overdue.”

30 12. The VAT was due on 07 November and was paid via the Faster payments service on 19 November. The VAT amounted to £45,769.2 and a 2% default surcharge was applied in the sum of £915.38

Liability for the penalty

The law

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

35 “(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...

(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.....

(4) if a taxable person on whom a surcharge liability notice has been served—

5 (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,
10 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.”

The arguments

14. Mr Dean suggests that he is not liable for the penalty as this is the company's first default. This is opposed by HMRC.

15 *Reasons for decision*

15. For the reasons given in paragraph 8 (above) I find as a fact that the surcharge liability notice imposed for a period of twelve months commencing on 15 February 2013. I find that the penalty of 2% was correctly incurred in accordance with s51(1) VATA as the late payment for the period ending 30 September occurred within 12
20 months of the service of the surcharge liability notice.

Reasonable excuse

The Law

16. Section 59 (7) VATA provides:

25 " 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—

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

30 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..

17. 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
35 case” *Rowland v HMRC [2006] STC (SCD) 536 at [18]*.

18. Section 71 VATA provides:

“an insufficiency of funds to pay any VAT due is not a reasonable excuse”

19. In the case of *Customs and Excise commissioners v Steptoe [1992] STC 757* Court of Appeal held that an insufficiency of funds cannot, of itself, constitute a reasonable excuse but that the Tribunal was obliged to consider whether the reasons for an insufficiency of funds, or the underlying cause of a default, might do so. Lord Donaldson MR indicated :-

“if the exercise of reasonable foresight and of due diligence and a proper regard for the fact that the tax would become due on a particular date would not have avoided the insufficiency of funds which led to the default, then the taxpayer may well have a reasonable excuse for non-payment”

The arguments

20. Mr Dean submits that there is a reasonable excuse for the late payment due to an insufficiency of funds. He states that there was a substantial late payment from one of their suppliers leading to cash flow problems on the due date. He paid the VAT as soon as this payment was received.

21. HMRC submit that there is no reasonable excuse due to an insufficiency of funds because the late payment by the supplier was a foreseeable event and Mr Dean did not make a request for time to pay before the due date.

Reasons for decision

22. I accept that the company’s cash flow was affected by the late payment from a supplier. However Mr Dean has not provided any evidence, such as a bank statement, to show that the company had insufficient funds to pay the VAT on 30 September.

23. In the event of an insufficiency of funds it would have been reasonable for Mr Dean to have sought a temporary loan in order to pay the VAT in advance of the due date. In the event that additional lending was not available it would have been reasonable for him to have contacted HMRC before the due date to request a time to pay arrangement in accordance with the advice given on the HMRC website.

24. There is no evidence to suggest that Mr Dean took these or any other steps to avoid the late payment. Accordingly I am not satisfied that Mr Dean acted diligently to avoid incurring the default.

25. For these reasons I am not satisfied that there is a reasonable excuse for the late payment.

Proportionality

The law

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

27. The issue of proportionality was considered in the case of *The commissioners for Her Majesty's Revenue and Customs v 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.
10 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

28. Mr Dean submits that the surcharge is disproportionate to the period of the
15 default amounting to an annual interest rate of 84.75%. He also submits that the level of the surcharge has been affected by the increased VAT as a result of the extended accounting period.

29. HMRC submit that the penalty has been imposed in accordance with the default surcharge regime and cannot be equated with a charge to interest. They also submit
20 that Mr Dean had the opportunity to make a payment on account but did not do so. 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

25 30. I accept that this was a short default period of twelve days. However the penalty was correctly imposed in accordance with s59 (4) VATA (above) 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.

30 31. I accept that the level of the penalty was artificially inflated by the extended accounting period. However Mr Dean had the opportunity to make a payment on account during the extended period but did not do so. Had such a payment been made the penalty would have been proportionately reduced.

32. For these reasons I do not find the penalty imposed to be disproportionate.

Decision

- 33. The company is liable for the penalty
- 34. There was no reasonable excuse for the late payment of VAT.
- 5 35. The penalty imposed was proportionate.
- 36. The appeal against the VAT penalty surcharge of £915.38 is dismissed.

Rights of appeal

37. 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: 14 May 2014