



TC03842

Appeal number: TC/2014/00293

*VAT default surcharge - insufficiency of funds - whether reasonable excuse
- no - whether surcharges disproportionate - no - appeal dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

EDINBURGH GROSVENOR GARDENS LTD

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE MICHAEL S CONNELL

The Tribunal determined the appeal on 17 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 Appellant's Notice of Appeal dated 10 January 2014 and HMRC's Statement of Case dated 15 January 2014, the Appellant submitting no Reply.

DECISION

The Appeal

5 1. Edinburgh Grosvenor Gardens Limited ('the Appellant') appeals against a default surcharge of £631.81 imposed by HMRC on 22 October 2013, in respect of the VAT period ended 31 August 2013, for its failure to submit, by the due date, payment of VAT due. The surcharge was calculated at 10% of the outstanding VAT due of £6,318.12

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

Background

15 3. The Appellant has been in the VAT default surcharge regime from period 11/12. Prior to the period subject to this appeal four earlier Surcharge Liability Notices had been issued

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

20 5. In respect of the default period, as payment was made by direct debit, the due date for payment was 10 October 2013. The return was received late on 24 October 2013 and the VAT payment was made late by two instalments. The first instalment was made on 11 October 2013 and the second instalment was made on 22 October 2013. A penalty was levied for the late payments.

25 6. 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. Section 59 (7) VATA 1994 sets out the relevant provisions : -

30 '(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 –

(a)

35 (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.

40 7. The onus of proof rests with HMRC to show that the surcharge was correctly imposed. If so established, the onus then rests with the Appellant to demonstrate that

there was reasonable excuse for late payment of the tax. The standard of proof is the ordinary civil standard of the balance of probabilities.

Appellant's contentions

5 8. The Appellant does not dispute that its VAT payment for the period 08/13, was late.

9. The Appellant operates a guest house in Edinburgh. Its stated grounds of appeal are that:

- (a) The surcharge of £631.81 is unreasonable and disproportionate in relation to the company's annual turnover of £93,285.
- 10 (b) That the company relies on the income from the three months ending in August each year for the majority of its income.
- (c) That as a small business the company does not have the necessary resources to cope with the sudden influx of work.
- 15 (d) They have found it difficult to cope with the move from paper to electronic returns and have experienced problems on occasions logging on to the system. When this occurs they have on occasions forgotten to retry.
- (e) They have tried to register for e-mail reminders but this was not activated correctly until the beginning of October 2013.
- 20 (f) They felt that the fact that they had collected £6,318 VAT in the three month period was a big achievement for a small guest house, only for a 'nightmare' surcharge to be issued in the sum of £631.81.

HMRC's contentions

10. The Appellant was issued with an Assessment to Tax and Help Letter (V173) following the non-submission of the 08/12 return, and whilst this does not form part
25 of the Appellant's surcharge history it would have made them aware of their failure to submit the online return for that period, thereby prompting them to review their procedures prior to the 11/12 period becoming due.

11. The Appellant entered the Default Surcharge Regime following a default in
30 period 11/12. The company then defaulted in three further periods, prior to the default under appeal.

12. A Guest House is ostensibly a cash business and therefore any VAT would in fact be collected at the point of sale prior to the due date. These monies were therefore available to the business to meet its VAT obligations. If the business chose to treat this as part of its cash flow until the VAT became payable that is a risk the business
35 took upon itself if it subsequently suffered an insufficiency of funds. The directors would have been aware of the business's seasonal nature. It was the directors responsibility to ensure that cash flow was handled so as to ensure that monies were available to meet the company's VAT liabilities when they arose. An insufficiency of funds is in any event, at law, not a reasonable excuse.

