



TC04242

Appeal number: TC/2014/03347

VAT default surcharge – payment made late – computer problems caused late payment – whether reasonable excuse – no – whether penalty disproportionate – no – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MOLLOY METALS LTD

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE MICHAEL S CONNELL

The Tribunal determined the appeal on 22 October 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 notification of appeal dated 23 April 2014 (received by the Tribunal on 18 June 2014) and HMRC's Statement of Case dated 27 July 2014, the Appellant submitting no response

DECISION

The Appeal

5 1. Molloy Metals Ltd ('the Appellant') appeals against a default surcharge of £5,607.83 imposed by HMRC on 18 May 2012, in respect of the VAT period ended 31 March 2012, for its failure to submit, by the due date, payment of VAT due. The surcharge was calculated at 15% of the VAT due of £37,385.53.

2. The point at issue is whether the Appellant has a reasonable excuse for making late the payment.

10 Background

3. The Appellant has been in the VAT default surcharge regime from period 03/09, and prior to the default under appeal had defaulted in five earlier periods.

15 4. The Appellant was on a quarterly basis for VAT. 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. 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 electronic filing and payment.

6. In respect of the default in period 03/12, as payment was made electronically the due date was 7 May 2012. The return was received on 9 May 2012 and the VAT payment reached HMRC by direct debit three working days later on 14 May 2012.

25 7. 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 –

35 (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

40 (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.

8. Section 59(7) must be applied subject to the limitation contained in s 71(1) VATA 1994 which provides as follows : -

‘(1) for the purposes of any provision of section 59 which refers to a reasonable excuse for any conduct -

5 (a) any insufficiency of funds to pay any VAT due is not a reasonable excuse.’

Although an insufficiency of funds to pay any VAT due is not a reasonable excuse, case law has established the principle that the underlying cause of any insufficiency of funds may constitute a reasonable excuse.

10 9. 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

15 10. The Appellant does not dispute that its VAT return and payment for the period 03/12 was late.

20 11. The Appellant’s agents (Gerard Davidson, Accountants) state that the late return was due to a error/crash in the client’s computer system on 4 May 2012. The agents say that they did not get the VAT details until 9 May 2012, whereupon they immediately filed the return online.

12. The agents state that the delay in making payment was therefore due to circumstances outside the Appellant’s control. The computer problems were resolved as quickly as possible and the return submitted just two days late.

25 13. The agents state that the VAT was paid in full for the VAT due on 14 May 2012 by direct debit.

14. The agents submit that a surcharge of £5,607.83 is a burden and an unfair penalty. The Appellant company is struggling to remain profitable and the surcharge imposed in the circumstances, is very severe.

HMRC’s contentions

30 15. The period 03/12 had a due date of 7 May 2012 for electronic VAT Payments and Returns. Neither the VAT return nor the payment due was received on time. The surcharge was correctly imposed in accordance with the VAT Act 1994 s 59(4), payment having been received by HMRC after the due date. The length of the delay is immaterial. The surcharge applies even if payment is one day late.

35 16. The potential financial consequences attached to the risk of default should have been known to the Appellant from the information printed on the 03/09 V160 Surcharge Liability Notice and subsequent V161 default notices for periods 03/10, 06/10, 09/10 and 03/11.

17. Included within the notes on the reverse of the Surcharge Liability Notice, is the following, standard, paragraph:

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.”*

10 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).

19. The requirements for submitting timely electronic payments can in any event be found:

- 15 • 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.

20 20. The Appellant could have paid a payment prior to the due date, thus reducing the amount of any surcharge to which they might become liable.

21. HMRC may allow additional time for payment if requested. Section 108 of the Finance Act 2009 specifies that there is no liability to a default surcharge for a period where contact is made with HMRC prior to the due date in order to arrange a payment deferment and this is agreed.

25 22. Any request must be made prior to the date on which the VAT falls due. The computer problems occurred on 4 May 2012, but HMRC records indicate that neither the Appellant nor the representative contacted the National Advice Service or the Business Payment Support Service prior to the due date to discuss the problems they were experiencing.

30 23. The due date of 7 May 2012 was a Bank Holiday Monday. HMRC maintain that due dates regularly fall on a weekend and/or Bank Holiday and the Appellant has the responsibility to make themselves aware of the times when this is the case and arrange for payment to be sent at an earlier date. The Appellant chose not to prepare the return until Friday 4 May 2012, and knowing that they intended sending it to the accountant
35 to submit, this left little time bearing in mind that Monday 7 May 2012 was a Bank Holiday.

24. The reliance on a third party for the completion, calculation and payment of VAT is not a reasonable excuse for the late payment of VAT. This is generally excluded by

VAT Act 1994 s 71(1)(b). The ultimate responsibility remains with the VAT registered directors.

25. The Default Surcharge of £5,607.83 for the 03/12 period is less than 1.1% of the Appellant company's total sales of £547,025.

5 26. The case of *Total Technology (Engineering) Limited v HMRC* was heard in the Upper Tribunal when it was held that:

- 1) There is nothing in the architecture of the default surcharge system which makes it fatally flawed.
- 10 2) The Tribunal found that the VAT default Surcharge 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 4) 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.

Conclusion

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

28. The Appellant's ground of appeal is that because of the computer crash it has a reasonable excuse for the late payment.

30 29. The Tribunal recognises that the event which caused the late payment was outside what the exercise of reasonable foresight would have enabled the Appellant to do in order to avoid a default. The Appellant's inability to submit its VAT return was caused at least in part by an unavoidable technological problem rather than carelessness, neglect or insufficiency of funds.

35 30. However, as HMRC say the Appellant could have requested time to pay but did not do so. The Appellant could have made a payment prior to the due date, thus reducing the amount of any surcharge to which they might otherwise become liable

40 31. Taking these factors into account it cannot be said that the Appellant, having due regard for the fact that it's VAT was payable on the due date, did everything it could by the exercise of reasonable foresight and due diligence to ensure payment was made on time. The burden of proof is on the Appellant to show that it has a reasonable

excuse for the late payment of VAT for the period 03/12. In the Tribunal's view, for the reasons given above, that burden has not been discharged.

5 32. The Appellant says that the surcharge is unfair and does not reflect any loss to HMRC. Legislation lays down the surcharges to be applied in the event of VAT being paid late and surcharges are applied at a rate which is fixed by statute and is determined by the number of defaults in any surcharge liability period. As such HMRC have no discretion as to the amount to be levied. It is not intended to reflect any loss to HMRC.

10 33. The Appellant argues that the surcharge is disproportionate. I agree with the submissions of HMRC as set out at paragraph 26 above, and that the surcharge is not disproportionate.

34. The appeal is accordingly dismissed the surcharge upheld.

15 35. 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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**MICHAEL S CONNELL
TRIBUNAL JUDGE**

RELEASE DATE: 20 January 2015

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