



TC03864

Appeal number: TC/2013/00308

*VALUE ADDED TAX –default surcharge- late payment of VAT –
proportionality – appeal dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

KEGWORTH INNS LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE GUY BRANNAN
MICHAEL SHARP**

Sitting in public at Northampton on 12 June 2014

The Appellant did not appear and was not represented

Martin Foster, Presenting Officer, for the Respondents

DECISION

Introduction

1. This is an appeal against a VAT default surcharge for the period 07/12.
2. The Appellant did not appear and was not represented.
3. We understood that the Tribunal's letters to the Appellant had been returned to the tribunal marked "addressee gone away." The Appellant also failed to reply to e-mails. The tribunal contacted the Appellant's director, Mr Ken Smith, by telephone on 12 May 2014 and informed him of the hearing date on 12 June 2014. The Appellant confirmed that the tribunal had the correct e-mail address. Mr Smith said he no longer lived at the address on the tribunal's file and that the Appellant had ceased trading. The tribunal requested an updated address which Mr Smith said he would provide by 15 May 2014. No such address had been received by the tribunal by the date of this hearing. As regards the hearing on 12 June 2014, Mr Smith said he may not be able to attend. No request for a postponement had been received by the tribunal. Further attempts were made to contact Mr Smith by telephone on 16 May 2014 but no response was received.
4. In the light of the above, we decided that it was in the interests of justice for the hearing to proceed.

Facts

5. The Appellant received a default surcharge notice issued on 14 September 2012 in the amount of £1,472 for the VAT period 07/12. The surcharge was imposed at the rate of 10%.
6. The Appellant had been in default for the periods 04/11, 07/11 and 10/11 and had been issued with default surcharge liability notices for those periods. Accordingly, the correct surcharge rate for a default in respect of the appealed period 07/12 was 10%. The Appellant accepted that it had paid its VAT late for three quarters in the preceding financial year, but only by one or two days.
7. According to HMRC's computer records, which we accept as correct, the Appellant had previously been in default for the period 04/11 (payment made one day late), 07/11 (payment made one day late) and 10/11 (payment made two days late).
8. The Appellant accepted in correspondence that its VAT payment for 07/12 had been late. The due date for payment had been 7 September 2012 (for a payment made electronically) and according to HMRC's computer records, which we accept as correct, the payment was received by HMRC on 10 September 2012. The payment was, therefore, made three days late. Although, as we have mentioned, the Appellant accepted in correspondence that its payment was late it asserted that the payment was made only one day late. It was not clear on what basis the Appellant's assertion was made. On the evidence before us, including information derived from HMRC's

computerised records, we find that the payment was made on 10 September 2012 i.e. three days late.

9. It also appeared from the correspondence that Mr Smith had been on holiday when the VAT payment for 07/12 had to be made and had failed to make advanced
5 arrangements for the payment of VAT.

Discussion

10. There is no dispute that the payment for 07/12 was made late, as we have found. The Appellant accepted that it should have foreseen the possibility of a late payment for 07/12 and should have made arrangements to ensure that the payment was made
10 on time. The Appellant also accepted that it had defaulted on three previous occasions. We accept the evidence of HMRC's computer records set out in paragraph 7 above. Accordingly, pursuant to s 59 (5) VATA 1994, by making a late payment in respect of 07/12, the Appellant rendered itself liable to a default surcharge at the rate of 10% and we find that the surcharge imposed on the Appellant by the notice in 14
15 September 2012 was correctly issued.

11. We are satisfied that there was no reasonable excuse for the late payment. Indeed, no excuse has been put forward by the Appellant.

12. The Appellant's main contention in correspondence was that the surcharge was disproportionate in relation to the late payment of only a few days. However, in
20 *Revenue and Customs Commissioners v Hok Ltd* [2013] STC 225 and *Revenue and Customs Commissioners v Total Technology Ltd* [2013] STC (both decisions of Warren J and Judge Bishopp) the Upper Tribunal concluded, first, that it was not within the power of the First-tier Tribunal to discharge a penalty properly imposed according to statute on the ground of perceived unfairness, and second that a penalty
25 of this kind and magnitude is not disproportionate. Accordingly, in accordance with those decisions we consider that there is no basis on which we could properly find that the default surcharge in this case was disproportionate.

13. The surcharge is therefore confirmed.

Decision

30 14. For the reasons given above, this appeal is dismissed.

15. 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
35 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.

**GUY BRANNAN
TRIBUNAL JUDGE**

5

RELEASE DATE: 01 August 2014