13. As the Appellant had been registered for VAT since August 2007 they would have been aware of the quarterly end dates and the dates by which returns and payments are due without the need for reminders.
- 5 14. The Appellant's inability to retain and/or recruit sufficient staff to undertake day to day duties during busier periods does not constitute a reasonable excuse for late submission of the returns and/or payment. The same circumstances would have been experienced in earlier years, for which returns were submitted on time.
- 10 15. The period 08/13 had a due date of 7 October 2013 for electronic payments and electronic VAT submission, the date for payment is extended by a further three working days where payment is made by direct debit. The return was received on 21 October and payment was received late as referred to above. The payment in respect of which the Appellant appeals the penalty was made twelve days late, on 22 October 2013 by direct debit.
- 15 16. The potential financial consequences attached to the risk of further default would have been known to the Appellant after the first default, given the information printed on the Surcharge Liability Notice.
17. Included within the notes on the reverse of the Surcharge Liability Notice, is the following, standard, paragraph:
- 20 *"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".*
- 25 18. The reverse of each 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).
- 30 19. The requirements for submitting timely payments can in any event be found-
- 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
 - On the E-VAT return acknowledgement.
- 35 20. With effect from the period 02/13 the Surcharge Liability Notices advise the trader of the percentage used to calculate the current surcharge, if one has been issued, and/or the percentage which will be used in calculating the surcharge for any subsequent default.

21. HMRC therefore maintain that the surcharge in respect of the period 08/13 has been correctly issued in accordance with VATA 1994 s.59(4), payment having been received after the due date.

5 22. The Appellant says that the surcharge is unreasonable and disproportionate. HMRC do not accept that the surcharge is unreasonable in comparison to the Appellant's turnover being less than 0.01% of its quoted turnover of £93,285. The case of *Total Technology (Engineering) Limited v HMRC*, heard in the Upper Tribunal held that:

- 10
- 1) There is nothing in the architecture of the Default Surcharge system which makes it fatally flawed.
 - 2) The VAT default penalty regime does not breach EU law on the principle of proportionality.
 - 3) In order to determine whether or not a penalty is disproportionate, the Upper Tier Tribunal addressed the following factors:

15

 - (a) The number of days of the default
 - (b) The absolute amount of the penalty
 - (c) The 'inexact correlation of turnover and penalty'
 - (d) The 'absence of any power to mitigate'
- 20

23. The Upper Tribunal Chamber President, Mr. Justice Warren and Judge Colin Bishopp decided that none of these leads to the conclusion that the Default Surcharge regime infringes the principle of proportionality. HMRC contend that the judgement supports HMRC's position that the default surcharge is in accordance with legislation and proportionate.

25

24. HMRC say that the penalty is in any event determined by the number of defaults and amount paid late. The penalty imposed is therefore commensurate with the default, and unless devoid of reasonable foundation cannot be held to be unfair.

Conclusion

30

25. The Appellant was clearly aware of the due date for payment of their VAT and the potential consequences of late payment.

26. The burden of proof is on the Appellant to show that they have a reasonable excuse for the late payment of VAT for the period 08/13.

35 27. There is no statutory definition of 'reasonable excuse', which is a matter to be considered in the light of all the circumstances of the particular case. A reasonable excuse is normally an unexpected or unusual event that is either unforeseeable or beyond the taxpayer's control, and which prevents them from complying with their obligation to pay on time. A combination of unexpected and foreseeable events may, when viewed together, be a reasonable excuse

40

28. The Appellant runs a business which operates on a cash basis, and therefore, as HMRC submit, any VAT would be collected at the point of sale prior to the due date. This cash should therefore have been available to the Appellant to meet its VAT obligation.

5 29. The Appellant says that the surcharge is disproportionate. For the reasons submitted by HMRC and set out in paragraphs 22 to 24 above, the Tribunal concurs that the surcharge is not unreasonable or disproportionate. This is in any event not a ground of appeal which can be considered by the Tribunal.

10 30. In the Tribunal's view, for the reasons given above, the Appellant has not shown a reasonable excuse for its failure to submit, by the due date, payment of VAT due of £6,318.12 for period 08/13 and HMRC was correct in charging a default surcharge in respect of the late payment in accordance with the VAT Act 1994 s 59(4).

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 "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)"
20 which accompanies and forms part of this decision notice.

25 **MICHAEL S CONNELL**
TRIBUNAL JUDGE

RELEASE DATE: 24 July 2014

30